

Investment Bank Engagement Letters

Kevin Miller
Alston + Bird LLP
90 Park Avenue
New York, New York 10016
Tel: (212) 210-9520
Fax: (212) 922-3840
kevin.miller@alston.com

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The Engagement Letter

Timing

- Investment banks generally require that an engagement letter be signed prior to commencing substantive work on the engagement to ensure that there is a clear understanding of the terms of the proposed engagement, and that the Investment Bank has the benefit of an indemnity/release covering any advice and services rendered.

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Scope of engagement

- The Investment Bank will act as the Company's (or specified committee of the Company's board) financial advisor (which may include rendering a fairness opinion).
- Some engagements are fairness opinion only.

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Scope of Engagement

Sample Provisions:

- Scope of Engagement. The Company hereby engages the Investment Bank to act as the Company's exclusive financial advisor in connection with the proposed acquisition (the "Transaction") of [[insert Target's full legal name] (the "Target")]. *[or, if a business division or assets of the Target are to be acquired, insert description of Target's business (the "Business")].*

The term "Transaction" shall also include any transaction or series of related transactions whereby, directly or indirectly, control of, or a significant interest in, [the Target][the Business] or any of [the Target's businesses or assets][the Business] is acquired by or otherwise transferred to the Company or any of its affiliates, including, without limitation, a sale, acquisition or exchange of securities or assets, a lease or license of assets (with or without a purchase option) pursuant to a stock or asset purchase agreement or a merger, consolidation or reorganization, recapitalization, spin-off, split-off, tender offer, leveraged buyout or other extraordinary corporate transaction or business combination involving [the Target][the Business];

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Scope of Engagement

Selected Discussion Topics

- Opinion only v. broader financial advisory services
 - Impact on fees and fee structures
- Definition of Transaction
- Exclusive v. non-exclusive financial advisor
 - Reasons for engaging a second financial advisor (e.g., to address potential conflicts)
 - Impact on fees and fee structures
- Company v. specified committee of the Company's Board

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Services to be provided

- Clients should have a clear understanding of the services to be performed by the Investment Bank.
- the Investment Banks should have a clear understanding of the services they are expected to perform.
- The scope and complexity of the services to be provided affects the determination of the appropriate fees.
- *In re Daisy Sys. Corp.*, 97 F.3d 1171 (9th Cir. 1996)
 - Allegation of broad duties as exclusive financial advisor based on nonexclusive list of services to be provided led to circumscribed lists of services in many engagement letters.

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First appeared as part of the conference materials for the
10th Annual Mergers and Acquisitions Institute session

"Update on Confidentiality, Letters of Intent and Other Preliminary Agreements"