Letter of Intent

Comment

The purpose of the letter of intent is to set forth the parties' basic understanding of the terms of the joint venture arrangement. The letter of intent is not intended to be binding commitment to enter into the joint venture, but it does specify that certain provisions are binding (including the exclusive dealings provisions of numbered paragraph 4).

The mutuality of a proposed joint venture raises some issues generally not present in an acquisition, and, thus, this form of letter of intent addresses the special considerations in the joint venture context. Among other things, it sets forth the basic terms of the joint venture in more detail than is usually the case in the acquisition context, recognizing that joint ventures do not conform to a basic structure in the way acquisitions generally do.

Most importantly, the two-way exchange of information in the joint venture context raises some special issues, and numbered paragraph 2 of the letter of intent highlights those considerations in the same way as the pre-formation confidentiality agreement. Such procedures may be applicable in certain acquisitions (such as those involving competitors), but are almost always applicable in joint ventures. See Preliminary Considerations – Antitrust and Choice of Entity.

Otherwise, a review of letters of intent is beyond the scope of this publication. For a discussion of letters of intent, the drafter should consult the commentary to the Letter of Intent included as an Ancillary Document to the *Model Asset Purchase Agreement with Commentary* and also as an Ancillary Document to the *Model Stock Purchase Agreement with Commentary*.

______________________, 200_____

Small Company

[Address]

Re: Proposed Joint Venture

Dear [Chairman/President]:

This letter confirms that Large Company is interested in forming a joint venture arrangement with Small Company on mutually agreeable terms.

Based upon the information currently known, it is proposed that the proposed joint venture for producing and marketing certain existing high-tech equipment and developing, producing and marketing a second-generation of high-tech equipment would be formed subject to the satisfactory completion of the ongoing investigation by each party of the other party's business relating to the proposed joint venture, subject to approval by each party's board of directors, and also subject to the following:

1. *The Joint Venture Agreement—Basic Terms*. The written joint venture agreement (the ''Joint Venture Agreement'') would include the terms set forth in Exhibit A and as otherwise mutually agreed to by the parties. To facilitate the negotiation of a Joint Venture Agreement, the parties agree that Large Company's lawyer will prepare the initial draft.

2. *Access; Confidentiality; Certain Limitations*. Each party will afford the other party access to such party, its personnel, properties, contracts, books and records and all other documents and data, subject to the Confidentiality Agreement entered into between Small Company and Large Company on __________, 200__, which remains in full force and effect. Consistent with that Confidentiality Agreement: (a) Large Company will make all requests for any information concerning Small Company to ___________;[1] (b) Small Company will make all requests for any information concerning Large Company to _____________ ;[2] (c) no party will make any inquiries of the other's customers, suppliers, lenders, employees or other persons having dealings with that party without the express prior written consent of the representative of that party designated above (which may be withheld for any reason and for no reason); and (d) in recognition of the competitive

relationship between the parties as to certain products and in order to protect the parties' operations and business if the proposed joint venture is not formed (i) the parties will develop procedures to protect certain sensitive information (including without limitation each party's customer lists, prices, costs, and____________) and the persons who may have access to it and (ii) all disclosures will be made in accordance with the requirements of applicable antitrust laws.

Comment

Not necessary to repeat, but many drafters think a helpful reminder.

[1] Small Company's designated ''gatekeeper.''

[2] Large Company's designated ''gatekeeper.''

3. *Conduct of Business*. Each party will operate its business in the ordinary course and refrain from any extraordinary transactions during the negotiation of the proposed joint venture.

4. *Exclusive Dealing*. Until the later of (a) [90] days after the Signing Date (as defined in numbered paragraph 8 below) or (b) the Termination Date (as defined in numbered paragraph 8 below):

i. Neither Small Company nor Large Company will, directly or indirectly, through any representative or otherwise, solicit or entertain offers from, negotiate with or in any manner encourage, discuss, accept or consider any proposal of any other person relating to a joint venture with such person involving the proposed business of the joint venture; and

ii. Small Company and Large Company will immediately notify the other party regarding any contact between such party or its representatives and any other person regarding any such proposal or any related inquiry.

5. *Costs*. Large Company and Small Company will be responsible for and bear all of their respective costs and expenses (including any broker's or finder's fees and

the expenses of its representatives) incurred at any time in connection with pursuing or consummating the proposed joint venture.

6. *HSR*. Large Company and Small Company will cooperate with each other and proceed, as promptly as is reasonably practical, to prepare and to file the notifications required by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the ‘‘HSR Act’’). Notwithstanding numbered paragraph 5, Large Company will pay one-half and Small Company will pay one-half of the filing fee under the HSR Act.

7. *Governing Law*. This letter will be governed by and construed under the laws of the State of ________ without regard to the laws of that jurisdiction that would make such choice ineffective.

8. *Termination*. This letter will remain in effect from the date this letter is signed on behalf of Small Company (the ‘‘Signing Date’’) until the Termination Date (as defined below). This letter will automatically terminate on _______ , 20 __, and may be terminated earlier upon written notice by either party to the other party unilaterally, for any reason or no reason, with or without cause, at any time (____________ , 20 __ or such earlier date being referred to as the ‘‘Termination Date’’); *provided*, *however*, that the termination of this letter will not affect the liability of a party for breach of any of numbered paragraphs 2 through 5 and 7 through 11 prior to the termination. Upon termination of this letter, the parties will have no further obligations hereunder, except for those in numbered paragraphs 2 through 5 and 7 through 11, which will survive any such termination.

9. *No Liability*. The provisions of this letter, other than numbered paragraphs 2 through 5 and 7 through 11, are intended only as an expression of intent on behalf of Large Company and Small Company, are not intended to be legally binding on Large Company or Small Company and are expressly subject to the execution of an appropriate Joint Venture Agreement. Moreover, except as expressly provided in

numbered paragraphs 2 through 5 and 7 through 11 (or as expressly provided in any binding written agreement that the parties may enter into in the future), no past or future action, course of conduct or failure to act relating to the proposed joint venture, or relating to the negotiation of the terms of the proposed joint venture or any Joint Venture Agreement, will give rise to or serve as a basis for any obligation or other liability on the part of Large Company or Small Company. The parties confirm that the formation of the proposed joint venture and the execution, delivery and performance of the proposed Joint Venture Agreement is subject to the satisfactory completion of the ongoing investigation by each party of the other party's business relating to the proposed joint venture and the approval by each party's board of directors.

10. *Entire Agreement.* This letter constitutes the entire agreement between the parties and supersedes all prior oral or written agreements, understandings, representations and warranties and courses of conduct and dealing between the parties on the subject matter hereof. This letter may be amended or modified only by a writing executed by all of the parties.

11. *Counterparts*. This letter may be executed in one or more counterparts, each of which will be deemed to be an original of this letter and all of which, when taken together, will be deemed to constitute one and the same letter.

If you are in agreement with the foregoing, please sign and return one copy of this letter, which thereupon will constitute our understanding with respect to its subject matter.

Very truly yours,

Large Company

By:________________

Name:_______

Title: ________

Accepted as to numbered
paragraphs 1 and 6 and agreed to as to
numbered paragraphs 2 through 5
and 7 through 11 on ______________,
200 ___.

Small CompanyBy: ______________

Name: ___________________

Title: ____________________

EXHIBIT A TO
LARGE COMPANY/
SMALL COMPANY
LETTER OF INTENT

Key Joint Venture Terms

1. *Ownership*. Large Company will own 60%, and Small Company will own 40% of the Joint Venture.

2. *Organization.* The Joint Venture will be organized as a Delaware limited liability company.

3. *Contributions*. Large Company will contribute undeveloped land to the Joint Venture, on which the Joint Venture will build a plant and offices. Each joint venturer also will contribute cash as well as existing assets (including sales forces and agreements with independent distributors) required to sell and service the current generation of equipment. Each joint venturer will exclusively license certain technology to the Joint Venture.

4. *Phases of Operation.* In Phase One of the Joint Venture, the joint venturers separately will produce high-tech equipment for the Joint Venture under toll manufacturing agreements. The Joint Venture will market and sell this equipment in the

US. During Phase One, the Joint Venture also will build a plant to produce the equipment. In Phase Two, the Joint Venture gradually will stop producing and selling the current generation of equipment and will transition to the manufacture and sale of the second-generation. The Joint Venture will distribute this equipment both in the US and overseas, after developing additional independent distributors.

5. *Duration of the Joint Venture*. The Joint Venture will continue indefinitely until terminated under the Joint Venture Agreement.

6. *Management Committee*. The Joint Venture's activities will be managed by a four-member Management Committee, on which Large Company and Small Company will have equal representation. The Management Committee will meet at least quarterly and will be chaired by a Large Company appointee. Most decisions will be made by majority vote, with the chair appointed by Large Company having an additional vote to break ties. Certain specified key decisions, however, require Large Company and Small Company consensus.

7. *Operating Management.* The Joint Venture's operating management will be authorized to conduct day-to-day operations of the Joint Venture, subject to direction by the Management Committee. The Joint Venture's CEO will be appointed by Large Company. Responsibility for initial appointments of other specified officers will be shared by the joint venturers.

8. *Business Plans*. The Joint Venture's initial business plan will be attached to the Joint Venture Agreement and will identify ''critical targets,'' which the joint venturers believe are essential for the Joint Venture to achieve. Updated business plans will be reviewed and adopted at least annually by the Management Committee.

9. *Investments.* The Joint Venture Agreement and/or the initial business plan will detail the timing for the joint venturers' contributions to the Joint Venture. Large Company and Small Company will not be obligated to make further contributions unless both agree.

10. *Joint Venture Distributions*. Joint Venture profits will be distributed annually, in proportion to the joint venturers' percentage interests. In determining distributions, the Management Committee will follow an agreed-upon distribution policy, reflecting the joint venturers' intention to make the Joint Venture self-sustaining without the need for additional investments. Also, the Joint Venture Agreement will require the Management Committee to distribute cash periodically to enable the joint venturers to meet their estimated tax obligations on Joint Venture income.

11. *Dispute Resolution.* All disputes under the Joint Venture Agreement of a ‘‘legal’’ nature will be subject to negotiation, mediation and, ultimately, binding arbitration. This does not apply to disputes involving issues of a business nature. Any failure to agree on key business issues will be subject to a separate dispute resolution process, ultimately involving negotiations between the joint venturers' respective CEOs. If this fails to resolve the business dispute, either joint venturer will be able to terminate the Joint Venture, as described below.

12. *Termination in the Absence of Default*. Either joint venturer may terminate the Joint Venture if:

a) the Joint Venture fails to achieve a critical target, after notice and an attempt to remedy the failure; or

b) the joint venturers are unable to resolve a business dispute, after following the dispute resolution process.

Upon any such termination, the terminating joint venturer must choose either to (1) require the Joint Venture to be dissolved or (2) initiate the ‘‘mandatory buy-sell’’ process described below.

In addition, at any time after three years from execution of the Joint Venture Agreement, either joint venturer may terminate the Joint Venture by initiating the ‘‘mandatory buy-sell’’ process described below.

13. *Remedies for Default.* If Large Company or Small Company were to

commit a specified default, the other joint venturer will be able to terminate the Joint Venture. Upon any termination for default, the non-defaulting joint venturer must choose to:

a) require the Joint Venture to be dissolved;

b) purchase the defaulting joint venturer's Joint Venture interest for 90% of its FMV; or

c) sell its Joint Venture interest to the defaulting joint venturer for 100% of its FMV.

In addition, provisions are made for shifts in control of the Joint Venture, pending implementation of the remedy elected by the non-defaulting joint venturer.

If *both* joint venturers default, provisions will be made for the Joint Venture to be dissolved promptly.

14. *Determining FMV Upon Default.* If a non-defaulting joint venturer chooses to purchase the defaulting joint venturer's Joint Venture interest or sell its Joint Venture interest to the defaulting joint venturer, FMV would be determined by agreement of the joint venturers. If there is no such agreement, FMV would be determined by an appraisal process.

15. *Mandatory Buy-Sell Process.* This process will apply if a joint venturer elects to use it upon terminating the Joint Venture in the absence of default. If the process is initiated, the offering joint venturer would offer, at the option of the offeree, to:

a) buy the offeree's entire Joint Venture interest, or

b) sell the offering joint venturer's entire Joint Venture interest to the offeree;

in either case at the same price per 1% of the Joint Venture. The offeree would have 30 days to respond. If the offeree fails to choose one of these two options in this period, the offeree will be required to sell its Joint Venture interest to the offering joint venturer at the price specified.

16. *Transfers of Joint Venture Interests.* Neither joint venturer will be allowed, without consent of the other joint venturer, to transfer its Joint Venture interest to unrelated third parties. Transfers to controlled entities would be allowed on certain conditions.

17. *Indemnities.* The joint venturers will indemnify each other against damages arising from breach of representations and warranties, breach of pre-closing obligations, and pre-contribution liabilities involving contributed assets, etc. There will be a threshold to preclude minor claims and time limits for making claims.

18. *No-Compete Provisions*. Each joint venturer will commit not to compete with the Joint Venture, solicit customers or employees away from the Joint Venture, disparage the Joint Venture's reputation or use trade names similar to the Joint Venture's name. These provisions will generally survive a joint venturer's being bought out of the Joint Venture.

19. *Confidentiality Commitments*. Each joint venturer will commit, for the duration of the Joint Venture, to keep in confidence any confidential information relating to the Joint Venture and its business.