

Putting the Agreement on Paper:

Legal Issues and Strategies

Importance of Legal Documentation

- Identify principal business issues
- Clarify rights and obligations of parties
- Minimize post-transaction disputes

Financing Transactions

- Equity
- Senior Indebtedness
- Mezzanine/Subordinated Indebtedness

Step One – LOI/Commitment Letter

- Confirm principal economic issues
- Market check
- Maximize their obligations
 - Firm commitments
- Minimize your obligations
 - Exclusivity
 - “Tails”

Step Two – Definitive Agreements

Different sets of issues, but same sets of provisions:

- Covenants
 - Affirmative covenants
 - Negative covenants
- Representations and Warranties

Equity Agreements

Covenants

- **Economics**
 - Yield
 - Preference
 - Anti-dilution protection
- **Governance**
 - Board composition
 - Veto Rights/Negative Covenants

Equity Agreements

Covenants

- Transfer Restrictions
 - ROFR/ROFO
 - “Drag Along”
 - “Tag Along”
- Put/Liquidity Rights
 - Valuation
 - Payment Terms

Equity Agreements

Representations and Warranties

- More detailed than other financing arrangements
- Ramifications of breaches

Senior Debt Agreements

- Consider business plan when negotiating agreements
- Maximize flexibility on front end
 - Minimize intrusion
 - Waivers can be expensive

Senior Debt Agreements

Covenants

- **Affirmative Covenants**
 - Obligations to take certain actions
 - Informational deliveries/notice of developments
- **Negative Covenants**
 - Restrictions on indebtedness or other payment obligations
 - Restrictions on distributions
 - Restrictions on other actions

Senior Debt Agreements

- **Financial Covenants**
 - Base upon reasonable forecast assumptions
 - Carefully consider the underlying definitions for calculating ratios
- **Representations and Warranties**
 - More limited than equity documents
 - Ramifications of breach
- **Other Issues**
 - Prepayment rights
 - “Flex” language in syndications
 - Waivers of sovereign immunity

Subordinated Debt Agreements

- Hybrid of equity and senior debt
- Ensure consistency with Senior Debt Agreements
- Cushion covenants off Senior Debt Agreements
- Minimize veto rights/control issues