



# *Acquisition & Due Diligence*

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## CHECKLIST

Acquisition is an exciting (and stressful) time for everyone involved. It is our job to make your life easier.

We have put together the following checklist of important due diligence considerations to help your deal move forward as smoothly as possible.

Please note that this list focuses on the title due diligence side of the transaction and is not intended to be comprehensive. The specifics of your deal will be governed by the terms of your purchase and sale agreement.



## Letter of Intent (“LOI”)

The LOI often opens the negotiation. It will generally be of limited binding effect. Some smaller deals move forward on a LOI or letter agreement without entering a formal purchase and sale agreement, though this is often inadvisable. The LOI frequently includes a proposed purchase price, a description of the assets, the exclusivity period, terms of confidentiality, the termination date, etc.

**TIP:** BE VERY CLEAR AND SPECIFIC AS TO WHAT PROVISIONS ARE BINDING AND WHAT PROVISIONS ARE NON-BINDING.

**TIP:** YOU MAY BE ASKED TO SIGN A NON-DISCLOSURE (NDA) OR CONFIDENTIALITY AGREEMENT BEFORE THE LOI.



## Purchase and Sale Agreement (“PSA”)

The PSA defines the essential terms and timeline of the transaction, including purchase price, definitions, adjustments to purchase price, defect notice thresholds, deadlines, warranties, indemnity, and other unique provisions.

The actual document may be titled a Purchase and Sale Agreement, a Mineral Acquisition Agreement, a Lease Acquisition Agreement, an Asset Purchase Agreement, or another variation.



## Land Due Diligence

Give yourself as much time for due diligence as the seller will agree to. Remember to give the broker sufficient time to run the title and the law firm sufficient time to review the title and identify the defects.

This is an important aspect of negotiating the PSA, as the seller will often want to limit this timeframe as much as possible. We recommend creating a priority list for the assets, starting with the highest-valued assets first.

**TIP:** CONFIRM WHETHER THE SELLER IS WILLING TO SHARE FILES OR IF YOUR DILIGENCE WILL BE LIMITED TO A VIRTUAL DATA ROOM.

**TIP:** HAVE YOUR BROKER AND LAW FIRM LINED UP AS EARLY IN THE PROCESS AS POSSIBLE. FAIR WARNING FACILITATES A MUCH SMOOTHER TRANSACTION.

**TIP:** UNDERSTAND WHERE AND HOW RECORDS ARE STORED AT THE BEGINNING OF THE DILIGENCE PERIOD.

**TIP:** IN SOME INSTANCES, IT MAY MAKE SENSE TO RENDER DEFECT NOTICES WITHOUT ACQUISITION TITLE OPINIONS. HOWEVER, ACQUISITION TITLE OPINIONS MAY HELP IDENTIFY DEFECTS THAT COULD IMPEDE A FUTURE SALE OF THE ASSET, OR MAY BE REQUIRED BY YOUR LENDER. GENERALLY, LENDERS WILL REQUIRE ACQUISITION OPINIONS ON ASSETS COVERING AT LEAST 80% OF THE PURCHASE PRICE.

- ❑ Identify target area and obtain a list of assets with legal descriptions.
- ❑ Obtain available title opinions and read through them for any prior issues that could be potential defects.
- ❑ Obtain and provide for review any applicable operating agreements, area of mutual interest agreements, division orders, voluntary or compulsory pooling orders, pay- decks or other unrecorded agreements that will survive closing.
- ❑ Collect any information related to all relevant carried parties and/or parties with tag-along or drag-along rights.
- ❑ Obtain surveys and plats/as-drilled plats for allocation, production sharing agreement or cross-unit wells.
- ❑ Review information provided by the broker and make sure information on lien and and litigation searches are included.
- ❑ Ensure any available data related to production, continuous development, retained acreage and lease maintenance is provided for review.
- ❑ Have the broker begin running updates on title opinions or from sovereignty as soon as possible. If there are federal or state-owned lands in your units, appropriate abstracts of the state or federal records should be provided along with runsheets covering the county records.
- ❑ Obtain current paychecks to ensure they match the PSA exhibits.
- ❑ Define an internal due diligence team for the acquisition. Note that when preparing the team, it is important to be mindful of the integration of the asset.

**TIP:** DUE TO TIME CONSTRAINTS, YOU MAY HAVE TO ALLOCATE TIME BASED ON THE COMPARATIVE VALUE OF EACH SPECIFIC ASSET.

**TIP:** CONSIDER THRESHOLD REQUIREMENT FOR PREPARATION OF AN ACQUISITION TITLE OPINION. IT MAY NOT BE COST- EFFECTIVE (OR EVEN POSSIBLE) TO OBTAIN TITLE OPINIONS ON EVERYTHING.

**TIP:** ACQUISITION TITLE OPINIONS WILL TYPICALLY BE LIMITED TO THE INTERESTS BEING ACQUIRED (E.G., WORKING INTERESTS, OVERRIDING ROYALTY INTERESTS, NON-PARTICIPATING INTERESTS AND/OR MINERAL INTERESTS OWNED BY SELLER)



## Content of the PSA

- ❑ Pay close attention to what the seller defines as a “permitted encumbrance” or “title defect” under the terms of the PSA. These can often be red flags as to defects the seller is aware of and is attempting to expressly limit.
- ❑ Be aware of provisions related to terminated leases as to land or depths, required consents to assign, reversionary interests, area of interest agreements, preferential rights, additional contracts such as gathering and transporting gas.

**TIP:** PERMITTED ENCUMBRANCES WILL OFTEN INCLUDE THINGS LIKE LANDOWNER ROYALTIES, PRODUCTION PAYMENTS, OVERRIDES, REVERSIONARY INTERESTS, SALES CONTRACTS, LIENS AND EASEMENTS.

**TIP:** WATCH FOR THE STANDARD OF TITLE REQUIRED. GOOD AND DEFENSIBLE VS. MARKETABLE?

- What are your defect thresholds and defect deductible amounts? Are you allowed to use defects cumulatively or in the aggregate across wells or DSUs, or will each defect have to individually meet the threshold?
- Be sure that the defect thresholds and defect deductibles reflect the type of assets being acquired. Both can be negotiated.
- What threshold triggers the walk right?



## Valuations and Defect Notices

- Be aware of whether valuations are being made as to different depths or benchmarks.
- Be aware of whether valuations are being made subject to certain carry agreements and/or before and after various payout thresholds. Which payout threshold is actually being used in the calculation?
- Ensure your NRI and/or Net Acre valuation methods are consistent with the interests described on the PSA exhibits. We can walk through the proposed formulas with you prior to the execution of your PSA.
- Who will be preparing the valuations and defect notices?



## Post-Closing

- Seller may retain properties subject to post-closing curative.
- Buyer may acquire properties at a decreased price subject to final accounting in which cured and uncured defects are taken into consideration.
- Be certain your assignment is properly filed for record with correct exhibits and in the federal or state records as applicable.
- Obtain your final accounting statement.
- Be sure to obtain the necessary approval of the transfer of assets from relevant state and federal agencies.
- Will employees familiar with the asset likely be laid-off or will they be available post-closing?

**TIP:** PROFESSIONAL COURTESY IS IMPORTANT BUT BE CAREFUL BEING TOO “COOPERATIVE” WITH THE SELLER OR “OVERSHARING” PRIOR TO THE DEFECT DEADLINE. THIS MAY RESULT IN AN EXPENSIVE BACK AND FORTH THAT ENDS WITH YOU PAYING BROKERS OR LAWYERS TO HELP CURE THE SELLER’S TITLE ISSUES.

**TIP:** NARRATIVE IS EXTREMELY IMPORTANT WHEN FILING THE DEFECT NOTICES. YOU GENERALLY ONLY GET THE ONE OPPORTUNITY TO EXPLAIN WHAT THE ACTUAL DEFECT IS THAT YOU ARE CLAIMING FOR IT TO BE USED AS EVIDENCE WHEN DECIDING IF THE DEFECT IS VALIDLY CLAIMED.

**TIP:** DEFECT NOTICES SHOULD BE SUBMITTED IN THOUGHTFUL MANNER ON A ROLLING BASIS. DOING SO GIVES THE SELLER TIME TO CURE THE ISSUES IN THE DEFECT NOTICE AND ENCOURAGES THEIR COOPERATION.

# Due Diligence in Oil, Gas and Mineral Transactions

## HOW OLIVA GIBBS ADDS VALUE:



For acquisitions, we carefully identify and assert defects on behalf of buyers to ensure issues are cured before purchase.



For sales, we respond to defect notices on behalf of sellers, and coordinate any necessary curative efforts.



We work directly for buyers and sellers, and also partner with other firms who may be negotiating the deal.



We have experienced title attorneys who understand title and the due diligence process, many of whom have also served on the deal side.



Our team understands tight timelines and demands within the due diligence time period. We value constant communication with our clients to ensure a mutual understanding of the task at hand.

## A NIMBLE LEGAL TEAM

Our attorneys are licensed to practice law in 13 states and routinely advise clients with assets in multiple producing regions.

This multi-jurisdictional experience equips us with a broad and nuanced view of the dynamic oil, gas, and mineral/royalty landscape nationwide.

Additionally, many of our team members are former landmen or in-house energy company executives, which provides our clients with unique perspective from all sides of a deal.

## CONTACT US

WE LOOK FORWARD TO HEARING FROM YOU.

