

# Pre-Contract Enquiries

for public and larger company acquisitions and mergers

*Expert knowledge means success*

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**Note:** This publication has not been updated since it was last published. Some of the hyperlinks may have changed and may need updating. In addition, some of the information in this publication may be out of date.

## Introduction

Prior to the acquisition of the share capital of a company, the purchaser will need some preliminary information about the business to be acquired.

This publication sets out a checklist of all the items that, in most situations, are required. It is merely illustrative and may not apply in every instance nor may it be complete. In those cases where documents are mentioned, accurate and up to date copies of those documents should be requested.

It should be noted that all references to "the Company" include references to its subsidiaries (if any). The Directors' Approval under paragraph 19 requires the signature of the person making the replies to these Pre-Contract Enquiries.

This checklist was prepared some time ago, prior to the 2008-9 recession and may need updating to reflect additional risks in acquisitions and mergers in troubled economic times.

As a preliminary point, it's useful to obtain a general history of the business of the Company including the date of its founding, ownership, changes, name changes, names of all predecessor entities, date of acquisition or creation of subsidiaries.

## 1. Incorporation and Statutory Matters

- The current Memorandum and Articles of Association of the Company (with any amending resolutions) or (for foreign companies) the Bye Laws of the Company, with all amendments and variations since inception.
- Copy of Certificate of Incorporation and any certificate on change of name of the Company.
- Registered office and other trade addresses.
- Third party consent to change of ownership (eg. shareholders, OFT, London Stock Exchange, SEC, NASDAQ).
- The place where the statutory registers can be inspected.
- The exact corporate name.

## 2. Accounts

- The last three years' audited accounts of the Company including accounts to the last year-end date, whether finalised or not.
- The current accounting reference date of the Company and any changes which have been made within the last three years.
- The management accounts for the last 15 months.
- The latest interim unaudited financial statements.
- Details of proposed changes to the draft accounts.
- The name and address of the accountant or auditor who signed off the financial statements referred to above.
- The auditor's audit/management comment letters and opinions given during the last five years.
- Long form or short form reports by auditors or reporting accountants at any time during the last five years.
- Reports by internal auditors during the last five years.
- Reports by lawyers/counsel of the Company relating to any accounting or taxation or financial matter.
- All budgets and forecasts for the last 39 months and forward budgets with assumptions for the next 24 months.
- For the latest financial statements of the Company, copies of schedules relating to:
  - Expenditure prepaid at the period-end date.
  - Deferred expenditure at the period-end date.
  - Accrued expenses and provisions at the period-end date.
  - Deferred income and accrued income at the period-end date.
  - Any documents relating to material write-downs and/or write-offs of notes or accounts receivable.
  - All liabilities (contingent or otherwise) that are not disclosed in the financial statements and all correspondence relating thereto.
- Supply a schedule of all monies receivable from sales or otherwise with an analysis of such receivables between each person or group of persons due to pay monies to the Company and an analysis on a time basis of the ageing of monies due. In respect of receivables that fell due on invoice or supply more than 60 days from the date of this request, please provide further details.
- A detailed list of outstanding purchase orders.
- A schedule of fixed assets owned by the Company showing a description of the asset, its date of purchase, its cost and its location.

## 3. Share Capital

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- The authorised and issued share capital of the Company together with names and addresses of all registered shareholders in the Company, showing numbers of shares held and whether held beneficially or otherwise.
- Full details of share options and warrants and the persons entitled thereto, date of grant, exercise price, exercise date and vesting date, etc.
- Securities authorised and outstanding (including stock books and records) by class, consideration paid for shares and authorising votes of shareholders and the Board.
- Agreements, if any, relating to the purchase, sale or issue of the Company's shares.
- Agreements relating to voting of securities (including arrangement among shareholders), pre-emptive rights or rights of first refusal and restrictive share transfers.
- Agreements to redeem or repurchase the Company's shares and securities.
- Specimen copy of a stock/share certificate.
- Any offering materials, prospectus, investor representation letters or subscription agreements for any sale, issue or placing of stock or shares or other securities in the Company.
- Underwriting and sub-underwriting agreements relating to any offer of securities made by the Company.
- Verification documents relating to any offer made by the Company or issue of stock or shares by it.
- Documents reflecting any lien, pledge or security interest in any security of the Company.
- Warrant or option agreements with a sample instrument.
- Agreements relating to registration rights.
- Related agreements:
  - Agreements relating to the voting of the Company's securities and restrictive stock/share transfers or any other shareholder agreements.
  - Agreements relating to pre-emptive or other preferential rights to acquire the Company's securities and any waivers thereof.
  - Agreements relating to any redemption rights.
  - Agreements relating to any stock appreciation rights, rights of first refusal, anti-dilution rights, take along rights or bring along rights.
  - Any co-sale agreements.
  - All agreements relating to the payment of dividends as well as any restriction in the payment of dividends.

- All agreements restricting the control of the Company or any annuity rights upon changes in control.

## 4. Management

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- Names and addresses of all directors and the secretary of the Company, stating job title, responsibility and any other directorships.
- Service Agreements of directors and key personnel.
- Length of Service of directors and key personnel.

## 5. Personnel

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- All Service Agreements of employees whose employment is not terminable on one months' notice or less.
- The standard terms and conditions of employment given to employees.
- Any arrangements made with employees with regard to the use of company cars and/or private cars.
- Full details of bonus schemes in force.
- Trade Union membership.
- Any share option, share incentive or profit sharing (including profit related pay) arrangements, with details of all outstanding entitlements.
- Any agreements with trade unions or employee associations.
- Any standard disciplinary procedures which are in force.
- Any disciplinary procedures already started.
- All outstanding or anticipated claims to industrial tribunals by employees for re-engagement and/or compensation in respect of dismissal or redundancy.
- Any applications to tribunals that are anticipated with reference to discrimination under the Sex Discrimination Act or the Equal Pay Acts or the US equivalent, including EEOC and other discrimination complaints during the last five years.
- Personnel manuals and employee handbooks.
- Health and safety procedures in place (with details of any offences or complaints) and documentation relating thereto.
- Arrangements and relation with Credit Unions affecting employees of the Company.
- Copies of consulting contracts.
- Details of loans and guarantees to or from or any other agreement with Directors, officers, or employees.
- Copies of the form of standard confidentiality agreements used by the Company in relation to its employees.

- Copies of agreements on inventions by employees.

## 6. Subsidiaries

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- All subsidiaries of the Company, and interests in other companies, together with particulars of shareholdings.

## 7. Finance

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- Name and address of all banks in which the Company has an account.
- Details or copies of all guarantees or indemnities given by or in respect of the Company and by directors, including intra-group or associated or connected-party arrangements.
- Loans made to or by the Company including all inter-company loans and indebtedness.
- Any contract by the Company to take or grant loans exceeding £1,000 (or whatever relevant figure is appropriate).
- Any mortgage, charge or debenture over any of the assets of the Company.
- Credit agreements, loan agreements and debentures, whether secured or unsecured, or any other evidence of indebtedness.
- Guarantees of third party obligations, credit support or working capital agreements and financial accommodations made by the Company or for which the Company is a beneficiary.
- Letter of Credit, pledge agreements or other evidences of liens securing the obligations described above.
- If relevant, a schedule of financing of customer obligations (whether direct or indirect) including the customer's identity, amount, terms and collateral. Supply copies of all documents relating to such financing of customer obligations involving in excess of £5,000 for any single customer (or whatever figure is appropriate).

## 8. Properties

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- A schedule of the property and land owned by the Company with a short description.
- Details/copies of all leases, tenancies or licences held, or granted by, the Company and authority to inspect the title deeds of all of the Company's properties (the description should include the size of properties, capacity occupied, planning permissions, tenure etc).
- A schedule of all insurance policies in force affecting the Company, its business, its products, its assets, its employees and directors and any other risk associated with the Company.

- The name and address of the broker or insurance consultant who deals with insurances of the Company.
- The location of deeds to properties and land owned by, leased by and occupied by the Company.
- Details of sub leases.
- Details of all equipment leases.
- Details of all assets subject to a lien or charge or mortgage together with full details of such encumbrance.

## 9. Trading Matters

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- All agreements in connection with the Company's business which cannot be terminated on three months' notice without payment of compensation.
- Any credit arrangements, in favour of a customer of the Company, granting more than thirty days' terms of payment or providing for special discounts.
- Any contracts for the sale or supply of stock or any products or equipment, or the provision of any service, by the Company which have more than six months unexpired or exceeding £1,000 in value (or whatever relevant figure is appropriate).
- All standard terms of purchase or sale, or terms of business.
- Any hire purchase, rental leasing and like agreements granted by the Company or to which it is subject.
- All licence, agency and distribution agreements, agreements of one year's duration or more and material supply agreements.
- Any business or trading names and any registrations under the Trade Marks Act.
- All current insurances, detailing the date of the last renewal, the next renewal dates, annual premiums, the amount of cover, the property covered, the nature of the cover and the name of the insurance company together with details of any claims within the last three years whether paid or outstanding.
- All motor vehicles owned or hired by the Company.
- Any licences under the Consumer Credit Act 1974 or other statutory authority.
- Plant and Machinery and Office Equipment:
  - List of main items, cost and book value
  - Capacity occupied/used
  - Details of assets not owned (both finance and operating leases)
- Any registrations under the Data Protection Act 1984.
- Particulars of any covenants or restrictions which operate in respect of the Company's activities.
- Capital commitments.

- Contingent Liabilities.
- On product manufacture, distribution and sale, please provide details of:
  - Supply agreements with third party manufacturers.
  - Marketing agreements including sales agent or representative, dealer and distributor agreements, consignment and pricing agreements.
  - List of distributors or sales representatives, copies of distributor or sales representative agreements and identify existing disputes, if any.
  - Provide for each customer, copies of contracts and related documents and the name of the principal contact at the customer and identify existing disputes, if any.
  - Provide number and names of accounts that have terminated in the last five years and list of clients and termination dates and the reason for termination.
- Any corporation tax outstanding and due to the Inland Revenue or other Revenue authority.
- Any deferred taxation provision, including any rollover relief claimed in respect of corporation tax on capital gains.
- Any tax clearances obtained and any tax indemnities taken.
- Any Treasury consents under Income and Corporation Taxes Act 1988, s765 within the last three years.
- Any US Treasury or Government consents under US tax law within the last three years.
- All correspondence with the Inland Revenue concerning shortfall assessments or apportionment of income.
- Details of all correspondence with the taxation authorities relating to any matter concerning the Company, which spans more than 3 items of correspondence or exchange of letters, faxes or other means of communication.

## 10. Litigation

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- Any existing and/or pending arbitration and/or litigation with amounts involved.
- Any judgements affecting the Company.
- Any general or special provision made by the Company in relation to the recovery of outstanding book debts.
- Name and address of lawyers acting on any of the above matters on behalf of the Company.
- Consent decrees, settlement agreements and injunctions.
- Litigation files, including pleadings of all litigation whether settled or pending, opinions of counsel, correspondence and analysis of material litigation status, consent decrees, injunctions etc. - all for the last five years.
- Lawyers' letters to accountants and auditors affecting the Company, during the last five years.
- Any reports from lawyers, appraisers or others regarding questionable or illegal matters or activities.
- Unless already covered above, a description of all litigation, claims and proceedings threatened or pending, including potential litigation against either the Company or its employees or its Directors or officers as a result of their employment or relationship with the Company - include details of potential litigation matters such as employees who may be in breach of non-competition agreements with their former employers or business associates or partners.
- Payroll taxes - details of recent audit results.
- Particulars of the Company's VAT registration number and address of the local VAT office concerned.
- VAT inspections - details of recent VAT inspections.
- Other Sales taxes:
  - a) Particulars of the Company's sales tax registration number and address of the local sales tax office concerned
  - b) Details of recent audit inspections
- Capital Gains Tax position (assets rolled over/base cost etc).
- The name and address and reference number of HM Inspector of Taxes for the Company's tax affairs for:
  - c) PAYE
  - d) Corporation Tax
- The name and address and reference number of the US tax office dealing with the Company's tax affairs for:
  - e) Payroll taxes
  - f) Corporation Tax
- Copies of all other tax returns and filings for the last five years, if not already included above.

## 11. Taxation

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- All agreements with the Inland Revenue (or US or foreign equivalents) and copies of the tax computations of the Company for the last 7 years.

## 12. Pensions

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- Name or short description of scheme.
- Funding assumptions:
  - Annual salary progression
  - Assumed annual increase in value of scheme assets
  - Controlled funding rate
- Members - number, average age and average remuneration of:
  - Male members.
  - Female members.

- Copy of Trust instruments and rules (incorporating all amendments to date).
- Details of current benefits.
- Is the scheme an exempt approved scheme as defined in Finance Act 1970 s21 (1)?
- Contracting-Out - Is there a Contracting-out Certificate issued under the Social Security Pensions Act 1975, s31 in respect of any employments to which the scheme relates?
- What is the nature of the scheme in terms of exempt approval status?
- Who are the Actuaries, Trustees and other pension advisors.
- Please supply copies of all recent actuarial valuations, at least for the past three years.
- Please provide copies of all other employee welfare benefit plans other than pension schemes.
- Copies of any Voluntary Employee Benefit Associations or any related plans.
- Copies of any plans relating to severance or termination pay, vacation, sick leave, loans or other extensions of credit, loan guarantees, relocation assistance, educational assistance, tuition payments, employee benefits, workers' compensation, executive compensation or fringe benefits (including any plan exempted from ERISA).
- Copies of all Government filings relating to each of the above arrangements, for each of the last three years.
- Copies of any investment management agreements.
- Copies of other documents relating to pensions and employee benefits not otherwise dealt with herein.

## 13. Sales

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- Principal customers and volume for last three years.
- Product and stock group analysis.
- Marketing and pricing policies.
- Market share - now/aimed for.
- Any exclusive products/processes/services (if so, what is position on patents/royalties etc).

## 14. Stock

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- A copy of the auditors working papers relating to their audit work and report upon the stock of the Company, its method of valuation and approach to maintenance of stock records.
- As regards suppliers of stock, the names (or reference numbers for later identification) of the 20 main suppliers showing the stock supplied by each of them as a percentage of the total

purchases of stock of the Company, in monetary terms.

- An explanation of the Company's buying policy and arrangements for forward contracting for purchase of stock whether to ensure continuity of supply or otherwise.

## 15. Intellectual Property

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- License or royalty agreements and the like (whether as licensor or licensee).
- All patents, registered designs and other industrial or intellectual property rights owned or used by the Company and all relevant licences and sub-licences.
- Identify and describe all policies and procedures for the protection of trade secrets and confidential information, including instructions and agreements with employees and independent contractors. All related written instructions and agreements should be provided.
- List all cause of action or other claims by the Company for infringement or misappropriation of trade marks, copyrights, trade secrets, patents, and any other intellectual property.
- Identify any conflict by the Company with existing trade marks, trade names, copyrights, trade secrets, patents, or other intellectual property claimed by others or otherwise known to the Company.
- Disclose whether the Company has received any notice of the infringement, violation, or misappropriation of the trade secrets, copyrights, patents, or other intellectual property rights of any third party, or whether the company is aware of any basis for any such claim.
- List and supply documentation relating to, patents owned, patent applications in hand and invention disclosures not covered by patents or patent applications.
- Please list the principal processes or other proprietary information considered by the Company to be its trade secrets.
- Describe unwritten policies and procedures on trade secrets and to the extent that they are written, provide copies of such policies and procedures.
- Any registrations under UK, US or other Data Protection laws.

## 16. Company and other Minutes

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- Minutes of all shareholders' meetings and consent actions in lieu of meeting.
- Minutes of all meetings of the Board of Directors (including all subsidiary or associated companies) and consent actions in lieu of meeting(s).
- Minutes of Permanent Committees of the Board, if any.

## 17. Compliance with Laws (predominantly applicable to the US)

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- All filings, reports, registration statements, correspondence, complaints, consent decrees, determinations, orders, etc., relating to federal regulatory agencies and all state and local agencies performing similar functions.
- Schedule of Government licenses, permits, permissions, consents, approvals and the like.
- Citations and Notices received from Government agencies.
- Material related to any suspended or revoked Government permits or licenses.
- Describe any complaints regarding compliance by the Company with the Immigration Reform and Control Act or comparable foreign agency.
- Provide details of special or peculiar arrangements made with NASDAQ including full details of all compliance obligations on the Company and its officers pursuant to membership of that exchange, such details to include a copy of the filings with SEC in connection with the initial public offering (IPO) or flotation of the Company and any undertakings given in connection with it.
- Any pending or threatened investigations by Governmental authorities.
- All material reports and correspondence with any Government entity, municipality or agency including FDA, USDA, EPA, and OSHA, since inception.
- All documents showing any certification of compliance with, or any deficiency with respect to regulatory standards of the Company since inception.
- Estimation and report on the burdens and costs of regulatory compliance (including ERISA, labour and other federal, state and local regulatory organisations).
- Description of any problems with such regulatory compliance as is set out above or otherwise.
- All material governmental permits, licenses, etc. of the Company presently in force, together with information regarding any such permits, licenses, etc. which have been cancelled or terminated, required to carry out the business or operations of the Company including such permits, licenses and other requirements stipulated by foreign, federal, provincial or local authorities and any evidence of exemption from any such permit or license requirement.
- Evidence of qualification or exemption under applicable federal and state blue sky laws for the issuance or transfer of the Company's securities.

## 18. Environmental Laws

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- Description of the use of the Company's property for agricultural or commercial purposes.
- Description of the use of any petroleum products on the Company's property other than by passenger vehicles.
- Description of the use of any chemicals on the Company's property.
- Description of any asbestos contained in any improvements located on the Company's property.
- Description and location of any equipment tanks, drums or other containers that may contain petroleum products, chemicals and/or hazardous materials or wastes ("Hazardous Substances") and spills, leaks or other releases of Hazardous Substances which have occurred on the Company's property.
- Description of any air emissions on the Company's property that are subject to regulation.
- Description of any wastewater discharges on or from the Company's property and solid or liquid hazardous wastes (other than wastewaters) generated at the Company's property.
- Full records from any public agency investigation of the Company's property or any neighbouring property with respect to any environmental laws.
- Full records and reports from any environmental consultant, or any other person, who performed tests or conducted an environmental audit on the Company's property or any neighbouring facility.

## 19. Miscellaneous

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- Any recent analyses of the Company or its business prepared by the Company, its investment bankers, analysts, accountants or other professional including an appraisal of the Company, marketing studies, feasibility reports, credit reports, business plans and other types of reports whether financial or otherwise.
- Copies of press releases or press clippings for the past three years.
- Other agreements, if not previously covered in this questionnaire, such as but not limited to:
  - Government contracts or sub contracts.
  - Supply agreements.
  - Purchase and requirements contracts (please list outstanding purchase commitments by purchase order, showing the amount payable).
  - Joint venture, partnership or any other similar agreement

- Franchise agreements whether the Company is a franchiser or franchisee.
- Agreement for the provision of management, of service, or tax sharing.
- Equipment maintenance agreements.
- Performance and guarantees and bonds.
- Advertising agreements and any advertising, promotional or marketing material.
- Secrecy, confidentiality and non-disclosure agreements with employees, Directors or third parties (please indicate any employee who is not covered by such agreements).
- Confidentiality or non-competition agreements to which employees or consultants of the Company are parties with their prior employers or partners or otherwise.
- Commission, brokerage and agency agreements.
- Forms of warranties, product documentation or manuals.
- Letters of intent.
- Agreement with third parties to manufacture products of the Company.
- Joint marketing and sales agreements.
- List of all third parties whose consent is required to this merger.
- List of principal competitors.
- List of (by description, with identification of each item) each product line of the Company.
- Written evidence of all material relationships between officers, Directors and shareholders, or their affiliates, with each other or with suppliers or customers of the Company.
- Written evidence of all material relationships as described above which have ceased to have effect or have been terminated.
- Any purchase options or buy out obligations with respect to subsidiaries.
- In relation to good standing:
  - List of all locations in which the Company is qualified to do business or is doing business and describe what sort of activities occur at each location.
  - Please provide good standing certificate for each location referred to above.
  - Tax status certificate for each such location.
- Any other permits, licenses or other approvals necessary to conduct the business of the Company. In addition, please provide information regarding any such permits, licenses, etc. that have been cancelled or terminated.
- A full description of the information, accounting and data processing systems of the Company, such description to include detailed notes of the software and hardware in use and a report from the IT Manager of the Company as to the suitability of such systems and hardware in relation to the requirements of the Company.
- On matters which are regarded as risk factors which affect or may affect the business of the Company and its activities, supply the following information:
  - If the Company suffered losses in the past or its profit record has not been consistent - an explanation of the circumstances surrounding the incurring of those losses should be provided.
  - Please explain the factors that can affect the product and customer mix.
  - Please advise full details of new product (or service) launches planned and the timing of them.
  - Please provide details of backlog of sales and the procedures in place to meet outstanding orders.
  - Please explain procedures for and the factors taken into account in preparing forecast demand for the products of the Company.
  - Please provide details of any factors that are known to the Company that could affect the Company's ability to maintain its position in the marketplace with its products and services.
  - Please explain the procedures to ensure that the Company has timely access to and about new technological developments and standards.
  - Please provide details of all known defects and errors in the Company's products.
  - Please provide details of key technical, financial and marketing personnel of the Company who have indicated, or who are likely to indicate, an unwillingness to continue in the employment of the Company after ownership of it changes as a result of its sale.
  - If relevant, explain the procedures in place to minimise currency exposure risk on international sales and purchases.

## 20. Directors' Approval

- The directors' warranty that they have used their best endeavours to make these replies correct and complete so far as they ought reasonably to be aware and to acknowledge that such warranty will be a condition of the Agreement for the sale and purchase of shares in the Company.

- A certified copy of a resolution of the board of directors of the Company in approval and confirmation of the replies as here stated and of the proposed sale of shares in the Company.
- Signature of person making above replies.

## Further Information

This guide is for general interest - it is always essential to take advice on specific issues.

We believe that the facts are correct as at the date of publication, but there may be certain errors and omissions for which we cannot be responsible.

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