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MERGERS AND ACQUISITIONS

Mechanics Of A Merger - Preliminary Steps Confidentiality Agreement

1. Purpose is to protect target
 - a. Often first document executed in a possible corporate combination
 - b. Potential acquiror or bidder will require sufficient information from the target to determine if the acquiror is interested in pursuing the acquisition and, if so, how much it will be willing to offer
 - c. Release of confidential information to direct competitors poses obvious dangers to the target
 - d. Confidentiality agreement protects the target against the business risk of disclosure or misuse of information by competitors
2. Target should have its own confidentiality agreement prepared before seeking invitations for bids
3. If bidder has prepared the confidentiality agreement, important for target to review and amend agreement. Agreement should be designed for target's protection
4. Care in negotiating different confidentiality agreements with different potential bidders - maintain level playing field
5. Provisions
 - a. Limited purpose - assist bidder to evaluate possible transaction - word "possible" to avoid the target committing to engage in the transaction at this stage
 - b. Information provided only to be used in evaluating possible transactions and can not be used in anyway that is detrimental to the target
 - c. All information made available is to be kept confidential
 - d. Limit availability of information to those representatives who have a "need to know"
 - e. Prohibit bidder from disclosing, without prior target approval, that the information has been made available or that discussions are taking place between the bidder and the target

- f. Limit copies of information to be made by bidder to a number reasonably necessary for the evaluation
 - g. If transaction not consummated, all copies of information to be returned to target or destroyed
 - h. Prohibit bidder from making contact with any target customers
 - i. Prohibit bidder from raiding employees from target
 - j. No obligations incurred in connection with a possible transaction until definitive agreement signed
 - k. Agreement should survive for a period of time even if transaction is not consummated
6. Information assembled - Control process
- a. Small group involved
 - b. In the first wave of the auction, if involved investment banker, investment banker will assemble bid package
 - c. Make one person clearing house for all requests for additional information
 - d. Provide everyone with same information to maintain a level playing field among bidders