

coordinated enforcement efforts in the healthcare sector. Taken together, the Ascension/AmSurg order and the Henkel litigation win show that the agency is pursuing its stated priorities in practice, and that the FTC is prepared to both negotiate strong structural remedies and litigate mergers to a final result in federal court when a negotiated fix is not available.

ENDNOTES:

¹See <https://www.ftc.gov/news-events/news/press-releases/2026/08/ftc-approves-final-consent-order-ascension-health-amsurg-deal>.

²See <https://www.ftc.gov/news-events/news/press-releases/2026/03/ftc-chairman-andrew-n-ferguson-launches-healthcare-task-force>.

³See <https://www.ftc.gov/news-events/news/press-releases/2026/06/ftc-requires-divestiture-ambulatory-surgery-centers-protect-patients-anticompetitive-effects>.

⁴See https://www.ftc.gov/system/files/ftc_gov/pdf/2510093ascensioncomplaint_0.pdf.

⁵See <https://www.cooley.com/news/insight/2026/2026-08-21-ftc-court-win-blocks-henkels-acquisition-of-liquid-nails> (see also *The M&A Lawyer*, Vol. 30, Issue 8, September 2026).

BUY-SIDE STRATEGY IN M&A AUCTIONS: THE SOFT SKILLS THAT HELP BIDS WIN

By Kiran Singh, Grant McGlaughlin, Gesta Abols and Paul Blyschak

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Dealmakers know there's no "one size fits all" to buy-side strategy in private M&A auctions: every target, seller and sales process is unique. That said, there are certain guiding principles that savvy buyers skillfully apply as a given auction warrants.

We discuss some of these at a high level.¹ We focus on an auction bidder's approach to the (1) letter of intent ("LOI"), and (2) mark-up of the auction's form of purchase agreement ("SPA").² We take the perspective of a private equity bidder (as opposed to a strategic). We focus specifically on the soft skills that, alongside competitive bid terms, help win auctions. We conclude with key considerations in the context of founder sales.

There's no doubt that price is king. But it's rarely the whole story.

Buy-Side Strategy and Bid Terms in a Perfect World

An auction seller is looking for the optimal mix of purchase price plus deal certainty. Part and parcel of deal certainty is the bidder's credibility and ability to close quickly.

Regarding deal terms generally, the typical seller's wish list is no secret. The question for the buyer is how attractive the target is and how competitive the auction is expected to be. Ideal deal terms to offer the sellers, as sophisticated bidders know well, would include:

- Minimizing closing conditions and any regulatory risk.
- Demonstrating bidder conviction through firm financing and investment committee ("IC") or board approval vs merely indicating the availability of financing and that the bid remains subject to approval(s).
- Minimizing post-closing risk by offering a clean walk via a commitment to representation and warranty insurance ("RWI") and a specific RWI policy provider and avoiding or minimizing (duration and cap) specific indemnities.

Purchase price is of course paramount. But savvy sellers will take a holistic approach to evaluating bids. It's not uncommon for deal certainty to take precedence over a delta between bidders' prices.

The LOI: Build Seller Confidence Beyond Bid Price

Convincing the seller that you offer the best mixture of price plus certainty is, at its heart, a multi-faceted signalling exercise. This starts with clear and direct engagement with the seller's process letter.³ In doing so, we recommend keeping three interrelated, softer goals in mind:

- **Answer questions, don't trigger them.** The LOI is a critical opportunity to demonstrate your sophistication, deal-readiness and appreciation for the seller's priorities. This is done by evidencing engagement and proving capability. Conversely, the use of qualifiers, instances of equivocation, or gaps in approach can quickly sink a bid. A few examples are illustrative. Be clear as to the core assumptions that drive your valuation; don't throw in the kitchen sink. Tackle proposed purchase price adjustments with precision and commercial sensibility. Clearly articulate structuring proposals and the rationale behind them. Have due regard for complex issues and establish technical credibility. Avoid sweeping diligence and other "subject to" qualifiers. Catch all material issues the seller would expect you to raise and address them head on. Driving by something important begs the question: what else did they miss?
- **Find ways to "show your work."** Approach the LOI much like a math exam: it's not enough to give the numerical answer, you should also show your work. This can be done directly as well as by implication. Identify your deal team and financial, legal and other advisors. Demonstrate that workstreams have been established and teams have been digging in.⁴ Indicate (ideally) that you're ready to begin site visits (etc.) and confirmatory due diligence. Don't submit a standard due diligence request list that isn't responsive or tailored to what's already been given in the auction VDR. Ask specific (not generic) questions aimed at material issues and risk. Show conviction in that you've hit the ground running. The due diligence

test to getting exclusivity isn't whether you've done everything, it's demonstrating you've scrutinized key diligence issues and can put your money where your mouth (or rather, bid) is. Deploy enough front-end capital to be able to do these things. Yes, tout your deal-list and stellar track record and reputation. But don't rest on your laurels either.

- **Cut a clear and quick path to closing.** Lean on your front-end spend to isolate your do or die battles. Key here are any regulatory, competition or national security type filings that can add significant runway to close. This is also where a PE can often significantly differentiate itself over a strategic. Craft your closing conditions and other related deal points accordingly. Save your negotiation capital for your hills to die on and avoid any temptation to try to nickel and dime. Make your best financial offer and lean against proposing an earnout. Leverage your front-end spend to shorten your exclusivity period to the extent reasonably possible. Pre-empt points of concern apparent from the diligence materials and explain how you plan to resolve them. Demonstrate potential flexibility and openness to finding and accommodating creative solutions. Yes, balance competitiveness with sufficient flexibility to preserve critical deal optionality during exclusivity. But don't over-lawyer or leave any impression you haven't done your homework, might need more time, or might try to re-trade later.

Working with the terms of the process letter when drafting your LOI is of course vital. But neither should these instructions be considered gospel in every case. Tactfully applied based on the circumstances, targeted and thoughtful deviation can work for a bid rather than against it.

The SPA Mark-Up: Keep it Predictable, Insurable and Closeable

Your mark-up of the auction SPA should be surgical. Think of your pen as a scalpel. The emphasis should be

on precision, avoiding volume, and signalling cooperation as opposed to confrontation. Examples include:

- **Issues List vs Mark-Up.** The process letter will often require a full-mark-up of the SPA. Whether this makes the most sense will depend on the seller's draft. Should it skew unreasonably seller-friendly, a targeted issues list focused on your five or six key issues may be better received than a heavy re-write of the SPA.
- **Stick to Material Points.** Avoid changes that don't move dollars or material risk. For commercial issues, these should generally be limited to (1) purchase price mechanics, (2) working capital adjustments, (3) baskets, caps and claim thresholds, (4) any escrows or holdbacks, and (5) any break fees, other financial terms and their definitions. For legal issues, the mark-up's focus should generally be narrowed to (1) closing conditions, (2) any key interim covenants, (3) bring-down standards, (4) indemnity structure, and (5) insurability.
- **Aim for RWI Conformity.** In RWI deals, revisions to the seller's representations and warranties should aim for insurability and not maximizing scope. Bespoke representations and warranties should be limited to value-critical items. The SPA mark-up shouldn't be used as a substitute for diligence (i.e., "diligence by drafting"). Don't modify the seller's representations so as to require significant disclosure schedule information production that's not material to the deal.
- **Work with the Seller's Draft.** Mirror the seller's language and style in your changes. Avoid irritants; e.g., throw away your thesaurus. Don't simply cut and paste precedent. Use notes to draft ("NTDs") sparingly and generally only for (1) commercial issues that go to purchase price or deal certainty, (2) addressing substantive legal issues or rationale, and/or (3) deviation directly con-

nected to RWI insurability or diligence gaps. Wordsmithing will quickly raise red flags.

All in all, seasoned dealmakers and skilled drafters know where the rubber hits the road in M&A agreements; what really matters versus what's just window dressing. Serially successful buyers leverage this wisdom to keep mark-ups light while zeroing in on their key goals. They simultaneously signal to the seller that they're there to do the deal without distraction by points that don't go directly to value or risk.

Signalling in Founder Sales

Signalling will be especially important for a private equity buyer in the context of a founder sale. The underlying goal is conveying that the deal is the start of a new collaborative relationship and new growth phase going forward. In other words, the essential message is that the founder sale is actually the dawn of a partnership working towards the real (and much bigger) exit in a few years time. This should involve a clear blueprint as to your plan to grow the business. This can also include evidence of your track record, e.g., by details of past rollover returns and/or references from CEOs of the fund's other or historic portfolio companies.

ENDNOTES:

¹Our review is by necessity high-level and non-exhaustive.

²For ease of reference, we refer to the auction form of purchase agreement as the SPA notwithstanding that some private M&A auctions will involve an asset purchase agreement.

³This will convey the sellers' specific expectations regarding bid content, including (1) price and consideration, (2) valuation methodology and assumptions, (3) financing arrangements and guarantors (equity and debt), (4) timing and scope of expected due diligence, (5) any bidder conditions, (6) any required or potential third party or regulatory approvals, and (7) the bidder's strategic plans post-closing, e.g., regarding key employees or relocation of operations.

⁴Note: sellers will know the time spent by a bidder

in the VDR, which sends a signal as to how serious a bid is and how much work has been done.

FDIC ISSUES PROPOSAL ON BANK MERGER TRANSACTIONS, SIGNALING MODERNIZED APPROACH TO MERGER REVIEW

By Mark Chorazak, Nate Balk and Melissa L. Dorow

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Executive Summary

- **What's new:** On September 17, 2026, the FDIC announced a proposed rule that would reform key facets of the agency's approach to processing and evaluating merger transactions subject to the Bank Merger Act, aiming to improve timeliness and expand predictability in the merger review framework.
- **Why it matters:** The proposal would introduce a "rapid processing" framework and certain safe harbors for merger evaluations and would significantly reduce the burden of the FDIC's review process for mergers by state nonmember banks, which account for approximately 2,700 of the approximately 4,500 currently operating banks and savings associations.
- **What to do next:** FDIC-supervised state nonmember banks will want to assess how the proposed changes could affect their M&A strategies and can provide the agency with practical feedback within the 60-day comment period.

On September 17, 2026, the Federal Deposit Insur-

ance Corporation ("FDIC") announced a proposed rule¹ that would reform key facets of the agency's approach to processing and evaluating merger transactions subject to the Bank Merger Act ("BMA"). These reforms aim to both improve the timeliness of applications and modernize the analytical framework underlying the FDIC's bank merger review. The proposed update also adds a new approval requirement for significant asset transfers.

The FDIC's proposal, if finalized, would significantly reduce the burden of the FDIC's review process for mergers by state nonmember banks, which account for approximately 2,700 of the approximately 4,500 currently operating banks and savings associations.

Key Features of the FDIC's M&A Proposal

Updates under the proposed rule would include:

Defined timelines and processing categories, including a "rapid processing" framework for *de minimis* merger transactions. The proposed rule requires that within 21 days after receipt of a merger application, the FDIC must provide a written explanation regarding the information required to render the application complete. Applicants would then have 30 days to provide the requested information or the application could be returned by the FDIC without rendering a decision. If the FDIC failed to provide a written explanation within 21 days, the application would be deemed substantially complete as of the date of receipt. In either case, the timelines for rapid, expedited and standard processing would begin on the date that the FDIC receives a substantially complete merger application.

- The proposed rule establishes a new subcategory of *de minimis* merger transactions, including certain corporate reorganizations, that qualify for rapid processing. *De minimis* transactions would be subject to a less onerous, streamlined letter-filing requirement and deemed approved in as few as five business days, unless the U.S. Attorney General objects to the transaction on competition grounds.
- The proposed rule would expand existing expe-