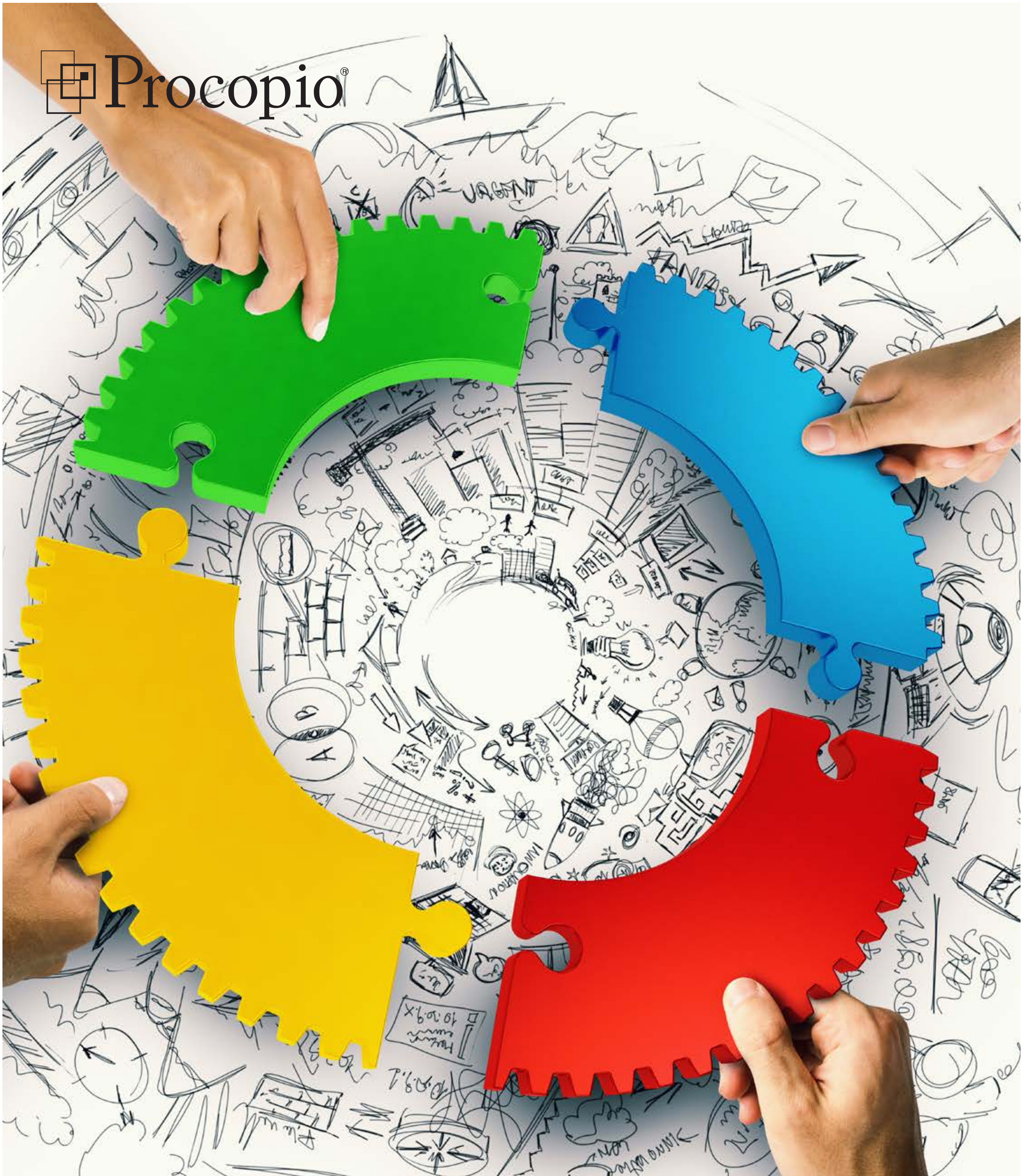


Key Points for Negotiating *Investment Banker Agreements*

By Jason Femrite

Whether you're a small to mid-size company or a multinational corporation, Procopio's Mergers & Acquisitions and Strategic Joint Ventures attorneys seek to know your market and partner with you to maximize your returns.

We've closed hundreds of deals totaling billions of dollars across a wide range of industries, including life sciences, software, technology, food and beverage, consumer products, medical device, manufactured products and hospitality. We help you grow through acquisition, expand your market reach through a synergistic business relationship, or maximize your exit.

As part of such practice, our attorneys regularly negotiate the terms of investment banking agreements.

Key Points *to Consider*

01

Engaging an unregistered advisor is a risky proposition and may have serious consequences for the seller. In fact, it could potentially give the buyer a right of rescission.

02

Using a bank with relevant experience offers a level of confidence that the institution has completed multiple deals in the industry and has access to a network of interested potential buyers.

03

Reasonable terms should be agreed upon. There are many nuances to investment banking agreements that may have significant financial effects upon the seller, both during the term of the agreement and after. It is important to carefully negotiate such provisions.

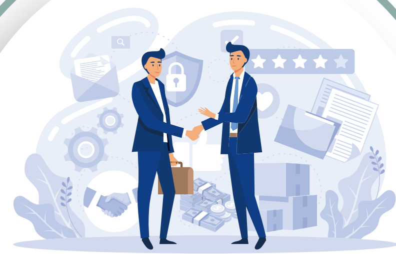
Two Sides to *Every Transaction*

BANK

Wants a general description of services to bind the seller to the bank for any kind of banking process, (e.g., sale, equity financing, debt financing, etc.)

Will often seek to have the seller retain the bank for likely additional services (for example, financing for the transaction) and give an option or right of first refusal for future services (such as financings).

Will try to avoid having additional services covered in the basic fee (for example, a fairness opinion without an additional fee).



SELLER

Should specify the nature of the engagement to avoid paying a fee for an unrelated transaction or being bound to use the bank for future engagements.

Wants to limit the bank's services, such as identifying (and contacting) suitable targets, analyzing the market with comparative analyses and determining the right price for the transaction.

Should limit the bank's right to provide other services not directly related to the contemplated transaction so that the buyer may benefit from competition among other firms in the future.

6 Key Provisions *to Consider*

- Fees (retainer and success fee)
- Transaction/ transaction value
- Tail
- Indemnification
- Confidentiality
- Expenses

Fees

RETAINER

- Bank may seek a large non-refundable retainer
- Seller should require that any retainer be paid over time, capped, and applied to any success fee

SUCCESS FEE

- Bank wants a percentage of the "transaction value," but no less than their minimum success fee, with the entire success fee paid at closing
- Seller should negotiate a fee structure that incentives the advisor to secure favorable economic terms, typically providing a greater incremental percentage fee for greater transaction values
- Seller should require that payment of any portion of the transaction fee based on contingent or future payments to the seller be made only after the contingent events have occurred

Transaction/*Transaction Value*

BANK

- Defines "transaction" to include a large universe of deal structures, such as minority purchases, joint ventures, collaborations and licenses that might arise from the engagement
- Pushes for "transaction value" to include any consideration payable, including assumption of debt, consulting agreement fees and distributions of cash to shareholders (even existing company cash)

SELLER

- Seeks to limit "transaction" to the specific transaction seller intends to enter into (e.g., a sale rather than a financing)
- Wants to limit "transaction value" to consideration actually paid to the seller and/or its shareholders
- Sellers should exclude existing cash from the calculation of deal value in cash-free deals

TRANSACTION VALUE EXAMPLE

For purposes hereof, the "transaction value" shall be defined as the total consideration paid or to be paid for the stock or assets of seller (including amounts paid into escrow) in the transaction, including without limitation, any cash or cash equivalents, stock or other securities, promissory notes or other debt instruments, non-compete payments, assumed indebtedness, earn-outs, royalties and any other contingent or deferred payments to be received by seller and/or its shareholders at and following the closing.

In the event that the consideration is paid in whole or in part in the form of securities, the value of such securities, for the purposes of calculating the transaction fee, shall be as determined by the buyer(s) party to the transaction, provided if no such value is set forth therein, the value shall be the fair market value thereof, as the parties hereto shall mutually agree, as of the day prior to the consummation of the transaction.

For avoidance of doubt, "transaction value" shall not include (i) deferred revenue, or (ii) dividends paid, or the value of any repurchases of securities, in anticipation of a transaction if the terms of such transaction (x) assumes seller's cash shall be distributed to the shareholders prior to closing, (y) requires only a minimum level of working capital, or (z) assumes a cash-free and debt-free deal.

Tail

BANK

- Wants to be paid a success fee on any transaction that closes within a “tail” period after the expiration or termination of its engagement, regardless of whether the bank introduced the eventual buyer/investor
- Seeks as long a tail as possible (24-48 months)

SELLER

- Wants to keep the period short (12 months)
- Prefers tail period to commence from the date that the engagement terminates or expires. For this reason, a set termination date in the engagement agreement, and the right to terminate at will if possible, are important provisions to consider. Absent such provisions, the agreement may not expire, the tail will not commence, and the seller may be forced to pay an unnecessary fee on a subsequent deal.
- Only wants the tail paid if the buyer/investor was introduced by the bank. For this reason, seller should consider requiring that any such identified parties be listed after expiration of the engagement
- Wants to request there be no tail if (i) the engagement is terminated by the bank, or (ii) the bank fails to provide a list of identified parties after expiration or termination of its engagement

TERMINATION/TAIL EXAMPLE

This agreement shall terminate upon the earlier to occur of (i) the closing of a transaction; (ii) thirty (30) days written notice of termination from either party for any reason; and (iii) the expiration of the term, unless the term is extended by the mutual written agreement of the parties.

Upon termination of this agreement, neither party shall have any liability to the other except that the bank shall be entitled to its transaction fee if, within twelve (12) months from the date of termination of this agreement, seller consummates a transaction with any identified party. For purposes of this agreement, “identified party” means a party identified in writing by the bank to the seller during the term as a potential party to a transaction.

Within thirty (30) days after the expiration or termination of this agreement, bank shall provide seller with a written list of all identified parties (“identified parties list”). The identified parties list shall be deemed correct unless seller notifies bank in writing of any dispute of its contents within (30) days after seller’s receipt of the identified parties list.

Notwithstanding any other provision of this agreement, seller shall have no obligation to pay the bank any transaction fee following the expiration or termination of this agreement should (i) the bank fail to provide a final identified parties list to seller within (30) days after the termination of this agreement or (ii) the bank terminates this agreement for any reason prior to the expiration of the term.

Indemnification

BANK

- Separate indemnification agreement for any damages from or based on the engagement or transactions contemplated, thereby including expenses incurred by the advisor in defending such claims
- Indemnification regardless of any court determination that indemnification is unavailable for reasons of public policy
- Requires cap on its own liability equal to the consideration it is paid under the engagement agreement
- May want to approve the settlement of any claim, regardless of whether bank is an identified party

SELLER

- Seeks to carve out of indemnification and contribution obligations for claims arising from the bank's fraud, gross negligence or bad faith acts
- Wants ability to defend/settle any ordinary course indemnity claims that do not name bank as a party
- Asks for a cap on the aggregate amount of damages payable under the indemnification provision or under any individual claim
- Requires that the advisor promptly notify the seller of any claims and insist on the right to direct the defense of any claims for which the seller may be required to indemnify the advisor

Confidentiality

BANK

- Prefers very limited confidentiality provision
- Carves out other departments (including trading or capital markets) and limits the duration of the confidentiality period as much as possible

SELLER

- Prefers to bind bank to a separate NDA with confidentiality provisions for at least one year after the end of the engagement
- May try to limit the bank's right to use or disclose information about the seller except as provided in the engagement letter
- Ideally, confidential information will not be shared with other departments of the bank, including trading or capital markets

Expenses

BANK

- Seeks broad expense reimbursements, potentially including allocation of overhead and research costs

SELLER

- Seeks to cap and define reimbursable expenses, excluding expenses that are not out-of-pocket expenses, and requiring that large expenses (such as outside legal counsel) and travel expenses be approved in advance

Other Deal Points

EXCLUSIVITY

Is the bank the sole advisor? Does that conflict with any existing or future investment banking agreements?

CONFLICTS OF INTEREST

Bank should not generally be allowed to represent a buyer in the same investment banking process

COMPLIANCE WITH LAW BY THE BANK

The bank should have, and agree to maintain, all required licenses

KEY PERSONS

If the seller is hiring the bank because of a key person, consider the right to terminate the engagement without fees if the key person is no longer involved

GOVERNING LAW AND VENUE

If there is a dispute between the bank and the seller, where will it be handled and under what law?

When You Work With *Our Team*

You'll always stay in contact with your partner of choice and won't get passed down to another attorney after a "honeymoon" period. As a founding member of LawExchange International and an active member of Meritas, we have access to knowledgeable and experienced legal representation around the world that provides you with diversified global support and insights.

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Jason represents private and publicly held companies, individuals and investment firms in a wide range of transactions from formation to finance, and eventually to exit or and acquisition. He focuses on mergers and acquisitions, capital finance, securities and general corporate matters. Jason's experience includes the representation of both buyers and sellers in mergers, stock and asset purchases, management buyouts, reorganizations and related transactions. He has represented companies in a wide range of industries, including life sciences, medical devices, software and online services, consumer products, food and beverage and engineered products. Jason co-chairs our Mergers & Acquisitions and Strategic Joint Ventures group and leads our Consumer Products and Food and Beverage practices.

About our *M&A Practice*

Whether you're a small to mid-size company or a multinational corporation, Procopio's Mergers & Acquisitions and Strategic Joint Ventures attorneys seek to know your market and will partner with you to maximize your returns. In the last five years, Procopio's M&A and Strategic Joint Ventures attorneys have represented clients in more than 300 deals in the billions of dollars. We've represented public and private companies in a broad array of industries, including life sciences and health care, software, food and beverage, manufacturing, and more.

We staff smartly and efficiently. You'll always stay in contact with your partner of choice and won't get passed down to another attorney after a "honeymoon" period. As a founding member of LawExchange International and an active member of Meritas, we have access to knowledgeable and experienced legal representation around the world that provides you with diversified global support and insights.

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Procopio is committed to helping clients reach their full potential while striving always to provide the highest level of client service. Our deep bench of nearly 200 seasoned and diverse attorneys offer practical legal solutions to clients around the world. We get to know each client's industry and its challenges, and partner with clients to identify unique business opportunities and capitalize on them now and into the future.

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