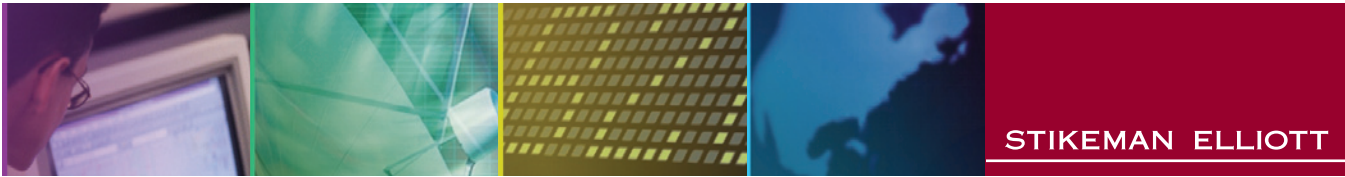


STIKEMAN ELLIOTT

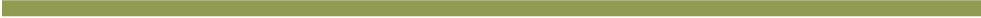
Controlled Auctions Tool Kit





CONTROLLED AUCTIONS TOOLKIT

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While there is no blue-print, the following key stages are quite typical in a controlled auction:

- 1. Setting the Stage.** The Seller will assemble the information to be included in the confidential information memorandum and in the data room. It will conduct its own due diligence and planning. Identifying issues at the outset will assist in having the auction process run smoothly.
- 2. Choosing the Team.** The Seller will retain professional advisors, including financial and legal advisors. The financial advisors and the Seller will draft the confidential information memorandum. The legal advisors will draft a confidentiality agreement and a form of purchase agreement and will review the confidential information memorandum.
- 3. Identifying Potential Bidders.** The Seller and its financial advisors will identify potential bidders - eg. participants in the target company's industry, financial investors, etc.
- 4. Contacting Potential Bidders.** Once a short list of potential bidders is created, the process of soliciting indications of interest will begin, often through the circulation of "teaser" information regarding the target corporation. Confidentiality agreements will be circulated to potential bidders for execution, and once signed, a more detailed confidential information memorandum with respect to the target corporation will be circulated.
- 5. Narrowing the Field - Soliciting Preliminary Indications of Interest.** In an effort to narrow the field of potential bidders, the Seller will solicit non-binding indications of interest from potential bidders setting out, among other things, the amount that the bidder is willing to pay based on its review of the confidential information memorandum. The Seller and its advisors will evaluate the indications of interest and select a limited number of bidders to continue to the next phase of the process.
- 6. Bidder's Due Diligence.** Those bidders selected by the Seller and its advisors to continue to the next phase will typically then be given the opportunity to conduct more extensive due diligence with respect to the target corporation.
- 7. Keeping Senior Management and Key Employees Motivated.** Not so much a step as it is (or should be) a rule. Commonly, one of the most challenging factors in the sale process is keeping senior management and key employees motivated. Their participation is crucial in trying to maximize the purchase price, but key

members of this team often know their future with any prospective purchaser may be limited. Auctions can be drawn out affairs and place enormous strain on a company. Identifying a strong leader to spearhead the process is critical. The leader needs to be engaged and to have the authority to make decisions to keep the process moving forward. “Stay bonuses” are often used as a tool to retain and motivate senior management and key employees during this important portion of the due diligence process. Stay bonuses are typically paid at the end of a sale process and require the participation of the employees up to and including the closing of any sale transaction. Sellers will often tie the amount of the bonus to the success of the auction process. Often, severance arrangements are also negotiated in order to keep key employees involved through the process despite the fact their prospects with a prospective purchaser may be limited.

- 8. Narrowing the Field Further – Soliciting Formal Offers.** Once the remaining bidders have completed (or nearly completed) their due diligence, the Seller will ask each of them to submit a formal offer (e.g. each bidder’s best and final price and terms). The Seller’s request for formal offers will often include a “seller friendly” draft of the purchase agreement, and the bidder will be asked to indicate any changes it requires to the draft purchase agreement. The Seller will make it clear that it will not be required to accept any offer, and that it will not have any obligations with respect to the transaction unless and until a definitive share purchase agreement is executed and delivered by each party.
- 9. Choosing the Winner and Final Negotiations.** A number of factors will influence the choice of the winning bidder, with the proposed purchase price and certainty of closing generally being the most important factors. The Seller will select one (or perhaps two) of the bidders and the parties will conduct final negotiations and settle a definitive purchase agreement.
- 10. Closing.** Typically there will be a period of 30 to 90 days between the signing of the purchase agreement and closing, during which time any required regulatory approvals and third party consents will be obtained, and other conditions of closing satisfied. The purchase agreement will typically contain covenants on the part of the Seller that during the time between the signing of the purchase agreement and closing, the target corporation’s business will continue to be run in the ordinary course.

Some Key Considerations

While it is impossible for us to mention all of the factors to be considered in the context of a definitive purchase agreement, a seller may consider the following when preparing the “seller-friendly” draft purchase agreement that it will circulate to potential bidders:

1. General:

- If possible, avoid any deferred purchase price, holdbacks or escrow amounts.
- If possible, consider delaying to sign and close contemporaneously rather than signing an “agreement” to purchase subject to the satisfaction of specified conditions of closing. Where there is a period between signing and closing, the seller will typically be required to carry on (or cause to be carried on) the business in the ordinary course and to consult with the purchaser regarding material operational matters. The seller may be reluctant to do so if there is a possibility that the transaction will not close. However, delaying to sign and close contemporaneously may not be practical/possible, and the benefits of doing so may be outweighed by signing an agreement and having a purchaser committed and actively pursuing all regulatory approvals, etc.

2. Representations and Warranties:

- Try to minimize the number and extent of representations and warranties.
- Use objective or factual representations and warranties (e.g., “the company has not received written notification of any material breach of any of its material contracts in the past two years”) rather than subjective representations and warranties (e.g., “the company is not in breach, in any material respect, of any of its material contracts”).
- Make copious use of “materiality” with reference to the business and assets taken as a whole and “knowledge” qualifications and, in the latter case, define “knowledge” to be the actual knowledge of particular individuals—usually senior officers of the company.
- Avoid providing the dreaded “full disclosure” warranty.
- Consider having the ability to update the disclosure schedule two business days prior to closing and obligating the purchaser to close unless the update reveals anything that has had a materially adverse effect.

3. Conditions of Closing:

- Try to minimize conditions of closing in favour of the purchaser. Always use objective conditions of closing and not those totally within control of the purchaser (e.g. financial out, due diligence out)
- Avoid providing a no material adverse change or effect condition of closing and, if you cannot avoid it, make sure it is historical (e.g....“had a material adverse effect on the business, assets and results of operation taken as a whole”) and not future or with respect to prospects (e.g. ...“is likely to have or could have or could reasonably be expected to have, a material adverse effect etc.). Also, avoid references to prospects.

4. Indemnities:

- Limit who can claim losses (e.g. in a share sale only the purchaser and not the purchaser and the target or the shareholders of the purchaser etc.).
- Limit the survival period of representations and warranties (e.g., one year following closing for most representations and warranties, longer periods for matters such as environmental liability (e.g. 3 to 5 years post-closing) and taxes (typically the relevant limitation period).
- Provide for the rules applicable to making any claim (e.g., written notice, particulars, etc.) and attempt to ensure that the seller has the right of carriage of any third party claims.

5. Damages and Limitation of Liability:

- Exclude consequential, indirect and similar heads of damages and, even though loss of profits may not be consequential damages, try to lump all of these heads of damages together as exclusions.
- Try to preclude the purchaser from seeking damages or other remedy for breach if it can be shown that the purchaser had knowledge of the breach prior to signing the agreement and/or prior to the closing of the transaction.
- Consider inserting de minimis amounts and deductibles (rather than thresholds where claims go back to the first dollar).
- Consider limits of liability on the aggregate claims that can be made. The U.S. practice of limiting total claims to a percentage of the purchase price is generally accepted in Canada and it is now common to see liability for all claims limited to 20% of the purchase price.

-
- Include provisions expressly requiring the purchaser to mitigate its damages and to offset any tax benefits, insurance or other amounts received by the purchaser and obligate the purchaser to make insurance claims.
 - Try to provide that claims under the indemnity provisions (with appropriate qualifications and limitations) are the exclusive remedies of the purchaser (i.e., no rescission or rectification of the agreement).

6. Other:

- Generally avoid arbitration for a seller if the transaction is entirely domestic since (a) arbitrators tend to “split the baby”, and (b) it is generally easier to enforce arbitration awards and usually there are no appeal rights. However, if it is a cross-border transaction, consider using arbitration provisions particularly to avoid the potential of costly jury awards.
- Consider inserting a provision waiving jury trials.
- Make sure the purchaser has an obligation prior to closing to disclose any breaches of the seller’s warranties and to extend the closing date to provide the seller with the opportunity to cure the breach.
- Consider inserting non-competition provisions in the purchase agreement since it is arguable that breaches by the purchaser of other provisions in the agreement taint the non-competition covenants.
- Always, always insert an “entire agreement” clause. Do not refer to any letter of intent or the confidential information memorandum in the agreement, except in the entire agreement clause.

DISCLAIMER LANGUAGE FOR CONFIDENTIAL INFORMATION MEMORANDUM

SAMPLE

[Name of investment bank] (the “Advisor”) has been retained by the shareholders (the “Shareholders”) of TargetCo (the “Company”) as its exclusive financial advisors in connection with a possible sale of all of the shares (the “Shares”) of the Company.

This Confidential Information Memorandum (the “Memorandum”) has been prepared by the Advisor based on information provided by or on behalf of the Shareholders. The sole purpose of this Memorandum is to assist the recipients in deciding whether to proceed with a further investigation of a possible acquisition of all of the Shares of the Company. This Memorandum does not purport to contain all of the information that a prospective purchaser of the Shares may require or desire in order to evaluate all of the factors it considers relevant to a decision to acquire the Shares.

This Memorandum is being delivered pursuant to the Confidentiality Agreements entered into by the recipients. The distribution and use by each recipient of this Memorandum and the information contained herein and any other information provided to the recipient by the Shareholders, the Company or the Advisor is governed by the Confidentiality Agreement. Each recipient, by its acceptance of this Memorandum, agrees that it and its agents, representatives, advisors, directors and employees will not reproduce, distribute or use all or any part of this Memorandum or such other information except in accordance with the provisions of the Confidentiality Agreement.

This Memorandum includes statements, estimates, targets and projections provided by the Company regarding anticipated future performance of the Company. These statements, estimates, targets and projections reflect various assumptions and judgments by the Company’s management and are subject to significant business, economic and competitive uncertainties and contingencies. These assumptions and judgments may not be correct. There can be no assurance that any estimates, targets or projections are attainable or will be realized. Accordingly, none of the Shareholders, the Company, the Advisor or any of their respective directors, employees, agents, representatives or any other persons shall have any responsibility or liability for any of these assumptions or judgments or for any statements, estimates, targets or projections regarding anticipated future performance of the Company.

No representation or warranty, express or implied, is or will be given by the Shareholders, the Company, the Advisor or their respective directors, employees, agents, representatives or any other person as to the accuracy, completeness or fairness of the information in this Memorandum and no responsibility or liability is

accepted for the accuracy, completeness, fairness or sufficiency of such information or for any errors, omissions or mis-statements, negligent or otherwise, relating to such information. Only those representations and warranties which may be made by the Shareholders in a definitive, written agreement (if one is executed) will, subject to the limitations and restrictions specified in such agreement, have any legal effect.

None of the Shareholders, the Company or the Advisor undertakes any obligation to provide the recipients of this Memorandum with access to any additional information or to update or otherwise revise the information in this Memorandum or any other information which may be supplied to any recipient or to correct any inaccuracies in any information which may become apparent.

This Memorandum does not constitute an offer to sell or a solicitation of an offer to buy the Shares or any other securities or any assets or business described herein.

The Shareholders reserve the right to negotiate with one or more prospective purchasers at any time and to enter into a definitive agreement for the sale of the Shares, or any other transaction related to the Company, without prior notice to the recipients or other prospective purchasers. The Shareholders also reserve the right to terminate, at any time, discussions with any prospective purchasers and to terminate further participation in the investigation and proposal process by any party and to modify any procedure for the sale of the Shares without giving advance notice or providing any reasons for the termination or modification.

Recipients are not to construe the contents of this Memorandum or any prior, contemporaneous or subsequent communications from either the Shareholders, the Company or the Advisor, as legal, investment, tax or other advice. Each recipient should consult its own advisors as to legal, investment, tax and other matters concerning the Company and the business of the Company.

All communications and inquiries relating to the Company or the procedures relating to a possible sale of the Shares should be directed to one of the individuals at the Advisor listed below. Recipients and their agents, representatives, advisors, directors and employees are prohibited from contacting or attempting to contact directly or indirectly any directors, employees, agents, representatives, creditors, customers or suppliers of the Shareholders or the Company.

MEMORANDUM RE: DATA ROOM RULES AND PROCEDURES

SAMPLE

MEMORANDUM

To: AcquireCo Diligence Team
Re: TargetCo
Data Room Policies and Procedures
Date: ●, 2005

Location and Hours

The TargetCo (the “Company”) data room is located at the offices of Stikeman Elliott LLP:

Suite 5300 - Commerce Court West
199 Bay Street, Toronto, Ontario, M5L 1B9
General telephone: (416) 869-5500
General facsimile: (416) 947-0866

The data room must be accessed through main reception on the 53rd floor. The data room will be open from 8:00 am to 6:00 pm Monday through Friday. Any request to have the data room open at alternative hours or on weekends should be made in writing to the data room administrators indicated below. Stikeman Elliott will make reasonable efforts to accommodate such requests.

Access

Visits to the data room must be arranged through ● of Stikeman Elliott at (416)●. You must provide Stikeman Elliott with a complete list of all members of your evaluation team and their titles.

The members of your evaluation team will be required to sign in and leave a business card on each day that they enter the data room. All sign in sheets will be retained by Stikeman Elliott. Visitors to Stikeman Elliott are required to wear identification badges while on the Stikeman Elliott premises. Team members will also be required to sign out when they leave the data room for the day.

Any members of your team who are not employees of AcquireCo (i.e., external counsel and financial advisors) acknowledge that by entering the data room and participating in the review of information, they will comply with and are bound by the terms of the Confidentiality Agreement dated ●, 2005 executed by AcquireCo.

Equipment

You may bring laptops and other electrical equipment that may be needed to use the laptops, such as extension cords and multiply plugs, into the data room. No scanners, copiers, fax machines or other duplicating equipment (including cell phones with cameras, etc.) will be permitted in the data room.

Data Room Administrators

The data room will be staffed and supervised by Stikeman Elliott. Any questions relating to the data room procedures or documentation should be directed to the following individuals:

Name	Telephone Number

Data Room Documents

No documents may be removed from the data room.

Data room documents may not be altered in any way. You may not make any annotations or markings on the documents or leave stickers on any of the pages. The organizational filing of the documents may not be modified or altered in any way.

Photocopies

Generally, documents in the data room may not be photocopied or otherwise reproduced. Requests for photocopies must be made in writing using the attached request form and provided to a data room administrator. Such requests will be compiled at the end of each day, and if approved by the Company in its sole discretion, Stikeman Elliott will provide the copies promptly.

Requests for Additional Information

Requests for documentation or information not available in the data room must be made in writing using the attached request form and provided to a data room administrator. At the end of each day your questions and requests will be collected and forwarded by Stikeman Elliott for discussion with the Company.

Confidentiality

You are reminded that the documents in the data room are to be used by you strictly in accordance with the terms of the Confidentiality Agreement executed by AcquireCo.

Data Room Sign-in Sheet

Date: _____

Data Room Visitors*:

	Name	Company	Title	Signature
1.	_____	_____	_____	_____
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____
7.	_____	_____	_____	_____
8.	_____	_____	_____	_____
9.	_____	_____	_____	_____
10.	_____	_____	_____	_____
11.	_____	_____	_____	_____
12.	_____	_____	_____	_____
13.	_____	_____	_____	_____
14.	_____	_____	_____	_____
15.	_____	_____	_____	_____

*By signing this Data Room sign-in sheet, you acknowledge that you (i) you have been provided with a copy of the Confidentiality Agreement dated ●, 2005 between TargetCo and AcquireCo and a copy of the data room rules and procedures and (ii) you are bound by, and will comply with, the Confidentiality Agreement and the data room rules and procedures.

LETTER SOLICITING INDICATIONS OF INTEREST for the Purchase of Shares of a Private Company

SAMPLE

[Potential Bidder]

Dear :

Re: Preliminary Indication of Interest

Further to your expression of interest during our telephone conversation of earlier today with respect to a possible purchase of all of the issued and outstanding shares (the “Shares”) of TargetCo (the “Company”) from the shareholders (the “Shareholders”) of TargetCo, on behalf of the Shareholders we would now like to offer you the opportunity to submit a preliminary and nonbinding indication of interest to acquire the Shares (a “Proposal”).

Since we have received an executed counterpart copy of the Confidentiality Agreement that we previously forwarded to you, we enclose a copy of a confidential information memorandum (the “Confidential Information Memorandum”) describing the Company’s business and operations, its management and certain historical and projected financial data. As noted in the Confidentiality Agreement, you are obligated to maintain the information contained in the Confidential Information Memorandum in confidence and also to maintain in confidence the fact that the Shareholders are considering a sale of the Shares.

The remainder of this letter includes a brief description of the procedure and process with respect to your submission of a Proposal, as well as summarizing the general process that will be employed in connection with the sale of the Shares going forward. Please review the following procedure and process carefully, and note that your Proposal must comply with the terms and conditions set forth below.

At this point, the information contained in the Confidential Information Memorandum will be the only information about the Company that will be provided to you by the Shareholders or the Company, although the Shareholders recognize that you and other potential bidders will want to conduct further detailed due diligence investigations with respect to the Company prior to submitting any final and binding bids. All bidders that the Shareholders designate will be given an opportunity to undertake further due diligence investigations prior to submitting any such final and binding bids.

Your Proposal should, at a minimum, contain the following:

-
- **Purchase Price.** The amount, in cash, that you would be willing to pay for the Shares based on the information in the Confidential Information Memorandum. Please include details regarding any assumptions and material contingencies that you have taken into account in arriving at your proposed purchase price.
 - **Details re: Financing.** A detailed description of your proposed source of financing, evidence of the availability of (and timing for obtaining) such financing and, in the event that you require external financing, please include the names of the source(s) that will be providing such financing, **[together with a letter from the proposed sources outlining their willingness to contemplate providing the required financing.]**
 - **Due Diligence Requirements.** A detailed description of any of the information that you anticipate requiring in order to complete your due diligence investigation of the Company.
 - **Conditions of Closing.** A detailed description (including anticipated timing) of any regulatory or other approvals or third party consents that you feel may be required in connection with your purchase of the Shares.
 - **Timing.** An estimate of timing for the execution of a definitive share purchase agreement and the closing of the transactions contemplated therein.
 - **Management.** A description with respect to your proposal for current management and employees of the Company following closing.
 - **A Description of Your Team.** A list of the names and contact information of the persons within your organization with whom we may clarify any issues with respect to your Proposal.

The Shareholders and their advisors intend to evaluate all Proposals as quickly as possible following their submission. After completing their evaluations, the Shareholders will notify all parties who have submitted Proposals as to whether or not they will be invited to continue to participate in this process.

Those parties invited to continue participating in this process will, at the appropriate time, be given the opportunity to visit a data room containing more detailed information with respect to the Company and its business and operations. In addition, such parties may, at the appropriate time, be given the opportunity to meet with the Company's senior management. Upon completion of the due diligence phase, the Shareholders will then solicit final and binding offers for the acquisition of the Shares.

The Shareholders reserve the right in their sole discretion to accept or reject any or all Proposals, and to modify or terminate this process at any time without specifying any reasons. The Shareholders will notify you in the event that they elect to modify or terminate this process.

If, after reviewing the Confidential Information Memorandum, you are interested in submitting a Proposal, please forward such Proposal to the undersigned, on behalf of the Shareholders, by email, with hard copies to follow by courier, on or prior to (Toronto time) on , 2005. In the meantime, please do not hesitate to contact the undersigned if you have any questions or comments with respect to this process in general or with respect to the information contained in the Confidential Information Memorandum. **We remind you that in accordance with the Confidentiality Agreement, you are not to contact the customers, suppliers, employees, directors, officers, agents or other representatives of the Company or the Shareholders without the prior written consent of [insert name of financial advisor].**

Thank you again for your interest.

Yours truly,

LETTER SOLICITING BINDING OFFERS for the Purchase of Shares of a Private Company

SAMPLE

[Potential Bidder]

Dear :

Re: Binding Offer

On behalf of the shareholders (the “**Shareholders**”) of TargetCo (the “**Company**”), and further to your previous preliminary and nonbinding indication of interest dated , 2005 with respect to a possible purchase from the Shareholders of all of the issued and outstanding shares (the “**Shares**”) of the Company, and your subsequent due diligence investigations with respect to the Company, **[insert name of financial advisor]** would now like to invite you to submit a final and binding offer (“**Offer**”) to acquire the Shares.

The remainder of this letter includes a brief description of the procedure and process with respect to your submission of an Offer, and summarizes the general process that will be employed in connection with the sale of the Shares going forward. Please review the following procedure and process carefully, and note that your Offer must comply with the terms and conditions set forth below.

Your Offer should, at a minimum, contain the following:

- **Identity of the Purchaser.** Please specify the identity of the prospective purchaser (i.e. if you propose purchasing the Shares indirectly, through a subsidiary, a limited partnership or other entity).
- **Purchase Price.** The amount, in cash, that you would be willing to pay for the Shares based on the information, including the Confidential Information Memorandum, that you have received to date and on the terms set forth in the form of share purchase agreement and schedules attached as Appendix A (the “**Agreement**”). In order to assist the Shareholders in assessing your proposal with respect to your proposed purchase price, please **[assume that the Company’s closing day balance sheet will be free of debt and all cash and cash equivalents,**

and] provide details of the assumptions, deductions and other matters that you have considered in arriving at your proposed purchase price.

- **Confirmation of Due Authorization.** Confirmation that the Offer has been executed and delivered by a signatory authorized to bind the prospective purchaser to its terms and a statement indicating that the Offer has received all necessary internal authorization including, if necessary, the approval of your board of directors.
- **Additional Due Diligence Requirements (if any).** The Agreement does not include a condition that makes the purchaser's obligation to close contingent upon the satisfactory completion of due diligence investigations. Your Offer should indicate that you and, as applicable, your sources of financing have not completed all due diligence investigations with respect to the Company. In the event that you or your sources of financing have not completed all due diligence investigations, please contact the undersigned in order to attempt to resolve any outstanding due diligence issues prior to submitting your Offer.
- **Details of Financing.** The Agreement does not include a condition that makes the purchaser's obligation to close contingent upon financing. Please include a detailed description of your proposed source(s) of financing, together with satisfactory evidence of the availability (and timing) of such financing. In the event that you require external financing, please include the names of the source(s) that will be providing such financing, copies of executed commitment letters (or equivalent) and other relevant documentation, together with the names and contact information of the representatives of such source(s) that the Shareholders or their representatives may contact in order to discuss your Offer and their proposed financing. Any external financing should be fully committed.
- **Management.** A description with respect to your proposal for current management and employees of the Company following closing, including details regarding proposed terms of employment (including compensation), benefits and arrangements for equity participation, if any.
- **Conditions of Closing.** A detailed description (including anticipated timing) of any regulatory or other approvals, third party consents or financing conditions that you feel may be required in connection with your purchase of the Shares.

-
- **Timing.** An estimate of timing for the execution of a definitive share purchase agreement and the closing of the transactions contemplated therein.
 - **Share Purchase Agreement.** A mark-up of the Agreement, revised to a form that you would be willing to execute and deliver. An electronic copy of the Agreement will be sent to you shortly in order to enable you to submit an electronic copy of your mark-up of the Agreement. Your submitted mark-up of the Agreement should be in both hard copy and electronic format (both clean and blacklined to show the changes you have made). In any case, please do not provide conceptual comments and do not retype the Agreement. [NTD: **Consider requiring bidders to submit executed Agreements.**]

You should be prepared to execute the Agreement that you submit as part of your Offer. The nature and extent of your revisions to the form of Agreement, including the nature and extent of any proposed conditions of closing, will be a key factor in the Shareholders' evaluation of your Offer. The Shareholders intend to enter into a definitive share purchase agreement with the party whose Offer most closely meets their objectives.

The Shareholders and their advisors intend to evaluate all Offers as quickly as possible following their submission, and to have the Shareholders negotiate and execute a definitive share purchase agreement as quickly as possible after such evaluations are completed. In this connection, you and your advisors should be prepared to meet on short notice, and your Offer should, at a minimum, remain in effect for [45] days from the deadline for making submissions as set forth below.

The Shareholders and their representatives disclaim any and all liability for the information that has been supplied to you, whether written or oral, and neither the Shareholders nor their representatives make any representation or warranty, express or implied, as to the accuracy, completeness or sufficiency of such information. By submitting an Offer, you acknowledge the foregoing and confirm that your decision to submit an Offer is based solely upon your own investigations with respect to the Company and its operations.

The Shareholders reserve the right in their sole discretion to accept or reject any or all Offers, to consider any and all factors in their determination of the most suitable Offer, to deal with any prospective purchaser individually or with more than one prospective purchaser simultaneously, and to modify or terminate this process at any time without specifying any reasons. The Shareholders will notify you in the event that they elect to modify or terminate this process.

The Shareholders shall not have any obligation to any prospective purchaser other than those set forth in a definitive and executed purchase agreement, if any, between the Shareholders and such purchaser.

Your Offer will constitute a legally binding agreement from you to complete the transactions set out in your Offer in accordance with the terms set out therein. All costs and expenses incurred by you in connection with your submission of an Offer and in respect of any resulting negotiations and agreements, including legal and accounting charges, will be borne by you.

Your Offer must be returned to the undersigned, on behalf of the Shareholders, by email, with hard copies to follow by courier, on or prior to (Toronto time) on , 2005. In the meantime, please do not hesitate to contact the undersigned if you have any questions or comments with respect to this process or otherwise. We remind you that in accordance with the previously executed confidentiality agreement, you are not to contact the customers, suppliers, employees, directors, officers, agents or other representatives of the Company or the Shareholders without the prior written consent of **[insert name of financial advisor]**.

We appreciate your interest in completing a transaction and we look forward to receiving your Offer.

Yours truly,

Dear :

Re: TargetCo - Confidentiality Agreement

In connection with your consideration of a possible transaction (the “**Possible Transaction**”) with respect to TargetCo and/or its businesses, subsidiaries or divisions (collectively, “**TargetCo**” or the “**Company**”), **[the Shareholders and]** the Company **[is/are]** prepared to make available to you certain information concerning the business, financial condition, operations, assets, liabilities and prospects of the Company. In consideration of our furnishing you with the Evaluation Materials (as defined below) you agree as follows. **[NTD: For a private M&A transaction, the Shareholders should be made a party to this agreement.]**

1. Confidentiality of Evaluation Materials and Work Papers

You will treat confidentially all information that **[the Shareholders,]** the Company or **[their/its]** Representatives (as defined below) make available to you or your Representatives in connection with a Possible Transaction relating to the Company (collectively, the “**Evaluation Materials**”) and all Work Papers (as defined below). You will not disclose the Evaluation Material or the Work Papers except as permitted by this agreement.

The term “**Evaluation Materials**” includes information made available to you regardless of whether such information is in oral, visual, electronic, written or other form or gathered by inspection, and regardless of whether such information is specifically identified as “confidential” or “proprietary”. Notwithstanding the foregoing, the term “**Evaluation Materials**” does not include information which:

- (a) is or becomes generally available to the public other than as a result of a disclosure by you or your Representatives,
- (b) as shown by written record, was in your possession or known to you on a non-confidential basis prior to its disclosure by **[the Shareholders,]** the Company or **[their/its]** Representatives,

-
- (c) as shown by written record, was independently developed by you without reference to the Evaluation Materials and without violating any other obligation of confidentiality you may have to **[the Shareholders,]** the Company, their Representatives or any other person, or
 - (d) is disclosed on a non-confidential basis by a person other than **[the Shareholders,]** the Company or **[their/its]** Representatives provided that such person is not bound by any obligation of confidentiality to **[the Shareholders,]** the Company, their Representatives or any other person.

The term “**Work Papers**” means all notes, analyses, compilations, forecasts, data, studies, interpretations, and other information, whether in visual, electronic, written or other form, prepared by you or on your behalf or for your benefit that contain, reflect, summarize, analyze, discuss or review any Evaluation Materials.

The term “**Representative**” means, as to any person, that person’s affiliates and its and their directors, employees, shareholders, agents, advisors (including, without limitation, financial advisors, legal counsel and accountants), and, if that person is a partnership (other than a partnership formed for the purposes of the Possible Transaction), that person’s partners. “**Representative**” does not include potential or actual participants or partners in a consortium, joint venture, partnership or other vehicle formed for the purposes of a Possible Transaction, and each such person must enter into a confidentiality agreement with us on the same terms as set out herein.

As used in this agreement, the term “**person**” shall be broadly interpreted to include, without limitation, any individual, corporation, limited liability company, partnership, trust, governmental entity, or other organization, association or entity.

[NTD: Include the following if the Proposed Transaction is a public M&A transaction.] You acknowledge and will advise your Representatives that **[Canadian]** securities laws generally prohibit any person who has material, non-public information concerning an issuer from purchasing or selling securities of the issuer or from communicating such information to any other person except in the necessary course of business.

2. Use of Evaluation Materials

You will use the Evaluation Materials and the Work Papers solely to evaluate a Possible Transaction and not directly or indirectly for any other purpose. You may disclose the Evaluation Materials and the Work Papers to any of your Representatives but only to the extent such Representatives need to know the Evaluation Materials and the Work Papers for the purpose of evaluating a Possible Transaction and only if such Representatives have been informed by you of the confidential nature of the Evaluation Materials and the Work Papers and have expressly agreed to be bound by and act in accordance with this agreement. You may also disclose the Evaluation Materials and the Work Papers with the prior written consent of the Company. All Evaluation Materials shall at all times remain the property of the Company, and neither you nor your Representatives shall acquire any rights in the Evaluation Materials by virtue of this agreement.

In the event that you or any of your Representatives receive a request or are required (by deposition, interrogatory, request for documents, subpoena, civil investigative demand or other process) to disclose all or any part of the Evaluation Materials or the Work Papers, you or such Representatives, as the case may be, agree to:

- (a) immediately notify **[the Shareholders and]** the Company of the existence, terms and circumstances surrounding such request or requirement,
- (b) consult with **[the Shareholders and]** the Company on the advisability of taking legally available steps to resist or narrow such request or requirement, and
- (c) assist the Company in seeking a protective order or pursuing any other legal action, remedy or assurance as the Company deems appropriate to preserve the confidentiality of the Evaluation Materials and the Work Papers.

In the event that such protective order or other remedy is not obtained or that the Company waives compliance with the provisions of this agreement, you or such Representatives, as the case may be, may disclose only that portion of the Evaluation Materials and the Work Papers which you are legally compelled to disclose, and shall exercise your best efforts to obtain assurance that confidential treatment will be accorded such Evaluation Materials and Work Papers.

3. Non-Disclosure

The disclosure of a Possible Transaction relating to the Company could have a material adverse affect on the Company's business if disclosure is made prior to the closing of the Possible Transaction. Accordingly, unless required by applicable law or regulatory authority or unless you have received the prior written consent of **[the Shareholders and]** the Company, prior to the closing of a Possible Transaction you will not, and you will ensure that your Representatives do not, disclose to any person the fact this agreement has been entered into or that discussions or negotiations may be, are or were taking place concerning a Possible Transaction relating to the Company or any of the terms, conditions or other facts with respect to any Possible Transaction including, without limitation, the status thereof. Upon becoming aware of any such legal disclosure requirement, you will immediately notify **[the Shareholders and]** the Company of such requirement and will provide **[the Shareholders and]** the Company with a copy of any such disclosure you intend to make.

4. Return of Documents

You will keep a written record of the subject and location of all Evaluation Materials disclosed to you and a list of Representatives to whom Evaluation Materials have been disclosed and will provide a copy of the record and list to us upon request.

You will give us immediate notice if you decide not to proceed with a Possible Transaction. If such notice is given, or at any time upon our request, you will, and will cause your Representatives to, within **[five]** business days of the notice or request:

- (a) return all Evaluation Materials to us without retaining any copies;
- (b) destroy all copies of the Work Papers; and
- (c) certify to us in writing that you and your Representatives have been complied with these provisions.

5. No Unauthorized Contact or Solicitation

During the course of your evaluation, all inquiries and other communications are to be made directly to **[insert name of financial advisors]**. Accordingly, you will not, and you will ensure that your Representatives do not, directly or indirectly, contact or attempt to contact any other Representatives, or any **[shareholders,]** creditors, customers or suppliers of the Company concerning a Possible Transaction relating to the Company, or seek any information concerning the business, financial

condition, operations, assets, liabilities or prospects of the Company from any person, without the express written consent of **[insert name of financial advisors]**. You will not, and you will ensure that your Representatives do not, discuss with or offer to any third party an equity participation in a Possible Transaction relating to the Company or any other form of joint acquisition by you and such third party without the prior written consent of **[the Shareholders and]** the Company.

Without the Company's prior written consent, for a period of two years from the date of this agreement you will not directly or indirectly, solicit for employment or employ or retain (as a consultant or in any similar capacity) any person who is now employed by the Company (or whose activities are dedicated to the Company) in an executive or management level position or otherwise considered by the Company to be a key employee.

6. No Representation or Warranty

You acknowledge and agree that none of **[the Shareholders,]** the Company or any of **[their/its]** Representatives is making any representation or warranty, expressed or implied, as to the accuracy, completeness or fairness of the Evaluation Materials, and none of **[the Shareholders,]** the Company or any of **[their/its]** Representatives will have any responsibility or liability:

- (a) for the accuracy, completeness or fairness of the Evaluation Material, or
- (b) to you, your Representatives or any other person resulting from the use of the Evaluation Materials by you, any of your Representatives or any other person.

Only those representations or warranties that are made to a purchaser in a definitive, written agreement ("**Sale Agreement**") (if one is executed) and subject to such limitations and restrictions as may be specified in such Sale Agreement, will have any legal effect. For purposes of this agreement, the term "Sale Agreement" does not include an executed letter of intent or any other preliminary written agreement, nor does it include any oral acceptance of an offer.

You also acknowledge and agree that no agreement regarding a Possible Transaction relating to the Company shall be deemed to exist between you and **[the Shareholders and/or]** the Company unless and until a Sale Agreement has been executed and delivered by you and **[the Shareholders and/or]** the Company and each of the other parties thereto. You waive, in advance, any claims (including, without limitation, breach of

contract) in connection with a Possible Transaction relating to the Company unless and until a Sale Agreement has been executed and delivered by you and **[the Shareholders and/or]** the Company and each of the other parties thereto. You also acknowledge and agree that unless and until a Sale Agreement has been executed and delivered by you and **[the Shareholders and/or]** the Company and each of the other parties thereto, there shall not be any legal obligation of any kind whatsoever with respect to any Possible Transaction relating to the Company by virtue of this agreement or any other written or oral expression with respect to such transaction except, in the case of this agreement, for the matters specifically agreed to herein.

7. **Process**

You acknowledge and agree that:

- (a) **[the Shareholders,]** the Company and **[their/its]** Representatives are free to conduct the process for a Possible Transaction relating to the Company as they determine, in their sole discretion (including, without limitation, negotiating with or providing additional information to any of the prospective purchasers and entering into a Sale Agreement without prior notice to you or to any other person),
- (b) any procedures relating to such a Possible Transaction may be changed at any time without notice to you or any other person, and
- (c) you shall not have any claims whatsoever against **[the Shareholders,]** the Company or **[their/its]** Representatives arising out of or relating to such a Possible Transaction.

8. **Legal Remedy**

You will immediately notify us if you become aware of a breach of this agreement **[and you will immediately take all necessary steps to limit the extent of the breach]**.

You acknowledge and agree that disclosure or use of the Evaluation Materials or Work Papers contrary to this agreement, or any other failure to comply with the terms and conditions of this agreement, will give rise to irreparable injury to us inadequately compensable in damages. We may, in addition to any other remedy available at law or equity, enforce the performance of this agreement by way of injunction or specific performance upon application to a court of competent jurisdiction without proof of actual

damages (and without the requirement of posting a bond or other security) and, notwithstanding that damages may be readily quantifiable, you agree not to plead sufficiency of damages as a defence in any such proceeding.

You shall indemnify and hold harmless **[the Shareholders,]** the Company and **[their/its]** Representatives from any damages, losses, liabilities, claims, demands, costs or expenses (including, without limitation, legal fees and expenses without reduction for tariff rates or similar reductions) arising out of or resulting from breach of this agreement by you or your Representatives.

The rights and remedies provided in this agreement are cumulative and are in addition to, and not in substitution for, any other rights and remedies. All such rights and remedies may be exercised from time to time, and as often and in such order as we deem expedient.

9. **Standstill** [NTD: This section 9 could be inserted for a public M&A transaction.]

From the date of this agreement to the earlier of, (i) the date of execution of a Sale Agreement, and (ii) the anniversary of this agreement, you will not, directly or indirectly, alone, jointly or in concert with any other person, without the express written consent of the **[board of directors / special committee of the board of directors of the Company]**:

- (a) propose, offer, negotiate or agree to (i) purchase, sell, transfer or otherwise acquire **[or dispose of]** any securities of the Company **[other than in the ordinary course of business]**; (ii) acquire a material portion of the assets or property of the Company; or (iii) enter into any merger, amalgamation or other business combination involving the Company;
- (b) “solicit”, or participate with any person in the “solicitation” of any “proxies” (as such terms are defined in the *Securities Act* (Ontario)) in order to vote, advise or influence any person with respect to the voting of any securities of the Company;
- (c) otherwise attempt to control or to influence the management or board of directors of the Company;
- (d) make any public or private disclosure of any consideration, intention, plan or arrangement

inconsistent with your obligations in Sections 9(a), (b) and (c), except as required by applicable law; or

- (e) advise, assist or encourage any other person in connection with any of the foregoing.

10. **Other**

- (a) This agreement constitutes the entire agreement between you and us with respect to the matters contemplated by this agreement and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral, with respect thereto. No modification of this agreement shall be binding unless it is in writing and signed by all of the parties to this agreement.
- (b) No failure or delay by us in exercising any right or remedy under this agreement shall be deemed to be a waiver of that right or remedy. No waiver of any breach of any provision of this agreement shall be deemed to be a waiver of any subsequent breach of that provision.
- (c) Except as provided in the second paragraph of section 5 **[and in Section 9]** of this agreement, your obligations under this agreement continue and are binding for **[an indefinite period of time]**.
- (d) If any provision of this agreement is determined to be illegal, invalid or unenforceable such provision will be severed from this agreement and the remaining provisions of this agreement will remain in full force and effect.
- (e) The division of this agreement into sections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this agreement.
- (f) Time is of the essence of this agreement.
- (g) This agreement is governed by, interpreted and enforced in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. You irrevocably attorn and submit to the exclusive jurisdiction of the courts of Ontario situated in the City of

Toronto and waive objection to the venue of any proceeding in such court or that such court provides an inconvenient forum.

- (h) This agreement may be executed in any number of counterparts and all counterparts taken together constitute one and the same instrument. Delivery of an executed counterpart signature page by facsimile or an electronic reproduction of an executed counterpart signature page by electronic mail is effective execution and delivery of this agreement.

If you are in agreement with the foregoing, please sign and return one copy of this agreement to us on or prior to (Toronto time) on , 2005.

Yours truly,

TARGETCO

By: _____
Name:
Title:

[SHAREHOLDERS]

By: _____
Name:
Title

ACCEPTED AND AGREED as of this _____ day of _____ 2005.

ACQUIRECO

By: _____
Name:
Title:

Top 10 Do's of Controlled Auctions

1. Clear objectives

2. Proper consideration of Controlled Auction

3. Management on side

4. Clear rules

5. Seller friendly agreement

6. Seller due diligence

7. Experienced advisors

8. Offsite data room

9. Maintain level playing field

10. Control of the process

About Stikeman Elliott's Mergers and Acquisitions Group

Mergers and acquisitions are a core practice area of Stikeman Elliott's national and international practice. We have been involved in numerous M&A transactions, particularly those with a cross-border aspect, spanning diverse industries both regulated and unregulated.

In change of control situations, the emphasis we place on quick response time, flexibility and practicality, and the range and longevity of our M&A practice, give our clients a high degree of comfort. They know that we can identify key legal issues and provide exactly the level of support needed in their business negotiations without making the process unduly complex, time-consuming, or costly. We have extensive experience with take-over bids, plans of arrangement, amalgamations, leveraged buy-outs and management buy-outs.

Our firm has earned particular respect for its expertise in both offensive and defensive mandates in hostile take-over situations, and recently acted on the successful defence of Air Canada. We have been involved over the years in a significant number of transactions involving U.S. and other non-Canadian acquirors of Canadian targets and have been instrumental in the development of novel and tax efficient acquisition structures, including those involving exchangeable shares.

Recognition for Our Work

Stikeman Elliott is regularly ranked as a leader in Canadian M&A. Lawyers in the firm's Toronto, Montreal, Vancouver and Calgary offices are identified by independent observers as among the most experienced and trusted members of Canada's M&A bar. In 2004, each of the four most respected publishers of national and international league tables placed Stikeman Elliott in its highest category for M&A advice – the only Canadian M&A group to receive a unanimous first-rank recommendation.

London-based Chambers Global describes the M&A Group as “a powerhouse”, specifically citing the “high quality of work” of a practice “centred on higher-end M&A and particularly cross-border deals”. The Legal Media Group's *IFLR 1000*, another UK-based survey, ranks Stikeman Elliott as “one of the best Canadian law firms in the field.” In its *Global Counsel 3000*, Practical Law Co. accords Stikeman Elliott its highest ranking as well, as does the *Canadian Legal Expert Directory*. The practice and its attorneys are also regularly cited in *A Guide to the World's Leading M&A Lawyers* (Euromoney) and the *International Who's Who of M&A Lawyers* (Law Business Research).

Stikeman Elliott has one of the country's leading domestic and cross-border M&A practices. *LEXPERT* magazine's April 2005 “Guide to the Leading 100 Canada/US Cross-border Corporate Lawyers in Canada” lists seven of Stikeman Elliott's top lawyers in M&A, outnumbering all other Canadian firms and further demonstrating the firm's unparalleled cross-border expertise. We are the top law firm in Canada for M&A (based on the number of 2005 *LEXPERT* directory and *LEXPERT* Top 500 citations). In addition, both Thomson

Financial and Bloomberg list Stikeman Elliott as one of the top Canadian firms in their worldwide, cross-border and Canadian league tables (2005 Q1).

Representative Mandates

Recently, the firm has worked on a number of significant Canadian and cross-border transactions including acting for:

- Sale by **Allianz AG** of Allianz of Canada, Inc. to ING Canada Inc.;
- **Assante Corp.** in its \$1 billion sale to CI Fund Management Inc. and the associated spin-off of its US operations to its shareholders;
- **Bain Capital Partners LLC** in connection with the acquisition & financing of the Dollarama business of S. Rossy Inc. and Dollar A.M.A. Inc.;
- **Bain Capital LLC**, a private equity fund, in the acquisition of Bombardier's recreational-products division;
- **Blackfriars Corp.** in its acquisition of Emco Limited for approximately \$440 million;
- **BPO Properties** (Brookfield Properties Corp.), **Canada Pension Plan Investment Board** and a third **institutional shareholder** in a deal led by Brascan Corp to acquire O&Y Properties Corp. and O&Y Real Estate Investment Trust. The deal, valued at Cdn\$2 billion, is considered to be the largest real estate transaction in Canadian history;
- **Canada Life** (counsel to the Special Committee of the Board of Directors) in an unsolicited bid by Manulife Financial Services and a negotiated transaction with Great-West;
- **Cara Holdings Ltd.** in its \$324 million bid to take Cara Operations Ltd. private;
- **Cedara Software Corp.** in its US\$383 million stock-for-stock merger with Merge Technologies Incorporated;
- **Cerberus Capital Management's** Canadian counsel in its Cdn\$1.2 billion bid for Royal Group Technologies;
- **Creo Inc.** in its US\$980 million acquisition by Eastman Kodak Company;
- **Hospitality Properties Trust** in connection with its acquisition of two Toronto hotels, as part of the acquisition of 12 hotels across the continental United States, Canada and Puerto Rico, and long-term management agreement with InterContinental Hotels Group respecting the management of 11 of these hotels;
- **John Hancock Financial Services** in its \$14.8 billion acquisition by Manulife Financial, which is the largest M&A transaction in Canadian history;
- **Kingfisher plc**, Europe's leading home improvement retailer, in connection with the \$360 million sale of its 20 Canadian big-box home improvement stores bearing the Réno-Dépôt and the Building Box banners to RONA;
- **KKR, Bain Capital & Vornado** in their winning bid to purchase Toys-R-Us, a deal valued at \$6.6 billion;

- **Koch Industries** in its \$4.4 billion acquisition of DuPont's clothing and carpet fibre business;
- **MAAX Inc.** in a \$640 million merger agreement with a group of investors;
- **Magna International Inc.'s** (acting for the special committee of board of directors) in the \$1.1 billion spin-off of MI Development Inc. shares to shareholders;
- **Microcell Telecommunications Inc.**, the Fido brand wireless telephone service, in a \$1.4 billion acquisition bid by Rogers Wireless;
- **MemberWorks Inc.** in its \$152.5 million acquisition of Lavalife Inc.;
- **Nortel Networks** in its agreement with Flextronics International Ltd. to divest Nortel Networks manufacturing operations and related activities in Canada and Brazil for approximately US\$700 million;
- **Ontario Teachers' Pension Plan** in the \$1.8 billion purchase of Fording Inc.;
- **Pernod-Ricard's** Canadian counsel in its US\$14.2-billion acquisition of Allied Domecq plc.;
- **PrimeWest Energy Trust** in its \$206 million acquisition of two subsidiaries of a US based oil and gas company;
- **Regis Corp.** in its \$210 million acquisition of Hair Club for Men and Women;
- **RR Donnelley** in its announced US\$6 billion merger with Moore Wallace;
- **Silver Lake Partners** in connection with all Canadian aspects of the US\$11.3-billion acquisition of SunGard;
- **Slocan Forest Products Ltd.** in its proposed sale to Canada's Canfor Corporation for \$464 million in stock, leading to the creation of the world's largest manufacturer of spruce, pine and fir products; and
- **Yellow Pages Group** in the tax structuring and financing of its \$2.55-billion acquisition of SuperPages.

Other examples of the firm's M&A mandates include acting for:

- **Alcatel** in connection with its acquisition of Newbridge Networks;
- **AMEC plc** on its acquisition of Agra (engineering services);
- **AMVESCAP plc** on its acquisition of Trimark;
- **BAE SYSTEMS plc** in its transaction with ONCAP L.P.;
- **Best Buy Co. Inc.** in its acquisition of Future Shop;
- **BioChem Pharma Inc.**, when it was acquired by Shire Pharmaceuticals;
- **Bristol-Myers Squibb Company**, which acquired the pharmaceutical business of DuPont Pharmaceutical Company including its Canadian subsidiary, DuPont Pharma Inc.;
- **CAE Inc.** in its acquisition of Schreiner Aviation Training BV;

- **CAI Capital Partners & Co. II** in acquisition of Dynaplas Ltd. and Dynalease Ltd.; and in its acquisition of MacDonald, Dettwiler & Associates Ltd.;
- **Canadian Imperial Bank of Commerce** in its acquisition of Merrill Lynch Canada Inc.;
- **Cervejarias Kaiser**, when Molson Inc. acquired Brazilian Cervejarias Kaiser SA;
- **C-MAC Industries Inc.** in its acquisition by Solectron Corporation;
- **Duke Energy** in its acquisition of Westcoast Energy;
- **eFunds Corp.** in its \$30 million acquisition of Oasis Technology Ltd.;
- **GCAN Holdings Inc.** in its acquisition of Gerling Canada Insurance Company from Gerling NAFTA;
- **Key Equipment Finance Inc.** and **KeyBank** in Key Equipment Finance Canada Ltd.'s acquisition of the TD Bank Financial Group's equipment finance and lease portfolio – a portfolio valued in excess of \$640 million;
- **L-3 Communications Corporation** in its acquisition of Spar Aerospace Ltd.;
- **Laboratory Corporation of America** in its acquisition of Dynacare Inc.;
- **Repap Enterprises Inc.** in its acquisition by Finland based UPM-Kymmene;
- **Shire Pharmaceuticals** in the sale of a vaccines business to Canadian biotech ID Biomedical Corp. for \$120 million in cash and stock;
- **Sysco Corporation** in its acquisition of Sobey's Inc.'s national foodservice operations; and
- **Wolseley plc**, as Canadian counsel, in its acquisition of Rexel Canada Inc.

For more information on
Controlled Auctions please contact:

Richard E. Clark
Chair of M&A/Negotiated Transactions Group

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