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## **M&A Engagement Letters**

Negotiating Agreements That Anticipate Fee Disputes,  
Confidentiality Concerns, Conflicts of Interest and Other Key Issues

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TUESDAY, JUNE 7, 2011

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

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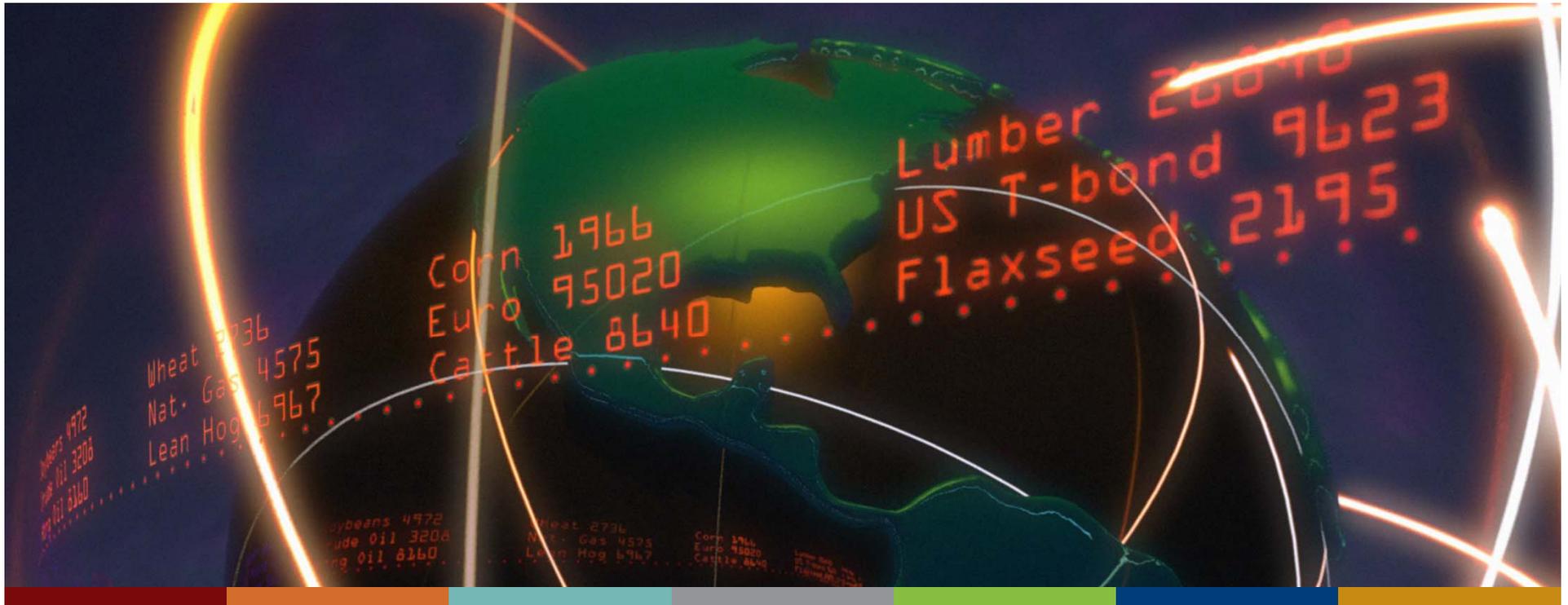
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# Negotiating M&A Engagement Letters



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# Scope of Engagement

- Foundational to an engagement agreement are terms setting the scope of the working relationship between advisor and client
- These terms address such questions as:
  - Who hires the advisor?
  - Who pays the advisor?
  - What services will advisor provide?
  - To whom are the advisor's services directed?
  - What transaction is covered?
  - Is the advisor acting exclusively for the client?
  - What is the term of the engagement?



# Scope of Engagement

## *Who hires advisor?*

*This letter confirms the agreement between COMPANY (the “Company” or “you”) and ADVISOR (“we” or “us”) to engage us as your financial advisor for the proposed Transaction described below.*

- The Company
- Special Committee
- Private equity or other fund
- Joint Venture participants
  - Avoid multiple clients and, if necessary, clearly define from whom the advisor will receive direction



# Scope of Engagement

## *Who pays advisor?*

*Types of payment: retainers, fixed fees, success fees, expenses and indemnification/contribution*

- The client
- Parent company or private equity fund
- Joint venture partners and shared obligations
- Sell-side engagement
  - Ongoing obligations (e.g., indemnification) will be obligations of buyer if merger/stock purchase
  - Asset sale



# Scope of Engagement

## *What services will advisor provide?*

- Sell-side
  - Review client and industry and assist in preparing information memo
  - Identify and screen potential purchasers
  - Contact potential purchasers, set up site visits and assist in facilitating buyer's due diligence efforts
  - Assist the client in negotiations and evaluating proposals
  - Provide a fairness opinion, and possibly an updated fairness opinion
- Buy-side
  - Identify potential targets or assist with identified target(s)
  - Review information regarding target and client
  - Assist in negotiations
  - Provide a fairness opinion



# Scope of Engagement

## *Services (cont.)*

- Strategic alternative
  - An M&A engagement may start as an engagement of a financial advisor to assist the client in reviewing strategic alternatives
- Fairness opinion
  - Provide an opinion regarding the fairness, from a financial point a view, to the client or its shareholders
- Valuation reports
  - Financial advisors in M&A engagements do not usually value particular assets or entities or provide valuation reports

# Scope of Engagement

## *Information Used by Advisors*

- Advisors rely on information
  - Furnished by client and counterparty
  - Publicly available
- Information may be facts or forward-looking estimates, projections or other forward-looking expectations
- Advisor assumes the accuracy and completeness of information
- Advisor undertakes no responsibility to verify information
- Absent express terms to that effect, advisor undertakes no duty to update deliverables like fairness opinions



# Scope of Engagement

## *HA2003 Liquidating Trust v Credit Suisse Securities (USA), 517 F. 3d 454 (7th Circuit 2008)*

- Credit Suisse engaged to, and did, render a buy-side fairness opinion in cash and stock merger
- Engagement letter and opinion recited that Credit Suisse would rely on information supplied by its client without verification
- Credit Suisse relied on projections of target furnished by management of its client
- Following rendering of the opinion, the market for tech stocks began to deteriorate, but buyer and seller went forward with the transaction; in buyer's case without an updated fairness opinion; Credit Suisse did not withdraw its opinion
- The transaction closed and buyer went bankrupt a year later as the tech bubble imploded



# Scope of Engagement

## *HA2003 Liquidating Trust v Credit Suisse Securities (USA) (cont.)*

- Credit Suisse was sued by the trustee in bankruptcy for gross negligence due to a failure to more fully review the projections and to not render an updated fairness opinion
- Court, applying New York law, affirmed the lower court's judgment for Credit Suisse (following a bench trial), as it had "followed the rules of the contract" and did what the contract required it to do—follow its client's projections; nor was there any provision in the engagement letter for an updated opinion
- Refusing to read in duties that essentially would require it to ignore the contract between the parties, the Court observed "Intelligent adults can set their own standards of performance and courts must enforce the deal they have struck."



# Scope of Engagement

## *Who is entitled to services and who can hold advisor accountable?*

- The client, right?
- In determining whether someone can hold the advisor accountable, Courts have looked at:
  - The addressees of the engagement letter and any fairness opinion
  - Language in the engagement letter disclaiming responsibility to anyone other than addressees
  - The nature and scope of duties undertaken by the advisor by contract
  - The course of conduct in providing the services
  - Disclosure of the advisor's work product
  - Purpose of the engagement; e.g., is it for a board special committee whose mandate is directed at interests of shareholder group
- Mitigation provisions:
  - Disclaimer of fiduciary duty
  - Disclaimer of third party beneficiaries
  - Limits on disclosure of advisor work product
  - Protecting confidentiality of work for other clients
  - Disclaiming duties outside express contract terms



# Scope of Engagement

## *Joyce v. Morgan Stanley*, 536 F. 3d 797 (7th Cir 2008)

- Morgan Stanley was engaged to provide seller advisory services and opinion that stock for stock merger transaction was fair to seller's shareholders
- Prior to being engaged by seller, Morgan Stanley had counseled the buyer in the transaction, but in the engagement letter explicitly disclosed and received acknowledgment of this prior relationship
- Deal was negotiated without a collar or similar mechanism to adjust for significant market changes; Morgan Stanley furnished the fairness opinion to seller's board
- After signing and before closing the value of the merger consideration fell
- The transaction closed without an updated opinion or withdrawn opinion from Morgan Stanley



# Scope of Engagement

## *Joyce v. Morgan Stanley (cont.)*

- Within 12 months of closing, the stock of buyer was worthless
- Shareholders of seller sued Morgan Stanley on a constructive fraud theory for its failure to help them hedge against losses in buyer's stock; constructive fraud required a showing of a confidential or fiduciary relationship with shareholders
- The Court affirmed the lower court's grant of Morgan Stanley's motion to dismiss; it refused to find any duty to shareholders on the part of Morgan Stanley outside the contract, noting engagement letter provided it was working for the corporation only, and the opinion indicated it was for the information of the board of directors and not a recommendation to shareholders



# Scope of Engagement

*Baker v. Goldman Sachs & Co.*, 2009 WL 2958227 (D. Mass 2009)

- Goldman was engaged to provide sell-side financial advisory services in the stock for stock merger of its private company client Dragon Systems
- Goldman was familiar with the buyer based on work for a prior client and performed financial diligence regarding the buyer in the course of the Dragon engagement
- Goldman required one of the individual co-founders and a director of this close corporation, along with a corporate shareholder to agree to the exculpation provisions of the engagement letter and they executed the engagement letter for that purpose; as a result, these persons were also addressees of the letter along with the CFO of Dragon; the salutation included "Ladies and Gentlemen" and did not specify the capacity in which these persons were addressed



# Scope of Engagement

## *Baker v. Goldman Sachs & Co. (cont.)*

- In describing the services Goldman would perform, the engagement letter indicated “we will provide **you** with financial advice and assistance in connection with this potential transaction”; “you” was not defined in any way to distinguish Dragon, the seller, from the two shareholders who were parties to the agreement
- The engagement letter did not contain any disclaimers of fiduciary duties or third party beneficiaries
- A merger was consummated with buyer and shortly thereafter it was revealed that buyer had improperly recorded significant income arising from its Asia business; the buyer went bankrupt and the value of the shares in buyer acquired in the merger by seller’s stockholders became worthless-an alleged \$300 million loss



# Scope of Engagement

## *Baker v. Goldman Sachs & Co. (cont.)*

- The co-founder shareholder of Dragon (and her husband) brought suit against Goldman based on, among other things, claims of breach of fiduciary duty, breach of contract, negligence and negligent misrepresentation; Goldman moved to dismiss the claims
- The breach of contract claim was premised on both direct rights under the engagement letter as well as claims of third party beneficiary status; the co-founder shareholder/director claimed direct beneficiary status because the letter was addressed to her and said Goldman would provide services to “you”; the court rejected this view since, taking the contract as a whole, it was apparent she only agreed to a portion of the contract

# Scope of Engagement

## *Baker v. Goldman Sachs & Co. (cont.)*

- However the court allowed the third party beneficiary claim to go forward based on the references to “you” and persistent interaction directly with shareholders throughout the engagement in a manner that did not suggest contacts were limited to her role as director; this was notwithstanding other engagement letter language that written or oral advice from Goldman was exclusively for the information of the board of directors and management of Dragon and that Goldman was exclusively engaged by Dragon
- Referring to her (and her shareholder husband’s) relationship as “muddy”, the court allowed their fiduciary duty claims to proceed; the court noted allegations of the shareholders placing their faith, confidence and trust in Goldman’s specialized judgment and advice and knowledge of buyer, and Goldman’s awareness of that reliance
- These same contacts, and Goldman’s alleged awareness of shareholders’ reliance, were sufficient to allow the negligence claims to proceed as well

# Scope of Engagement

*What “transaction” is covered by the engagement?*

- Sample sell-side engagement definition:

*“Transaction” means any transaction or series or combination of related transactions whereby, directly or indirectly, by merger, plan of exchange, sale, consolidation, joint venture or otherwise [\_\_ % or more] of the Company’s capital stock (based on shares outstanding) or assets (based on book value) is transferred or exchanged by you and/or your shareholders.*

- This is the critical issue for determining if the advisor gets paid (or if the client has to pay the advisor) a success fee.



# Scope of Engagement

## *Transaction (cont.)*

- Questions to ask in defining the Transaction for which the advisor will provide services and receive a fee:
  - Should Transaction include:
    - the sale of a division?
    - a subsidiary or a portion of the assets of the company?
    - only control of the company?
  - Should Transaction specifically exclude:
    - the sale of certain assets?
    - sales to particular parties?
    - raising external funds through means of a public equity offering?
    - raising external funds through a private placement of less than [\_\_%] of the company's stock?
    - obtaining bank financing or refinancing?
  - In a buy-side engagement, should transaction be limited to particular named targets? targets in particular industries? all possible targets? or exclude particular targets?



# Scope of Engagement

## *Transaction (cont.)*

- The scope of the transaction – especially when something other than the whole company is sold to a third party – will need to be carefully reviewed when the advisor prepares the fairness opinion, if one is requested
- Although the parties may believe that a transaction will occur a certain way (*e.g.*, as a sale of all the equity or a merger), the advisor should be cautious about limiting the scope of the transaction for which it will be paid:
  - The company's board and management has the ability to structure a transaction in a variety of ways to accomplish different goals and consider whether the advisor should be incented to promote a particular structure based on whether it will receive a success fee
    - Asset sale, stock sale or merger
    - Multiple sales of divisions, subsidiaries or operating assets
    - Formation of joint ventures or grants of perpetual licenses where the company receives payment for the value of the company

# Scope of Engagement

## *Who is the advisor – exclusivity?*

*The Company agrees that it has engaged exclusively ADVISOR to act as the Company's investment banker and financial advisor regarding the Transaction . . .*

- Advisors usually want to be the only financial advisor managing the transaction for the client
  - Centralized knowledge of negotiations and counterparties' interest
  - No fee incentive to drive transaction to a particular counterparty
- Courts have pointed to "exclusivity" as one indicia of possible fiduciary relationship



# Scope of Engagement

## *Exclusivity (cont.)*

- Multiple advisors can be engaged in different ways:
  - Two advisors could be engaged under the same engagement letter as co-advisors to work together on the engagement (with each having the same mandate)
    - These engagement letters have additional challenges in identifying whether one advisor leads the transaction process, how fees are split and how indemnification provisions are structured
  - Two advisors could be engaged to work on transactions with different mandates (*e.g.*, different industries or targets for a buy-side engagement)
  - There could be an existing advisor that will receive a fee, but whose role in the transaction process is limited (*e.g.*, a finder)
  - A separate independent advisor could be engaged to provide a fairness opinion

# Scope of Engagement

## *How long does the engagement last?*

*You or we may terminate our engagement under this agreement, with or without cause, upon [\_\_] days' written notice to the other party; provided, however, no such notice may be given by you prior to [\_\_\_\_] days from the date of this agreement. The fee, expense reimbursement, other investment banking services, indemnity, contribution, exculpation, use and disclosure of advice, and miscellaneous provisions of this agreement (including Annex A) will survive any termination of our engagement under this agreement.*

- The term is usually open ended (no set termination date) or a period of at least a year
- Most allow the advisor or the client to terminate the engagement with advance notice
- Most give the advisor a period of time after the letter is executed to begin the engagement before the client can terminate the engagement



# Scope of Engagement

## *Term (cont.)*

- Certain provisions continue past termination: *e.g.*, earned fees, tail fee rights, reimbursement for expenses during the term, confidentiality, indemnity, contribution, and exculpation
- Advisors want to avoid other built-in termination provisions to engagement letters that try to terminate the fee provisions

# Advisor Compensation

## *Success Fees*

*Additionally, upon any closing of a Transaction, \_\_\_\_\_ shall pay HW&Co. a fee (the "Closing Fee") at the closing of the Transaction, which shall be calculated as \_\_\_% of the Purchase Price (as defined below) up to \$\_\_\_ million plus \_\_\_% of that portion of the Purchase Price between \$\_\_\_\_\_ and \$\_\_\_ million, plus \_\_\_% of that portion of the Purchase Price above \$\_\_\_\_\_ million. The Closing Fee shall be paid in cash via wire transfer at the time a Transaction is consummated.*

- Key word is "contingent"
  - vast majority of advisor's compensation is on a "they get paid when you get paid" basis, *i.e.*, a "Success" or "Transaction" Fee
  - modest retainer fees are also common, particularly for middle market M&A deals
    - demonstrate commitment
    - lump sum, monthly or milestone-based
    - can often be credited against Transaction Fee
- Definition of "Transaction" is crucial term



# Advisor Compensation

## *Success Fees (cont.)*

*The total "Purchase Price" shall include all proceeds paid or distributed to the shareholders (and/or to the Company in the case of an asset sale), including any amounts received in a recapitalization, whether paid at closing or held in escrow, including cash, notes, stock, noncompete payments, equity value and fair market value of assets retained, and earnouts, in addition to any third party debt or bank debt assumed, repaid, refinanced, restructured, retired, extinguished, or acquired by the Purchaser, or shareholder notes that are directly or indirectly assumed, forgiven or repaid by the Purchaser. Any deferred payments (including cash or equity earnouts, but excluding amounts held in escrow) will be adjusted to reflect the net present value of such payments at discount rates mutually agreeable to the Company and HW&Co.*



# Advisor Compensation

## *Success Fees (cont.)*

- Valuation basis for Transaction Fee calculation = Enterprise Value (of entity sold)
  - Enterprise Value = FMV Equity Consideration + Net Debt (= Debt Less Cash)
    - basic premise: the amount of leverage on a business should not affect the banker's fee
    - all "market" fee measures are Enterprise Value based
    - comprehensive definitions of FMV Equity and Net Debt

# Advisor Compensation

## *Success Fees (cont.)*

### FMV Equity (Consideration Received)

- Cash
- Stock of acquiror
- Working capital adjustment
- Assets retained
- “Rolled Over” equity
- Note from Buyer (or company obligation)
- Non-compete payments
- Funds held in escrow
- Earnouts

### Net Debt

- All third party interest bearing Debt...
  - ST or LT
  - Capital leases
- ...whether:
  - assumed
  - repaid
  - refinanced
  - restructured
  - retired
  - extinguished
  - acquired
- Shareholder notes assumed, forgiven or repaid by Buyer
- Other/contingent liabilities, e.g.
  - Prior earnout obligations
  - Underfunded pension obligations

- Non-operating assets (boats, planes, unrelated real estate holdings, etc.) typically pulled outside of the Transaction and retained by Sellers
- How to value non-cash consideration such as deferred consideration and equity



# Advisor Compensation

## *Success Fees (cont.)*

- Transaction/Success Fee “Philosophy”
  - align interests and incentivize advisor
  - Sellside: typically, a percentage of Enterprise Value up to a threshold or “breakpoint”, plus a “ratchet” or “gear” for incremental value above the breakpoint
    - e.g. 1.25% of Enterprise Value up to \$100 million, plus 5% of every dollar greater than \$100 million
    - multiple breakpoints not uncommon
  - Buyside: a simple percentage of Enterprise Value or flat fee are most common
    - typically higher than Sellside fees for auctions
  - payable in cash at closing, typically via wire transfer
  - a stated minimum Success Fee is also common



# Advisor Compensation

## *Success Fees (cont.)*

*If HW&Co.'s engagement is terminated, the Closing Fee will be due at the closing of a Transaction if within twelve months of the date of termination, a Transaction is agreed to or consummated with any party (i) identified in writing or orally by HW&Co. during HW&Co.'s engagement hereunder, or (ii) with whom the Company or any of its officers or shareholders had any discussions regarding a potential Transaction during HW&Co.'s engagement hereunder, whether or not such discussions were initiated by HW&Co.*

- "Tail" Period
  - specified/negotiated period of time after termination of engagement in which Success Fee is payable if Transaction is agreed to or consummated
    - protects banker if either Buyer or Seller has a change of heart within some reasonable period of time after termination
    - eliminates "bad actor" incentives, e.g. terminate banker prior to closing and then close Transaction
  - language regarding list of Buyers covered by Tail is typically a negotiated item.



# Advisor Compensation

## *Fairness Opinion Fees*

*In the event an Opinion is requested and furnished by us, an Opinion fee in the amount of [\_\_\_\_\_], and if an updated Opinion is requested and furnished by us, an updated Opinion fee in the amount of [\_\_\_\_\_] will be payable upon rendering of the Opinion and the updated Opinion, as the case may be.*

- payable upon delivery and upon any bring-downs
- may or may not be credited against any Transaction/Success Fee payable
- not contingent upon closing a Transaction (helps eliminate conflicts)



# Advisor Compensation

## *Expenses*

*In addition to any fees discussed above and regardless of whether the Transaction is consummated, \_\_\_\_\_ agrees to promptly reimburse HW&Co. for all reasonable out-of-pocket expenses incurred in connection with the proposed Transaction. These expenses primarily include travel, telephone, postage, fax, research, and copy expenses. Monthly expense invoices will be provided and are to be paid on a current basis within fifteen (15) days of receipt of a statement from HW&Co.*

- all out-of-pocket expenses incurred by an advisor in connection with a Transaction are reimbursed by the client, *e.g.*
  - legal
  - travel
  - electronic data room
  - telephone
- the expenses are in addition to fees paid
- expense caps (“not to exceed \$X without prior approval”) are generally acceptable
- expect at least \$50,000 in expenses for a typical domestic M&A deal
  - deals requiring foreign travel are generally 2x



# Confidentiality

- Description and Purpose of the Confidentiality Agreement
  - A non-disclosure agreement (NDA), confidentiality agreement (CA), or confidential disclosure agreement (CDA), is a legal contract between at least two parties that outlines confidential material, knowledge, or information that the parties wish to share with one another for certain purposes, but wish to restrict access to by third parties.
- Direction of Confidentiality Obligations
  - Investment Bank to Client
  - Client to Investment Bank
  - Mutual
  - Joinder Agreements
    - Broad standstill provisions in the underlying NDA may arguably catch Investment Banks



# Confidentiality

- Sell-Side Client may request that Investment Bank coordinate execution of NDA with potential Buy-Side Counterparty(ies)
  - In doing so, Investment Bank will be careful not to render legal advice or negotiate provisions of the NDA on behalf of Client, especially where client is not present. Client and its external counsel should approve the form of NDA to be used and should approve all material negotiated modifications.
- Standalone NDA vs. Confidentiality Provision in Engagement Letter
  - Efficiency – one document vs. two
  - Whose standard terms and conditions
  - Scope
  - Interplay with Indemnification



# Confidentiality

- What does “Confidential Information” cover?
  - Typically the definition is broad and often includes all information or material disclosed or provided by the Discloser to Recipient, either orally or in writing, and any “derivative” material
  - *Sample clause: “All information or material disclosed or provided by the Discloser to Recipient, either orally or in writing, or obtained by Recipient from a third party or any other source, concerning any aspect of the business or affairs of the Discloser or its “affiliates” (as such term is defined in Rule 12b-2 under the Securities Exchange Act of 1934), including without limitation, any information or material pertaining to products, formulae, specifications, designs, processes, plans, policies, procedures, employees, work conditions, legal and regulatory affairs, assets, inventory, discoveries, trademarks, patents, manufacturing, packaging, distribution, sales, marketing, expenses, financial statements and data, customer and supplier lists, raw materials, costs of goods and relationships with third parties. Confidential Information also includes any notes, analyses, compilations, studies or other material or documents prepared by Recipient which contain, reflect or are based, in whole or in part, on the Confidential Information.”*



# Confidentiality

- Sometimes will include the existence and subject matter of the confidentiality agreement and/or that discussions or negotiations are or may occur with respect to the subject matter of the agreement.
- Investment Bank may want to limit to only that information that is specifically identified as being confidential.
  - Oral and Written



# Confidentiality

- Exceptions to definition of “Confidential Information”
  - Information that is publicly available or becomes publicly available through no action or fault of Recipient
  - Information that was already in Recipient’s possession or known to Recipient prior to being disclosed or provided to Recipient by or on behalf of the Discloser, provided, that, the source of such information or material was not bound by a contractual, legal or fiduciary obligation of confidentiality to the Discloser or any other party with respect thereto
  - Information that was or is obtained by Recipient from a third party, provided, that, such third party was not bound by a contractual, legal or fiduciary obligation of confidentiality to Discloser or any other party with respect to such information or material
  - Information that is independently developed by the Recipient without reference to the Confidential Information



# Confidentiality

- Restrictions on Use of Confidential Information
  - *Sample clause: “Recipient must use solely for the purpose of providing (evaluating whether it will provide) services related to the subject of the confidentiality agreement and at no time shall Recipient otherwise use the Confidential Information for the benefit of itself or any other third party or in any manner adverse to, or to the detriment of, Discloser or its affiliates or their respective shareholders. Recipient must not disclose to any other party except its officers, employees or other authorized agents and representatives and professional consultants of Recipient (typically defined as “Representatives”) to whom disclosure is reasonably necessary in connection with the provision of services contemplated under the agreement and who shall agree to be bound by the terms of this Agreement, and except as otherwise consented to [in writing] by Discloser.”*
  - Client may ask that Investment Bank obtain signed agreements from its Representatives and/or that Investment Bank is liable for breaches of its Representatives.



# Confidentiality

- Disclosure required in connection with legal proceedings or civil investigative demand
  - *Sample clause: “In the event Recipient is requested or required (by oral questions, interrogatories, requests for information or documents in legal proceedings, subpoena, civil investigative demand or other similar process or by any law, rule or regulation of any governmental agency or regulatory authority) to disclose any of the Confidential Information, Recipient shall provide Discloser with prompt written notice of any such request or requirement so that Discloser may seek a protective order or other appropriate remedy and/or waive compliance with the provisions of this Agreement. If, in the absence of a protective order or other remedy or the receipt of a waiver by Discloser, Recipient is nonetheless, legally compelled to disclose Confidential Information, Recipient may, without liability hereunder, disclose to such tribunal only that portion of the Confidential Information which counsel advises Recipient is legally required to be disclosed, provided that Recipient shall use its best efforts to preserve the confidentiality of the Confidential Information, including, without limitation, by cooperating with Discloser to obtain an appropriate protective order or other reliable assurance that confidential treatment will be afforded the Confidential Information by such tribunal.”*



# Confidentiality

- Carve-out may be incorporated to ensure notice is not required to be provided to a Discloser in the event a general request is made for access to the Investment Bank's files/records (that may contain Confidential Information) as part of an ordinary course audit or examination by a bank examiner, securities regulator or self-regulatory organization.



# Confidentiality

- Client may request return of Confidential Information
  - Sample clause: *“Recipient shall, upon accomplishing the limited purpose of evaluating the Transaction, or at any time upon the request of Discloser, immediately return to Discloser all Confidential Information (including notes, writings and other material developed therefrom by Recipient) and all copies thereof and retain none for its files. Notwithstanding such return, Recipient shall continue to be bound by this Agreement.”*



# Confidentiality

- However, pursuant to Rule 17a-4 of the Securities Exchange Act of 1934, as a registered broker-dealer, an Investment Bank may be required to retain written Confidential Information received from a Client, including but not limited to that provided in electronic format via e-mail.
- So Investment Bank will ask for carve-out for compliance and regulatory purposes and to comply with internal policy
  - ***Sample clause: “Notwithstanding anything to the contrary in this Agreement, Recipient may retain such documents and records as are required to be maintained in order to satisfy any law or regulation to which it is subject or audit or applicable legal or regulatory record retention requirements or internal policies implementing such requirements (including its policy of retaining all electronic communications such as e-mail and instant messages.)”***



# Confidentiality

- No Representations or Warranties
  - Sample clause: *“The Confidential Information is being provided to Recipient “as is” and without any representation or warranty of any kind, either express or implied, regarding the accuracy or completeness of the Confidential Information. In no event shall the Discloser or its affiliates or any of their respective directors, officers, employees, agents or representatives have any liability to Recipient relating to or arising out of any use of the Confidential Information.”*
    - Recipient may request carve-out for provision of information that Discloser knows or reasonably should have known was materially inaccurate.



# Confidentiality

- Term
  - Private vs. Public Discloser
    - Most confidential Information of public company Discloser will likely be stale within a fairly short period.
  - Is NDA covering trade secrets and/or other intellectual property
    - Longer term may be warranted but the extended term should apply only to information relating specifically to trade secrets and/or other intellectual property.



# Confidentiality

- Indemnification
  - Sample clause: *“Recipient shall indemnify and hold harmless the Discloser and its affiliates and their respective directors, officers, employees, agents and representatives from and against any and all losses, damages, costs and expenses (including, without limitation, reasonable attorneys’ fees and expenses) caused by or arising out of any breach of this Agreement by Recipient or any breach for which Recipient is responsible hereunder, and any and all actions, suits, proceedings, claims, demands or judgments incident thereto.”*
  - Investment Bank that are recipients of Confidential Information will often resist indemnification on grounds that Client can sue directly for breaches of the NDA.



# Confidentiality

- Equitable Remedies
  - Sample clause: *“The parties acknowledge and agree the Confidential Information is unique and should the Recipient breach any term or condition of this Agreement, the remedy of damages alone may be an inadequate remedy for the Discloser. Therefore, the parties agree, should the Recipient breach any term or condition of this Agreement, the Discloser shall have the right to seek equitable remedies against the Recipient including, without limitation, specific performance and injunctive relief in order to require the Recipient to specifically perform under the terms and conditions of this Agreement and/or enjoin the Recipient from breaching any terms or conditions of this Agreement, including (without limitation) the disclosure of the Confidential Information. Further, the Recipient acknowledges and agrees that any breach of this Agreement by any shareholder, director, officer, consultant, agent, representative, employee or servant of the Recipient shall be deemed and construed to be a breach of this Agreement by the Recipient.”*



# Confidentiality

- No Licenses Granted
  - Sample clause: “Discloser grants no licenses, by implication or otherwise, under any patent, copyright, trademark, trade secret or other rights by disclosing Confidential Information under this Agreement.”
    - Ensure that language does not capture Investment Bank’s work product, where applicable.



# Confidentiality

- Definitive Agreement
  - Sample clause: “Discloser and Recipient understand and agree that no contract or agreement providing for any transaction involving Discloser or Recipient shall be deemed to exist between Recipient and Discloser unless and until a final definitive agreement has been executed and delivered between the parties regarding a transaction.”
- No Solicitation
  - Sample clause: “For a period of [one] year from the date of this Agreement, Recipient will not directly solicit the employment of any officer of Discloser or its affiliates without Discloser’s prior written consent.”
    - Carve out for general job advertising/mass solicitation and for employees who were not solicited by the Investment Bank.

# Confidentiality

- Standstill

- Typically see for Public company but not for Private company
- Terms can be overbroad, especially as applied to a full service Investment Bank.
- Watch out for terms in underlying NDA (inadvertently) covering Investment Bank via joinder.

- *Sample clause: "Recipient hereby covenants and agrees that, for a period of \_\_\_\_\_ from the date of this Agreement, without the prior written consent of Discloser, Recipient will not in any manner, directly or indirectly, or in conjunction with any other person or entity, (a) effect or seek, offer or propose (whether publicly or otherwise) to effect or participate in, (i) any acquisition of any securities (or beneficial ownership thereof) or assets of Discloser, (ii) any tender or exchange offer, merger or other business combination involving Discloser, (iii) any recapitalization, restructuring, liquidation, dissolution or other extraordinary transaction with respect to Discloser, or (iv) any "solicitation" of "proxies" (as such terms are defined in Rule 14a-1 under the Securities Exchange Act of 1934) or consents to vote any securities of Discloser; (b) form, join or in any way participate in a "group" (as such term is used in Section 13(d)(3) of the Securities Exchange Act of 1934) or otherwise act, alone or with others, to seek to acquire or affect control or influence the management, Board of Directors or policies of Discloser; (c) enter into any discussions or arrangements with any third party regarding any of the foregoing; or (d) take any action which might force Discloser to make a public announcement regarding any of the foregoing. Recipient further covenants and agrees that, without the prior written consent of Discloser, it will not directly or indirectly, enter into any agreement, arrangement or understanding, with any other person or entity regarding a possible transaction involving Discloser of the type and for the term described above."*



# Confidentiality

- Trading in Securities and Material Non-Public Information
  - Sample clause: *“Recipient acknowledges that it is aware, and agrees to advise its directors, officers, employees, agents and representatives who are informed as to the matters which are the subject of this Agreement, that the United States securities laws prohibit any person who has material, non-public information concerning the Transaction from purchasing or selling securities of a company that may be a party to such Transaction or from communicating such information to any other person under circumstances in which it is reasonably foreseeable that such person is likely to purchase or sell such securities.”*
  - Carve-out for ordinary course brokerage and trading activities of Investment Bank
    - Sample clause: *“Nothing in this Agreement shall prohibit employees on the [investment bank’s] “public side” from engaging in ordinary course brokerage and trading activities provided that they are not in possession material non-public information, [investment bank] having established and maintained adequate information barriers to safeguard material non-public information in the possession of employees on the private side.”*



# Conflicts of Interest

- Institutional vs. Personal Conflicts of Interest
  - Personal conflicts managed via rigorous employee trading policies/procedures
- Multiple representations
  - Providing financial advisory for two sellers in same industry
  - Providing financial advisory to both seller and buyer(s)
  - Providing financial advisory to two or more buyers of a company/asset
  - Providing financing to multiple buyers with no financial advisory role
  - Providing financial advisory to seller and financing to one or more buyers
  - Providing advisory to one or more buyers and financing to multiple buyers
  - Providing financial advisory for buyer/seller in which advisor owns securities of buyer/seller



# Conflicts of Interest

- Managing Conflicts
  - Reputational, legal and regulatory
  - Conflicts Clearance Procedures
  - Conflicts Review Guidelines/Procedures
  - Notices
    - Confirm that provision of notice does not breach existing confidentiality obligations
  - Notices and Consents/Conflict Waivers
  - Separate Deal Teams/Separate Financing “trees”
  - Appropriate Information Barriers
    - Physical barriers
    - Restricted file access
  - Client engages second Investment Bank



# Conflicts of Interest

- Generic conflicts disclosure in engagement letters
  - Sample clause: “[Client] acknowledges that [investment bank] is a global, full service securities firm engaged in securities trading and brokerage activities, and providing investment banking, investment management and financial advisory services. In the ordinary course of its trading, brokerage, investment and asset management and financial activities, [investment bank] and its affiliates may hold long or short positions, and may trade or otherwise effect or recommend transactions, for its own account or the accounts of its customers, in debt or equity securities or loans of [client] or any other company that may be involved in the Transaction contemplated by this Agreement. Further, in connection with its merchant banking activities, [investment bank] may have made private investments in the [client] or any other company that may be involved in the Transaction contemplated by this Agreement. As a global, full service financial organization, [investment bank] and its affiliates may also provide a broad range of normal course financial products and services to its customers (including, but not limited to investment banking, commercial banking, credit derivative, hedging . . . (cont.)



# Conflicts of Interest

- Generic conflicts disclosure in engagement letters (cont.)
  - . . . and foreign exchange products and services), including companies that may be involved in the Transaction contemplated by this Agreement.. [Investment bank] acknowledges its responsibility to comply with applicable securities laws as they relate to the trading of securities while in possession of material non-public information and further acknowledges that it has in place information barriers to protect the unauthorized transmission of this information to employees of [investment bank] and its affiliates who do not have a legitimate need to know this information. Furthermore, [client] acknowledges [investment bank] may have fiduciary or other relationships whereby [investment bank] or its affiliates may exercise voting power over securities of various persons, which securities may from time to time include securities of [client] or of potential purchasers or others with interests in respect of the Transaction. [Client] acknowledges that [investment bank] or such affiliates may exercise such powers and otherwise perform its functions in connection with such fiduciary or other relationships without regard to [investment bank's] relationship to [client] hereunder."

# Conflicts of Interest

- Tailored Conflicts Disclosure
  - If specific (potential) conflict identified, more tailored language may be appropriate e.g., Stapled Financings
  - Sample clause: *“[Client] agrees that [Investment Bank] may offer and provide or otherwise assist in obtaining or arranging all or a portion of the financing for one or more potential purchasers in a Transaction and [Client] hereby waives, to the fullest extent permitted by law, any claims it may have based on any actual or potential conflicts of interest in connection with such activities of [Investment Bank]. Further, [Client] agrees that information received by [Investment Bank] in connection with its engagement hereunder may be shared with [Investment Bank’s] internal committees, including its credit committees, in connection with their review of any proposed Transaction-related financing commitments. Further, if in connection with its financing activities, [Investment Bank] is provided with confidential information by and regarding potential purchasers (including but not limited to information regarding such purchasers’ Transaction strategies or proposed Transaction terms), [Investment Bank] shall have no obligation to disclose such information to [Client] or to use such information for [Client’s] benefit.”*



# Conflicts of Interest

- Tailored Conflicts Disclosure (cont.)
  - Toys R Us
  - Del Monte
  - Investment banks may refuse to provide a fairness opinion in a sell-side advisory when also providing a staple.
    - Alternatively, investment bank may require that the client obtain a second fairness opinion from another reputable investment bank.



# Conflicts of Interest

- Conflicts and Fairness Opinions

- Structure of Fairness Opinion Fee

- So as to mitigate perceived conflict, the Fairness Opinion Fee is typically payable upon delivery of the opinion and payment is not contingent upon transaction closing.
    - ***Sample Clause:*** *“In the event that a fairness opinion is provided to the Board of Directors of [client], [client] agrees to pay [investment bank] a fairness opinion fee in the amount of \$\_\_\_\_\_. Such fee will be payable in cash upon the delivery of such opinion, without regard to whether such opinion is accepted or a Transaction is consummated.”*



# Conflicts of Interest

- Conflicts and Fairness Opinions (cont.)
  - FINRA Rule 5150 (previously NASD Rule 2290)
    - Addresses conflicts in connection with investment banks' rendering of fairness opinions
    - Requires banks to include certain disclosures in fairness opinions that will be provided or described to recipient's public shareholders, including:
      - » Whether the bank acted as a financial advisor to party to the transaction and will receive compensation contingent upon the successful transaction completion, for rendering opinion and/or serving as advisor;
      - » If the bank will receive any other significant payment or compensation contingent upon the successful completion of the transaction;
      - » Any material relationships that existed during the past two years or mutually understood to be contemplated in which any compensation was received or is intended to be received as a result of the relationship between bank and any party to the transaction that is the subject of the fairness opinion;
      - » If any information that formed substantial basis for the opinion that was supplied to bank by client requesting the opinion concerning the companies that are parties to the transaction has been independently verified by bank, and if so, a description of the information that were verified;
      - » Whether or not the fairness opinion was approved or issued by a fairness committee; and
      - » Whether or not the fairness opinion expresses an opinion about the fairness of the amount or nature of the compensation to any of the client's officers, directors or employees, or class of such persons, relative to the compensation to the public shareholders of client.



# Conflicts of Interest

- Conflicts and Fairness Opinions—FINRA Rule 5150 (cont.)
  - Also requires that banks have written procedures for approval of a fairness opinions, which includes:
    - » the types of transactions and the circumstances in which bank will use a fairness committee to approve or issue a fairness opinion, and in those transactions in which it uses a fairness committee:
      - the process for selecting personnel to be on the fairness committee;
      - the necessary qualifications of persons serving on the fairness committee;
      - the process to promote a balanced review by the fairness committee, which shall include the review and approval by persons who do not serve on the deal team to the transaction; and
      - the process to determine whether the valuation analyses used in the fairness opinion are appropriate
      - The process to determine whether the valuation analyses used in the fairness opinion are appropriate



# Conflicts of Interest

- Conflicts and Fairness Opinions (cont.)
  - Regulation M-A. Item 1015 (b)(3)
    - In connection with any required disclosure of fairness opinion, disclosure must include description of any material relationship between advisor and party which is subject of transaction and its affiliates that existed in past two years or is mutually understood to be contemplated and any compensation received or to be received as a result of the relationship



# Disclosure of Advice/Opinions

- Investment bank is retained by the client company and all advice of the investment bank is provided to the company, not to shareholders or other constituencies.
  - *Young v. Goldman Sachs*
  - *Joyce v. Morgan Stanley*
  - *Baker v. Goldman Sachs*
- Engagement letter should be addressed to senior executive officer or, in certain circumstance, Chairman of the Board, in each case in his/her capacity as such.
- Engagement letter should indicate that advice and opinions are solely for Board of Directors and only in their capacity as such



# Disclosure of Advice/Opinions

- Sample clause: “[Client] acknowledges and agrees that all advice and opinions (written and oral) rendered by [investment bank] are intended solely for the use of the Board of Directors in (and only in) their capacity as such, and may not be used or relied upon by any other person, nor may such advice or opinions be reproduced, summarized, excerpted from or referred to in any public document or given to any other person without the prior written consent of [investment bank].”
- Engagement letter should state that investment bank owes duties only to its corporate client
  - Sample clause: “In rendering such services, [investment bank] will act as an independent contractor, and [investment bank] owes its duties arising out of this engagement solely to the Company and to no other person.”



# Disclosure of Advice/Opinions

- Engagement letter should state that it is for benefit of the investment bank and corporate client only
  - Sample clause: *“The Engagement Letter is solely for the benefit of the Company and [investment bank] and no other person (except for indemnified persons to the extent set forth in Appendix A) shall acquire or have any rights under or by virtue of this Engagement Letter .”*



# Disclosure of Advice/Opinions

- Fairness Opinions
  - Advisor is retained to provide an opinion to the Board of Directors or, in certain circumstances, a Special Committee of the Board.
  - Fairness Opinions are not required as a matter of law. However, the Delaware Supreme Court (See *Smith v. Van Gorkom* 1985), identified directors' failure to obtain a fairness opinion as one factor pertinent to holding that the directors violated duty of care.
    - Therefore, Board of Directors may often ask for a fairness opinion in corporate transactions where a shareholder vote is required, or where matter is otherwise material, to assist in performance of fiduciary duties.
  - Public Disclosure of Fairness Opinions
    - Generally, investment bank will address the fairness opinion to the Board of Directors (or Special Committee, as applicable) and limit disclosure to, or reliance by, any other person or constituency.



# Disclosure of Advice/Opinions

- Public Disclosure of Fairness Opinions (cont.)
  - Sample clause: “[Client] acknowledges and agrees that all advice and opinions (written and oral) rendered by [investment bank] are intended solely for the use of the Board of Directors (or special committee thereof) of the [client] and may not be used or relied upon by any other person, nor may such advice or opinions be reproduced, summarized, excerpted from or referred to in any public document or given to any other person without the prior written consent of [investment bank]. If required by applicable law, such opinion may be included in any disclosure document filed by [client] with the SEC with respect to the proposed Transaction; provided however, that such opinion must be reproduced in full and that any description of or reference to [investment bank] be in a form reasonably acceptable to [investment bank] and its counsel. [Investment bank] shall have no responsibility for the form or content of any such disclosure document, other than the opinion itself.”



# Disclosure of Advice/Opinions

- Public Disclosure of Fairness Opinions (cont.)
  - However, fairness opinions are routinely disclosed in disclosure documents publicly filed with the SEC (e.g., a proxy or information statement, S-4 registration statement, Rule 13e-3 Transaction Statement or Solicitation/Recommendation Statement on Schedule 14D-9).
  - The SEC has objected to disclaimers in such public disclosure documents, and the related attached fairness opinions, that state that the opinion may not be relied upon by anyone other than its addressee (i.e., the Board or Special Committee) and has required advisors to either demonstrate via applicable case law or state law the legal basis for this conclusion or delete this language from their fairness opinion and related disclosure.



# Rights to Other Banking Services

- Additional Services

- Advisor bank may desire to lock-up the right to provide additional services in connection with both capital raising and M&A activities by the client.

- Sample clause: *“To the extent that the [client] requires any of the following additional services (whether or not such additional services are related to a Transaction) during the Term or in the [ ] months following the Term, the [client] will provide [investment bank] the exclusive right of first refusal to provide such Additional Services: (a) Sole bookrunning and lead manager, or lead placement agent, as the case may be, for any equity financing; (b) Sole bookrunning and lead manager, or lead initial purchaser, or lead placement agent, as the case may be, for any debt financing; or (c) Exclusive financial advisor in connection with an M&A transaction. The terms and conditions relating to such services will be outlined in a separate proposal and the fees for such services will be in addition to fees payable hereunder. Any such proposal will be negotiated separately and in good faith, set forth in a separate written agreement, and be consistent with then prevailing industry practice. The agreement set forth in this section is neither an expressed nor implied commitment by [investment bank] to provide any additional services.”*

- To the extent client will not agree, fallback provision would be a right to pitch for such services and possibly a right to match terms.



# Rights to Other Banking Services

- Legal Concerns
  - FINRA Rule 5110 –
    - Rights of First Refusal
      - May be deemed “unreasonable”
      - Or may be ascribed value and included in underwriter compensation calculation
    - “Tail” fees
      - May be deemed “unreasonable”
  - If investment bank is part of a larger financial group with a banking affiliate subject to U.S. bank regulation, watch for:
    - *Anti-tying* – See Section 106 of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1971-1978) and Regulation Y of the Federal Reserve Board (12 C.F.R. 225.7)
    - *Inter-affiliate transaction rules* – See Section 23B of the Federal Reserve Act (12 U.S.C. 371c) and Regulation W of the Federal Reserve Board (12 C.F.R. Part 223)



# Indemnification

*You agree to indemnify and hold harmless us, our affiliates (within the meaning of the Securities Act of 1933), and each of their respective partners, directors, officers, agents, consultants, employees and controlling persons (within the meaning of the Securities Act of 1933) (each such person or entity is hereinafter referred to as an "Indemnified Person"), from and against any losses, claims, damages, liabilities and expenses, joint or several, and all actions, inquiries, proceedings and investigations in respect thereof, to which any Indemnified Person may become subject arising out of or in connection with our engagement under the agreement...*

*...whether or not such action, inquiry, proceeding or investigation is initiated or brought by you, your creditors or stockholders, or any other person...*



# Indemnification

- Every engagement letter includes some form of indemnification for the advisor and its representatives and other relations
- Indemnification is usually framed broadly by reference to any action arising out of the engagement regardless of whose action or inaction precipitated the claim
- To protect against claims by persons not in privity with the advisor, indemnification is written to extend to claims by persons such as shareholders and creditors



# Indemnification

*You are not responsible for any losses, claims, damages, liabilities or expenses to the extent that such loss, claim, damage, liability or expense has been finally judicially determined to have resulted primarily and directly from actions taken or omitted to be taken by such Indemnified Person due to such person's gross negligence, willful misconduct or bad faith...*

*...periodically reimburse an Indemnified Person for such person's reasonable and documented legal and other expenses as may be incurred in connection with investigating, preparing, defending, paying, settling or compromising any such action, inquiry, proceeding or investigation...*



# Indemnification

- Advisors acknowledge that not all their acts are deserving of indemnification
- Carve outs from advisor indemnification customarily include gross negligence and willful misconduct and frequently bad faith; other carve outs are negotiable depending on circumstances, including selected breaches of contract
- “Primarily and directly” are additional protections advisors seek to incorporate before risking loss of indemnification
- Advisors customarily insist on some third party determination, such as a court order, which is final and non-appealable, as to its gross negligence, willful misconduct or bad faith, before relinquishing its right to indemnification
- Indemnification for expenses as incurred is generally viewed by advisors as a crucial element of its agreement in order to avoid fronting significant costs in advance of a determination, if ever, of its own culpability in respect of the claim



# Contribution

*If the indemnity or reimbursement referred to above is, for any reason whatsoever, unenforceable, unavailable or otherwise insufficient to hold each Indemnified Person harmless, you agree to pay to or on behalf of each Indemnified Person...*

*...so that each Indemnified Person ultimately bears only a portion of such losses, claims, damages, liabilities or expenses as is appropriate (i) to reflect the relative benefits received by each such Indemnified Person, respectively, on the one hand and you and your stockholders on the other hand or (ii) if the allocation on that basis is not permitted by applicable law, to reflect not only the relative benefits referred to in clause (i) above but also the relative fault of each such Indemnified Person, respectively, and you as well as any other relevant equitable considerations...*



# Contribution

- Contribution offers protection to the advisor against liability and expenses when indemnification is unavailable
- In some instances, clients are successful in negotiating a carve out from contribution in the event indemnification is unavailable by reason of the advisor's gross negligence and other indemnification carveouts
- Advisors will seek to measure contribution in proportion to the relative benefits of the parties given the limited upside they have relative to their client in the transaction
- Advisors will typically request a limit on its contribution equal to fees it has been paid



# Exculpation

*You also agree that no Indemnified Person shall have any liability to you or your affiliates, directors, officers, employees, agents, creditors or stockholders, directly or indirectly, related to or arising out of the agreement or the services performed thereunder, except losses, claims, damages, liabilities and expenses you incur which have been finally judicially determined to have resulted proximately and directly from actions taken or omitted to be taken by such Indemnified Person due to such person's gross negligence or willful misconduct.*

- Advisors customarily seek to privately order their liability (whether in contract or tort) to their client by limiting claims by their client to those grounded in gross negligence and the other carve outs from indemnification
- From an advisor's perspective, this provision complements its efforts through the engagement letter to limit liability not only directly to its client with whom it is in privity, but anyone who may seek to claim damages through its client and is not in direct privity with the advisor



# Miscellaneous Provisions

- Disclaimer of Fiduciary Duty
  - Courts have recognized validity of these provisions that disclaim duties
    - Joyce v. Morgan Stanley
    - Young v. Goldman Sachs
  - Sample clause: “[Client] acknowledges that it has retained [investment bank] solely to provide the services set forth in this Engagement Letter. In rendering such services, [investment bank] will act as an independent contractor, and [investment bank] owes its duties arising out of this engagement solely to the [client] and to no other person. The [client] acknowledges that nothing in this Engagement Letter is intended to create duties to the [client] beyond those expressly provided for in this Engagement Letter, and [investment bank] and the [client] specifically disclaim the creation of any fiduciary relationship between, or the imposition of any fiduciary duties on, either party.”



# Miscellaneous Provisions

- Merger Clause
  - Create certainty of rights and obligations by restricting to “four corners” of the Engagement Letter.
  - Avoid argument that pre-contractual discussions give rise to contractual obligations and support application of the parol evidence rule.
    - Sample clause: *“This Agreement constitutes the complete agreement between the parties hereto with respect to the subject matter hereof and shall continue in full force and effect until terminated by mutual agreement of the parties hereto.”*
- Governing Law
  - Creates greater certainty as to whether the engagement letter will be held to constitute an enforceable obligation between the parties.
    - Sample clause: *“This agreement shall be governed by and construed in accordance with the laws of the State of [New York], without regard to the conflicts of laws provisions thereof.”*

# Miscellaneous Provisions

- Dispute Resolution
  - Judicial Action; Choice of Forum and Venue
    - Sample clause: *“Each party agrees that any action, claim, suit, or proceeding (each a “Proceeding”) concerning the interpretations, enforcement and defense of the transactions contemplated by this Agreement (whether brought against a party hereto or its respective affiliates, employees or agents) will be exclusively commenced in the state and federal courts sitting in [New York] (the “Courts”). Each party hereto hereby irrevocably submits to the exclusive jurisdiction of the Courts for the adjudication of any dispute hereunder or in connection herewith or with any transaction contemplated hereby or discussed herein (including with respect to the enforcement of this Agreement), and hereby irrevocably waives, and agrees not to assert in any Proceeding, any claim that it is not personally subject to the jurisdiction of any such Court, or that such Proceeding has been commenced in an improper or inconvenient forum.”*
    - Exclusive vs. Non-Exclusive jurisdiction
    - Greater familiarity with complex commercial litigation ; greater certainty of outcome

# Miscellaneous Provisions

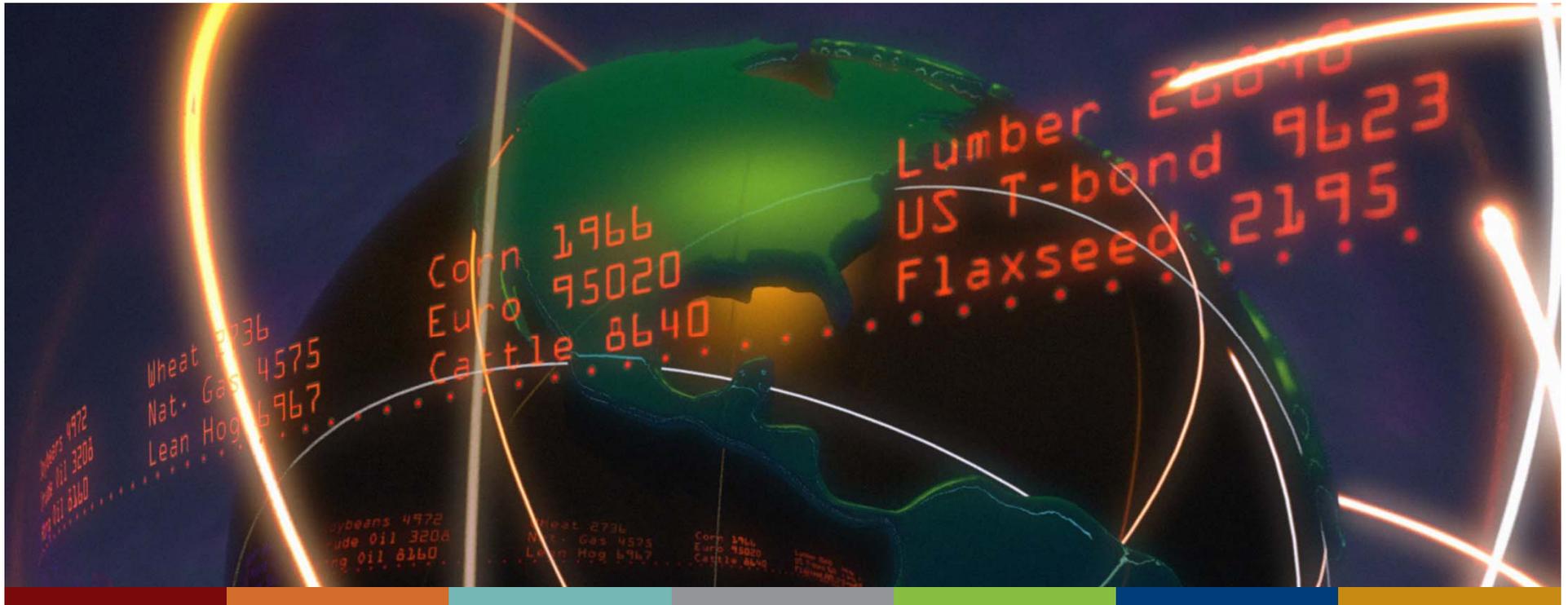
- Dispute Resolution (cont.)

- Arbitration

- Sample clause: *“Any dispute between the parties concerning the interpretation, validity or performance of this Agreement or any of its terms and provisions shall be submitted to binding arbitration in the City and County of New York before JAMS (Judicial Arbitration and Mediation Services), and the prevailing party in such arbitration shall have the right to have any award made by the arbitrators confirmed by a court of competent jurisdiction. EACH PARTY IRREVOCABLY WAIVES ANY AND ALL RIGHTS THEY HAVE TO A TRIAL BY JURY IN ANY ACTION, PROCEEDING OR CLAIM OF ANY NATURE ARISING OUT OF THIS LETTER AGREEMENT , AND ACKNOWLEDGES THAT THE FOREGOING WAIVER IS KNOWING AND VOLUNTARY.”*

# Miscellaneous Provisions

- Dispute Resolution (cont.)
  - Waiver of Jury Trial
    - Again, creates greater certainty of outcome
      - Sample clause: “Each party (on its own behalf and, to the extent permitted by applicable law, on behalf of its shareholders) hereby irrevocably waives any right they may have to a trial by jury in respect of any claim, counter-claim or action based on or arising out of this Engagement Letter, [investment bank’s] performance under this Engagement Letter or the transactions contemplated hereby.”



# Negotiating M&A Engagement Letters



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