

A Closer Look at Stock Purchase Agreements

December, 2001
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Haynes and Boone, LLP
1000 Louisiana St., Suite 4300
Houston, TX 77002

Arthur M. Nathan
713.547.2009
nathana@haynesboone.com

Paul Dickerson
713.547.2235
dickersp@haynesboone.com

Scot Dixon
713.547.2260
dixons@haynesboone.com

1. INITIAL COMMENTS

1.1. Buyer's Perspective

Buyer wants to pay a reasonable price for a clean company. Buyer wants comprehensive and unqualified representations and warranties from Sellers to assure Buyer that it is getting what it believes it has bargained for. The risks of the unknown should be borne by Sellers; any undisclosed problem that somehow relates to the pre-closing period—that somehow can be linked to anything that transpired on Sellers' watch—should be Sellers' problem.

1.2. Sellers' Perspective

Sellers' believe they are selling an ongoing business and that all businesses have a normal level of problems. They believe Buyer is buying this business "warts and all." Sellers are willing to protect Buyer against anything truly extraordinary, and against their outright fraud, but that's it.

1.3 How Does The Agreement Fit Together?

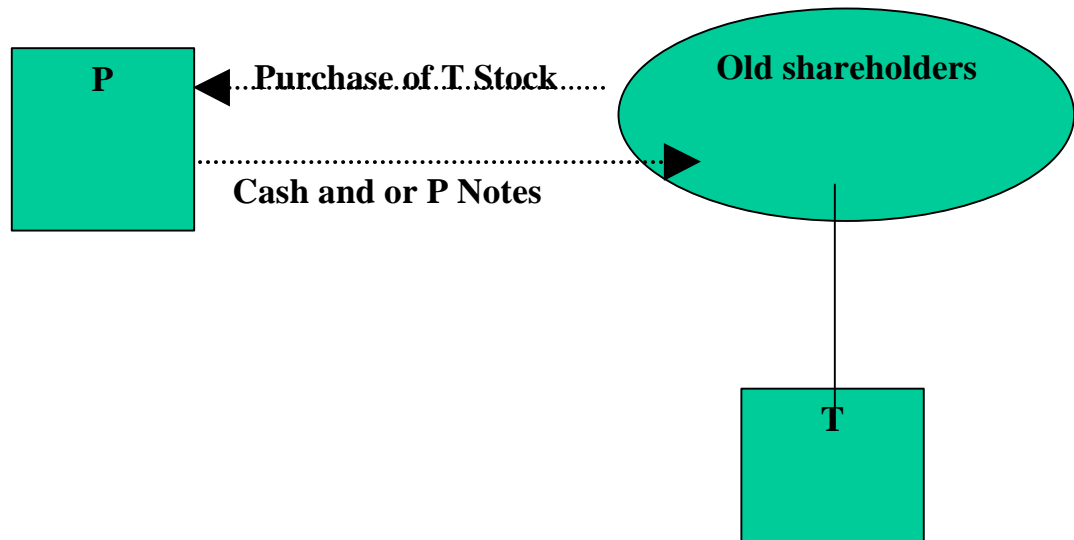
- (i) A Consistent Structure
- (ii) The Deal Provisions: Transfer of Stock; Purchase Price, Consideration, Deferred Consideration, Earn-Outs; Purchase Price Adjustments; Special Tax Elections (Code Section 338(h)(10))
- (iii) Representations and Warranties of Sellers (and Company)
- (iv) Conduct of Business Pending the Closing
- (v) Conditions to Closing
- (vi) Covenants of the Parties
- (vii) Indemnification and Resolution of Disputes
- (viii) Termination
- (ix) Covenants Not to Compete and Trade Secrets
- (x) Brokerage
- (xi) Other Provisions
- (xii) Schedules and Exhibits
- (xiii) Disclosure Schedule

1.4 Tax Issues

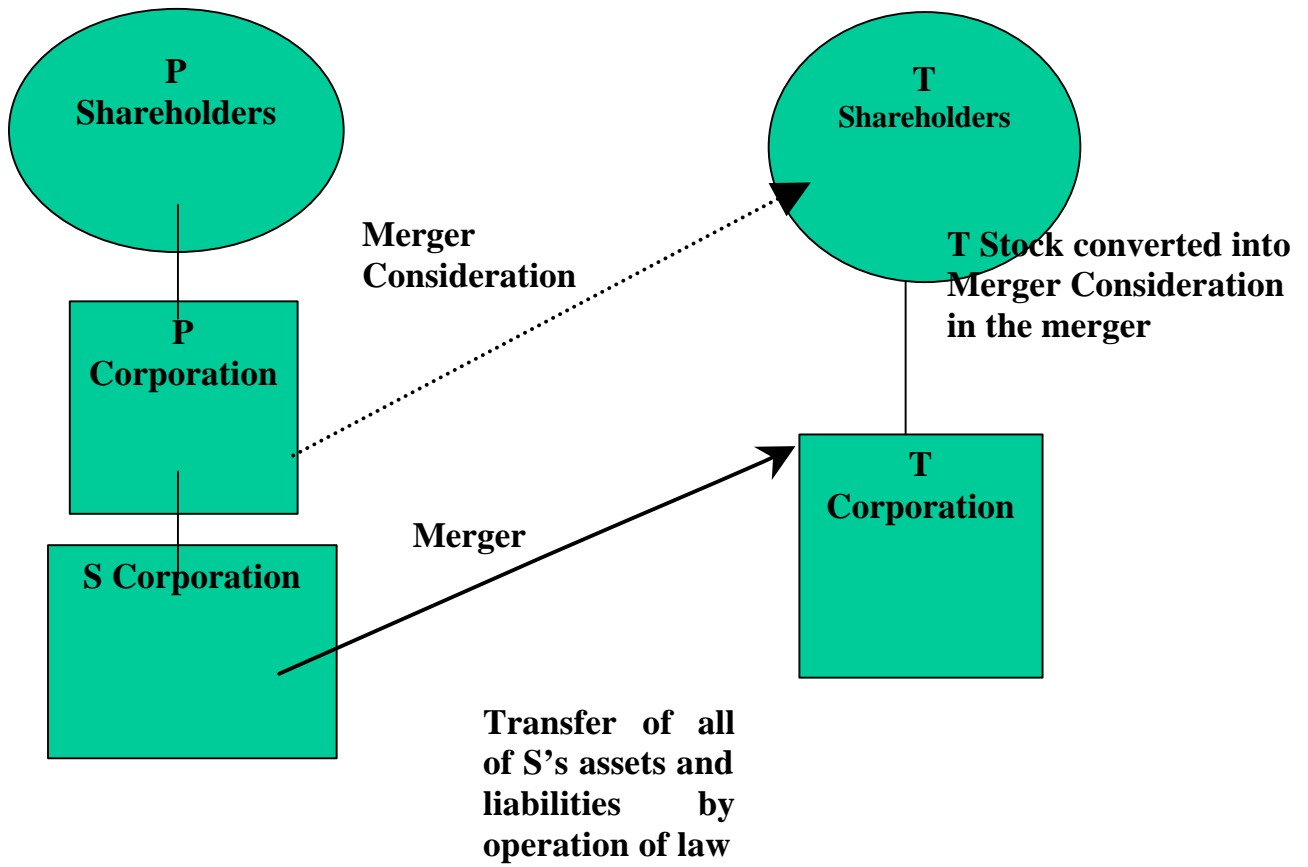
- (i) The Seller
- (ii) The Buyer

- (iii) Direct Stock Sale/Purchase
- (iv) Tax treatment of reverse subsidiary merger where acquiror organizes a new subsidiary company which is merged into the target corporation depends on whether the consideration is considered to have been received from the acquiror or the target
 - (a) Taxable sale of target's stock to the parent acquiror
 - (b) Complete redemption of target's stock
- (v) Installment Sale treatment
- (vi) Effect of target financing
- (vii) Target stock redemptions and dividends as part of purchase of target shares
- (viii) Code Section 338 elections

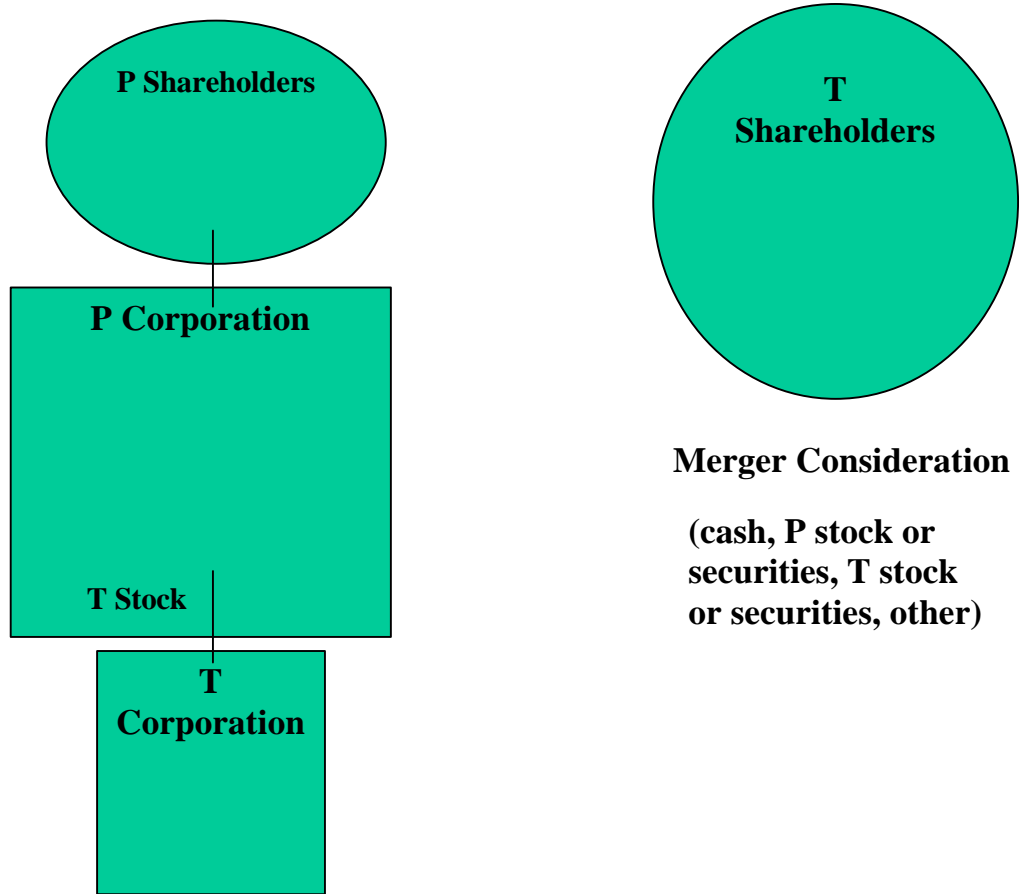
Purchaser's Taxable Purchase of Target's Stock



Taxable Reverse Subsidiary Merger



Aftermath of Taxable Reverse Subsidiary Merger



2. INTRODUCTION

“This Stock Purchase Agreement is entered into on [as of] _____, 2001, by and among _____, a _____ corporation (the ‘Buyer’), and _____, _____ and _____ (collectively the ‘Sellers’). The Buyer and the Sellers are referred to collectively herein as the ‘Parties.’”

3. RECITALS

“The Sellers in the aggregate own all of the outstanding capital stock of _____, a _____ corporation (the ‘Target’).”

This Agreement contemplates a transaction in which the Buyer will purchase from the Sellers, and the Sellers will sell to the Buyer, all of the outstanding capital stock of the Target in return for cash and the Buyer Notes.”

Comment: Recitals can help the reader understand the basic context and structure of the acquisition. The parties and their counsel should, however, be aware of the possible legal effect of recitals.

4. DEFINITIONS

It is useful, both to reduce the length of other sections and to facilitate changes during negotiations, to have a section of the SPA that lists all defined terms appearing in more than one section of the agreement. Although it is not unusual to have the definitions as the first section in the SPA, it is suggested that the definitions be put in a schedule so that they are not the first provision that the parties see since the business people involved in the transaction will not want to look through all of the definitions as the first part of the agreement. The definitions may be made the last part of the SPA.

4.1. GAAP

“GAAP” means United States generally accepted accounting principles as in effect from time to time.

Comments: GAAP is not a static concept—a financial statement will change as GAAP changes. Buyer should examine Target’s financial statements from previous years to ensure their consistency from year to year. Buyer should also determine whether there are any pending FAS bulletins that would require a change in Target’s accounting practices, and Buyer may want Sellers to represent and covenant that there have been (e.g., within the past five years) and will be (prior to the closing) no voluntary changes in Target’s accounting practices.

4.2. Hart-Scott-Rodino Act

“Hart-Scott-Rodino Act” means the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.”

Comments: The Hart-Scott-Rodino Act requires the parties to a proposed acquisition within the scope of the Act to give prior notice of the transaction to the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice and to delay consummation of the acquisition until expiration of a specified waiting period. The purpose of the Hart-Scott-Rodino Act is to allow the government an opportunity to evaluate the

anticompetitive aspects of a proposed acquisition and to seek to enjoin its consummation in appropriate circumstances.

4.3. Knowledge

“Knowledge” means actual knowledge without independent [or after reasonable] investigation.

Comments: Sellers will attempt to use knowledge qualifications to limit many of their representations and warranties. The inclusion of a knowledge qualification in the representation concerning threatened litigation has become accepted practice. Ultimately, the issue is allocation of risk—should Buyer or Sellers bear the risk of the unknown? If Buyer agrees to a knowledge qualification, the next issue is whose knowledge is relevant. Buyer will seek to have the group of people be as broad as possible and to ensure that this group includes the people who are the most knowledgeable about the specific representation being qualified. The broader the group and the greater the knowledge of the people in the group, the greater will be the risk retained by Sellers. The parties must also determine the scope of the investigation to be built into the definition of “Knowledge.”

4.4. Securities Act

“Securities Act” means the Securities Act of 1933, as amended.

Comments: Section 5 of the Securities Act of 1933 prohibits the sale of a security unless a registration statement with respect to that security has become effective or a statutory exemption is available. The sale of Target’s stock to Buyer and the issuance of Buyer’s promissory note are potentially sales of securities subject to this registration requirement. The SPA seeks to take advantage of the exemption for the issuance of Buyer’s notes and the so-called private resale exemption for the transfer of the stock of Target to Buyer.

5. SALE AND TRANSFER OF SHARES; CLOSING

5.1. Shares

“On and subject to the terms and conditions of this Agreement, the Buyer agrees to purchase from each of the Sellers, and each of the Sellers agrees to sell to the Buyer, all of his or its Target Shares for the consideration specified below in this §___.”

Comments: The UCC provides that Buyer acquires from Sellers all of the rights of Sellers in the transferred shares, except to the extent that Buyer is a party to a fraud or has notice of an adverse claim. In addition, under the UCC, if Buyer is a “bona fide purchaser,” Buyer acquires Sellers’ interest in the transferred shares free of any adverse claim. What if the Seller is a limited partnership for state law purposes but a corporation for Federal income tax purposes?

5.2. Purchase Price

“The Buyer agrees to pay to the Sellers at the Closing \$_____ (the ‘Purchase Price’) by delivery of (i) its promissory notes (the ‘Buyer Notes’) in the form of Exhibit __ attached hereto in the aggregate principal amount of \$_____ and (ii) cash for the balance of the Purchase Price payable by wire transfer or delivery of other immediately available funds. The Purchase Price shall be allocated among the Sellers in proportion to their respective holdings of Target Shares as set forth in §___ of the Disclosure Schedule.”

Comments: The purchase price and the method of its payment can take a wide variety of forms. The amount Buyer is willing to pay for Target depends on a variety of factors. If Buyer and Sellers cannot agree on the value of Target, they may make a portion of the purchase price contingent on the performance of Target after the acquisition. The contingent portion of the purchase price (often called an “earnout”) is commonly based on Target’s earnings (or other agreed-upon criterion such as sales) over a specified period of time after the acquisition. Although an earnout may bridge a gap between Buyer’s and Sellers’ views of the value of Target, constructing an earnout raises many issues, including how earnings will be determined, the formula for calculating the payment amount and how that amount will be paid (cash or stock), how the Target’s businesses will be operated and who will have the authority to make major decisions, and the effect of a sale of Buyer during the earnout period. Resolving these issues may be more difficult than agreeing on a purchase price. What if the parties intend to make a Code Section 338(h)(10) election so that the transaction is treated as an asset sale for Federal income tax purposes but as a stock sale for state law purposes? When might it be advisable and when is it permissible to make a Code Section 338(h)(10) election?

5.3. Closing

“The closing of the transactions contemplated by this Agreement (the ‘Closing’) shall take place at the offices of _____ in _____, _____, commencing at 9:00 a.m. local time on the [second] business day following the satisfaction or waiver of all conditions to the obligations of the Parties to consummate the transactions contemplated hereby (other than conditions with respect to actions the respective Parties will take at the Closing itself) or such other date as the Buyer and the Requisite Sellers may mutually determine (the ‘Closing Date’); provided, however, that the Closing Date shall be no earlier than _____, 20__.”

Comments: Depending on the nature of the acquisition and the interest of the parties in completing the acquisition within a certain time frame, there are many ways to set the date of the closing. In certain circumstances (e.g., when Buyer needs to obtain financing), the parties may want to provide that the closing will not take place prior to a certain date. There may be other conditions to the Closing such as obtaining regulatory approval (Hart-Scott-Rodino or Exon-Florio approval), approval of third parties such as customers or landlords, or waivers of rights of third parties.

5.4. Closing Obligations

“At the Closing, (i) the Sellers will deliver to the Buyer the various certificates, instruments, and documents referred to in §__ below, (ii) the Buyer will deliver to the Sellers the various certificates, instruments, and documents referred to in §__ below, (iii) each of the Sellers will deliver to the Buyer stock certificates representing all of his or its Target Shares, endorsed in blank or accompanied by duly executed assignment documents, and (iv) the Buyer will deliver to each of the Sellers the consideration specified in §__ above.”

Comments: The parties should be aware of the distinction between deliveries to be treated as covenants, the breach of which will give the non-breaching party a right to damages, and deliveries to be treated as conditions, the breach of which will give the non-breaching party the right to terminate the acquisition (i.e., a “walk right”) but not a right to damages. Consider “materiality” qualifiers when dealing with these issues.

6. REPRESENTATIONS AND WARRANTIES OF SELLERS

In this section, Sellers provide a formal description of the Target and their businesses. Technically, representations and warranties are different. Representations are statements of past or existing facts. Warranties are promises that existing or future facts are or will be true. In practice, however, the terms “representation” and “warranty” are used interchangeably by many people who work in the world of M&A. Sellers’ representations and warranties serve three overlapping purposes:

- (i) provide disclosure about the Target before the signing of the SPA;
- (ii) provide a foundation for Buyer’s right to terminate the acquisition before or at the closing if the representations and warranties are not accurate at the time of the closing; and
- (iii) provide a basis for Buyer’s right to indemnification if a representation and warranty is inaccurate.

Adding a “knowledge” qualifier to Sellers’ representations and warranties can significantly limit Buyer’s post-closing indemnification rights. However, such qualifications should not affect Buyer’s “walk rights.” If, prior to the closing, Buyer learns of a fact (not already known to Sellers) that is inconsistent with a representation containing a knowledge qualification, Buyer should disclose this fact to Sellers, Sellers will thus acquire knowledge of the fact, and the representation will be inaccurate despite the knowledge qualification. Buyer will then have to decide whether to close the transaction. The indemnification language will become quite important since Buyer’s knowledge of the “fact” could impact the Buyer’s rights to recovery against the Seller.

Seller: Sellers may object to the absence of “materiality” qualifications in their representations by arguing that, in light of the comprehensive and detailed nature of the representations, it is unrealistic to expect every representation to be accurate in all respects.

Buyer: Buyer may claim that, because of the limited purposes served by Sellers’ representations, Sellers should not be concerned about the presence of immaterial inaccuracies in these representations. The basket and cap in the indemnity provisions will support the Buyer’s position in some instances.

6.1. Organization and Good Standing

“If the Seller is a corporation, the Seller is duly organized, validly existing, and in good standing under the laws of the jurisdiction of its incorporation.”

Comments: If Buyer has concern that a Target might be an inadvertent “investment company” (e.g., if a Target’s assets include significant investment assets and ownership is widespread), Buyer should also seek a representation such as: “The Target is not an ‘investment company’ within the meaning of the Investment Company Act of 1940.” Consider what is required to reach the conclusions made in this representation and warranty. What third party evidence is available? Will certificates from the Secretary of State provide any valuable information? Will certificates from the Comptroller of Public Accounts provide any valuable information? Consider also how this representation should be modified if the Seller is a limited partnership for Texas state law purposes but is a corporation for Federal income tax purposes.

6.2. Authority/No Conflict

“The Sellers have full power and authority (including, if the Sellers are incorporated, full corporate power and authority) to execute and deliver this Agreement and to perform their obligations hereunder. This Agreement constitutes the valid and legally binding obligation of the Sellers, enforceable in accordance with its terms and conditions. The Sellers need not give any notice to, make any filing with, or obtain any authorization, consent, or approval of any government or governmental agency in order to consummate the transactions contemplated by this Agreement.

Neither the execution and the delivery of this Agreement, nor the consummation of the transactions contemplated hereby, will [(A)] violate any constitution, statute, regulation, rule, injunction, judgment, order, decree, ruling, charge, or other restriction of any government, governmental agency, or court to which the Sellers are subject or, if the Sellers are a corporation, any provision of its charter or bylaws [or (B) conflict with, result in a breach of, constitute a default under, result in the acceleration of, create in any party the right to accelerate, terminate, modify, or cancel, or require any notice under any agreement, contract, lease, license, instrument, or other arrangement to which the Sellers are a party or by which they are bound or to which any of their assets are subject].”

Comments: This representation provides that Sellers have full authority to execute and deliver the SPA. The purpose served by the no conflict representation differs from that served by the more general representations concerning legal requirements, governmental authorizations, orders, and contracts which alert Buyer to violations and other potential problems not connected with the acquisition. What if there are shareholder agreements in existence among the shareholders? What if there are outstanding options or subscription agreements? Consider whether individual shareholders have legal capacity to execute and deliver the SPA.

6.3. Capitalization

“The Sellers hold of record and own beneficially the number of Target Shares set forth next to their names in §___ of the Disclosure Schedule, free and clear of any restrictions on transfer (other than any restrictions under the Securities Act and state securities laws), Taxes, Security Interests, options, warrants, purchase rights, contracts, commitments, equities, claims, and demands. The Sellers are not a party to any option, warrant, purchase right, or other contract or commitment that could require the Sellers to sell, transfer, or otherwise dispose of any capital stock of the Target (other than this Agreement). The Sellers are not parties to any voting trust, proxy, or other agreement or understanding with respect to the voting of any capital stock of the Target.”

Comments: This representation elicits information about the number of outstanding shares of Target so that Buyer can verify that it is acquiring all of the outstanding shares of capital stock. Consider the use of the term “marketable” in describing the state of title in the shares. The representation also addresses the issue of rights to acquire shares.

Buyer: Buyer will also want to know the number of authorized shares to ensure that the outstanding shares were validly issued and that there are sufficient shares authorized to cover outstanding warrants, options, and convertible securities. The Buyer may be interested in authorized, issued and outstanding shares in the event there are treasury shares.

Sellers: Sellers may want to specify that this information is as of a given date, such as the date of the SPA.

6.4. Financial Statements

“Attached hereto as Exhibit ___ are the following financial statements (collectively the ‘Financial Statements’): (i) audited consolidated and unaudited consolidating balance sheets and statements of income, changes in stockholders’ equity, and cash flow as of and for the fiscal years ended _____, 19____, _____, 19____, _____, 19____, _____, 19____, and _____, 20____, (the ‘Most Recent Fiscal Year End’) for the Target and its Subsidiaries; and (ii) unaudited consolidated and consolidating balance sheets and statements of income, changes in stockholders’ equity, and cash flow (the ‘Most Recent Financial Statements’) as of and for the _____, months ended _____, 20____, (the ‘Most Recent Fiscal Month End’) for the Target and its Subsidiaries. The Financial Statements (including the notes thereto) have been prepared in accordance with GAAP applied on a consistent basis throughout the periods covered thereby, present fairly the financial condition of the Target and its Subsidiaries as of such dates and the results of operations of the Target and its Subsidiaries for such periods, are correct and complete, and are consistent with the books and records of the Target and its Subsidiaries (which books and records are correct and complete).”

Comments: This representation requires the delivery of specified financial statements of the Target and provides assurances regarding the quality of those financial statements. Issues frequently arise concerning the appropriate degree of assurance regarding the quality of the financial statements.

Buyer: Buyer’s first draft of this representation often includes a statement that the financial statements are true, complete, and correct in an effort to eliminate the leeway for judgments about contingencies (such as to the appropriate size of reserves for subsequent events) and materiality inherent in the concept of fair presentation in accordance with GAAP.

Sellers: Sellers generally feel the “true, correct and complete” formulation is an unfair request for assurances that the financials meet a standard that is inconsistent with the procedures used by accountants to produce them. In addition, Sellers may be reluctant to represent that interim financial statements are fairly presented in accordance with GAAP, either because of some question about the quality of the information contained (e.g., there may be no physical inventory taken at the end of an interim period) or because of the level of disclosure included (such as the absence of a full set of notes to financial statements). There may also be normal year end adjustments. These are inherently inexact procedures, that are built around estimates and materiality standards which are incompatible with the notion of 100% precision or accuracy. Many Sellers feel “fair presentation in accordance with GAAP” is the correct standard.

Buyer: If Sellers attempt to add a “materiality” qualifier to this representation, Buyer will likely point out that GAAP already has its own inherent materiality qualification, and that “double-dipping” on materiality should not occur. Buyer also may request audited consolidating financial statements, which contain separate financial statements for each of the Target and the eliminations necessary to produce the consolidated financial statements.

Sellers: Sellers can be expected to object to the additional accounting and audit work required to produce those statements, in which materiality judgments reflect the size of the smallest of the Target, and to argue that Buyer should be concerned about the financial aspects of the Target’s business as a whole, not on an entity-by-entity basis.

6.5. Books and Records

“The Sellers have delivered to the Buyer correct and complete copies of the charter and bylaws of each of the Target and its Subsidiaries (as amended to date). The minute books (containing the records of meetings of the stockholders, the board of directors, and any committees of the board of directors), the stock certificate books, and the stock record books of each of the Target and its Subsidiaries are correct and complete. None of the Target and its Subsidiaries is in default under or in violation of any provision of its charter or bylaws.”

Comments: The books of account of the Target are the basis of the financial statements. If the books of account are inaccurate or incomplete, the information provided to the Target's auditors (or Buyer's auditors) will be suspect and the financial statements will be of little value to Buyer. Some SPAs omit the portion of the representation relating to the minute books. Such a representation could be especially troublesome to Sellers if the Targets are closely held and have conducted their affairs informally. It is in those instances, however, that this representation is most important to Buyer.

6.6. Title to Properties; Encumbrances - Target

“§___ of the Disclosure Schedule lists all real property that any of the Target and its Subsidiaries owns. With respect to each such parcel of owned real property, and except for matters which would not have a material adverse effect on the financial condition of the Target and its Subsidiaries taken as a whole:

(i) the identified owner has good and marketable title to the parcel of real property, free and clear of any Security Interest, easement, covenant, or other restriction, except for installments of special assessments not yet delinquent, recorded easements, covenants, and other restrictions, and utility easements, building restrictions, zoning restrictions, and other easements and restrictions existing generally with respect to properties of a similar character;

(ii) there are no leases, subleases, licenses, concessions, or other agreements granting to any party or parties the right of use or occupancy of any portion of the parcel of real property; and

(iii) there are no outstanding options or rights of first refusal to purchase the parcel of real property, or any portion thereof or interest therein.

§___ of the Disclosure Schedule lists all real property leased or subleased to any of the Target and its Subsidiaries. The Sellers have delivered to the Buyer correct and complete copies of the leases and subleases listed in §___ of the Disclosure Schedule (as amended to date). To the Knowledge of any of the Sellers, each lease and sublease listed in §___ of the Disclosure Schedule is legal, valid, binding, enforceable, and in full force and effect, except where the illegality, invalidity, nonbinding nature, unenforceability, or ineffectiveness would not have a material adverse effect on the financial condition of the Target and its Subsidiaries taken as a whole.”

Comments: This representation is important only if the Target owns significant real property interests.

Sellers: Sellers should consider whether exceptions are necessary for existing use and other restrictions. The exceptions may be most appropriate in the Disclosure Schedule.

Buyer: In acquisitions involving very significant real property—or real property intended for development—Buyer should consider seeking a representation concerning the Target’s history of zoning and other land use disputes.

6.7. Condition and Sufficiency of Assets

“The Target and its Subsidiaries own or lease all buildings, machinery, equipment, and other tangible assets necessary for the conduct of their businesses as presently conducted [and as presently proposed to be conducted]. Each such tangible asset is free from defects (patent and latent), has been maintained in accordance with normal industry practice, is in good operating condition and repair (subject to normal wear and tear), and is suitable for the purposes for which it presently is used [and presently is proposed to be used].”

Comment: This representation seeks comfort about the condition and sufficiency of the Target’s tangible assets. The Seller may have a concern making a representation based on the way the business is proposed to be conducted since the Seller may not have any control over the future direction of the business.

6.8. No Undisclosed Liabilities

“None of the Target and its Subsidiaries has any Liability (and there is no Basis for any present or future action, suit, proceeding, hearing, investigation, charge, complaint, claim, or demand against any of them giving rise to any Liability), except for (i) Liabilities set forth on the face of the Most Recent Balance Sheet (rather than in any notes thereto) and (ii) Liabilities which have arisen after the Most Recent Fiscal Month End in the Ordinary Course of Business (none of which results from, arises out of, relates to, is in the nature of, or was caused by any breach of contract, breach of warranty, tort, infringement, or violation of law).”

Comment: This representation assures Buyer that it has been informed of all liabilities (including “contingent” liabilities) of the Target. Sellers may seek to add a knowledge qualification to this representation, arguing that they cannot be expected to identify every conceivable contingent liability to which the Target may be subject.

Sellers: Many Sellers feel risk allocation is a business issue, not a legal issue, and that the business deal negotiated by the parties contemplates that Buyer will take over the target company’s ongoing business “warts and all,” with Sellers responsible only for known problems that they failed to disclose. Sellers may seek to narrow the scope of this representation by limiting the types of liabilities that must be disclosed.

Buyer: Buyer will typically resist the addition of limitations on this representation, pointing out that the risk of unknown liabilities is more appropriately borne by Sellers (who presumably have considerable familiarity with the past and current operations of the Target) than by Buyer. Even if Buyer successfully resists Sellers’ attempts to narrow the scope of this representation, Buyer should not overestimate the protection that this representation provides. If Buyer seeks even broader protection against undisclosed contingencies, Buyer should consider proposing a definition of the term “liability” that expressly includes not only “contingent” liabilities, but also “unmatured,” “unaccrued,” “unliquidated,” “unasserted,” “conditional,” “secondary,” “potential,” and other similar categories of liabilities.

6.9. Taxes

“(i) Each of the Target and its Subsidiaries has filed all Income Tax Returns that it was required to file, and has paid all Income Taxes shown thereon as owing, except where the failure to file Income Tax Returns or to pay Income Taxes would not have a material adverse effect on the financial condition of the Target and its Subsidiaries taken as a whole.

“(ii) §___ of the Disclosure Schedule lists all Income Tax Returns filed with respect to any of the Target and its Subsidiaries for taxable periods ended on or after _____, 20___, indicates those Income Tax Returns that have been audited, and indicates those Income Tax Returns that currently are the subject of audit. The Sellers have delivered to the Buyer correct and complete copies of all federal Income Tax Returns, examination reports, and statements of deficiencies assessed against or agreed to by any of the Target and its Subsidiaries since _____, 20___.

“(iii) None of the Target and its Subsidiaries has waived any statute of limitations in respect of Income Taxes or agreed to any extension of time with respect to an Income Tax assessment or deficiency.

“(iv) None of the Target and its Subsidiaries is a party to any Income Tax allocation or sharing agreement.

“(v) [To the Knowledge of any of the Sellers, none of the Target and its Subsidiaries has been a member of an Affiliated Group filing a consolidated federal Income Tax Return (other than a group the common parent of which was the Target).]”

Comments: Buyer’s counsel, when drafting these representations, should carefully consider the corporate structure of the Target’s businesses. If the Target is included in a larger consolidated return, the representations should be revised to cover all taxes and tax returns of that group, and provisions elsewhere in the SPA should deal with matters such as responsibility for audit adjustments and for filing returns after the closing for periods prior to the closing for the group that includes the Target. Consider the definition of “taxes” to be sure that all taxes, interest, penalties and successor liability taxes are included within the scope of the definition.

6.10. No Material Adverse Change

“Since the Most Recent Fiscal Month End, there has not been any material adverse change in the financial condition of the Target and its Subsidiaries taken as a whole. Without limiting the generality of the foregoing, since that date none of the Target and its Subsidiaries has engaged in any practice, taken any action, or entered into any transaction outside the Ordinary Course of Business the primary purpose or effect of which has been to generate or preserve Cash.”

Comments: In light of the materiality qualification in this representation, Sellers would prefer to make this representation on behalf of all Targets as a whole. Buyer, however, will want to know if any Target has suffered serious recent setbacks so that it can judge the significance of such problems for the entire acquisition. Similarly, if significant lines or segments of a Target’s business are conducted in divisions (rather than subsidiaries), Buyer may request this representation for one or more of those divisions.

6.11. Compliance with Legal Requirements; Governmental Authorizations

“Each of the Target, its Subsidiaries, and their respective predecessors and Affiliates has complied with all applicable laws (including rules, regulations, codes, plans, injunctions, judgments, orders, decrees, rulings, and charges thereunder) of federal, state, local, and foreign governments (and all agencies thereof), and no action, suit, proceeding, hearing, investigation, charge, complaint, claim, demand, or notice has been filed or commenced against any of them alleging any failure so to comply.”

Comments: This section contains Sellers’ “compliance with all applicable laws” representation. This representation requires disclosure of past, current, and potential violations of laws and governmental regulations by the Target.

Sellers: Sellers may object to the disclosure of past violations, arguing that Buyer should not be concerned about historical violations that have been cured and are no longer pending.

Buyer: Buyer may respond by pointing out that it has a legitimate concern that the Target’s operations have not been based on and do not entail a pattern of legal violations.

6.12. Contracts; No Defaults

“§___ of the Disclosure Schedule lists all written contracts and other written agreements to which any of the Target and its Subsidiaries is a party the performance of which will involve consideration in excess of \$_____. The Sellers have delivered to the Buyer a correct and complete copy of each contract or other agreement listed in §___ of the Disclosure Schedule (as amended to date).”

Comments: This section requires Sellers to provide a complete list of the Target’s contracts that meet specified criteria and to advise Buyer of any pending, asserted, or potential default under these contracts. Representations concerning such contracts are especially important when contracts are a major asset of the Target. Buyer may choose to require Sellers to list only contracts that are “material” to the Target’s businesses, were incurred other than in the ordinary course of the businesses, or are void or subject to termination at the option of a third party upon a change in control.

6.13. Insurance

“§___ of the Disclosure Schedule sets forth the following information with respect to each insurance policy (including policies providing property, casualty, liability, and workers’ compensation coverage and bond and surety arrangements) to which any of the Target and its Subsidiaries has been a party, a named insured, or otherwise the beneficiary of coverage at any time within the past [10] years:

- (i) the name, address, and telephone number of the agent;*
- (ii) the name of the insurer, the name of the policyholder, and the name of each covered insured;*
- (iii) the policy number and the period of coverage;*

(iv) the scope (including an indication of whether the coverage was on a claims made, occurrence, or other basis) and amount (including a description of how deductibles and ceilings are calculated and operate) of coverage; and

(v) a description of any retroactive premium adjustments or other loss-sharing arrangements.

With respect to each such insurance policy: (A) the policy is legal, valid, binding, enforceable, and in full force and effect; (B) the policy will continue to be legal, valid, binding, enforceable, and in full force and effect on identical terms following the consummation of the transactions contemplated hereby; (C) neither any of the Target and its Subsidiaries nor any other party to the policy is in breach or default (including with respect to the payment of premiums or the giving of notices), and no event has occurred which, with notice or the lapse of time, would constitute such a breach or default, or permit termination, modification, or acceleration, under the policy; and (D) no party to the policy has repudiated any provision thereof. Each of the Target and its Subsidiaries has been covered during the past [10] years by insurance in scope and amount customary and reasonable for the businesses in which it has engaged during the aforementioned period. §___ of the Disclosure Schedule describes any self-insurance arrangements affecting any of the Target and its Subsidiaries.”

Comments: This representation seeks information and assurances regarding the adequacy of the Target's insurance coverage and their exposure to uninsured risks.

Buyer: Buyer should examine the present and prospective cost of the Target's insurance, the availability of continued coverage following the acquisition, and whatever insight that the loss runs or claims history may give on matters such as the Target's quality control and safety programs. Buyer may want to continue some or all of the Target's existing policies, especially for types of coverages that are difficult or expensive to obtain, such as product liability insurance. If so, Buyer should verify that the policies are issued to the Target. If Sellers, rather than the Target, are the owners of the policies, the assignment of such policies will require the written consent of the insurer. The Buyer will also want to determine whether the insurance is a claims made or occurrences based policy.

6.14. Environmental Matters

“(i) Each of the Target, its Subsidiaries, and their respective predecessors and Affiliates has complied with all Environmental, Health, and Safety Laws, and no action, suit, proceeding, hearing, investigation, charge, complaint, claim, demand, or notice has been filed or commenced against any of them alleging any failure so to comply. Without limiting the generality of the preceding sentence, each of the Target, its Subsidiaries, and their respective predecessors and Affiliates has obtained and been in compliance with all of the terms and conditions of all permits, licenses, and other authorizations which are required under, and has complied with all other limitations, restrictions, conditions, standards, prohibitions, requirements, obligations, schedules, and timetables which are contained in, all Environmental, Health, and Safety Laws.

(ii) None of the Target and its Subsidiaries has any Liability (and none of the Target, its Subsidiaries, and their respective predecessors and Affiliates has handled or disposed of any substance, arranged for the disposal of any substance, exposed any employee or other individual to any substance or condition, or owned or operated any property or facility in any manner that could form the Basis for any present or future action, suit, proceeding, hearing, investigation, charge, complaint, claim, or demand against any of the Target and its Subsidiaries giving rise to any Liability) for damage to any site, location, or body of water (surface or subsurface), for any

illness of or personal injury to any employee or other individual, or for any reason under any Environmental, Health, and Safety Law.

(iii) All properties and equipment used in the business of the Target, its Subsidiaries, and their respective predecessors and Affiliates have been free of asbestos, PCB's, methylene chloride, trichloroethylene, dioxins, and Extremely Hazardous Substances."

Comments: Specific representations concerning environmental issues help Buyer define or confirm the value of the property being acquired and, together with indemnification and other provisions, offer some protection against the potentially open-ended nature of these liabilities, some of which may not be obvious upon an inspection of the property.

Buyer: Buyer likely will have to make important determinations of nonapplicability of certain environmental laws. Statutes such as CERCLA and similar state statutes, which are the primary basis for environmental liability, impose strict and retroactive liability. Consequently, Buyer will not want to limit these representations to violations of the environmental laws, but will want to have Sellers represent that there are no past or present actions or conditions that could form the basis of an environmental claim against the Target or anyone for whose actions the Target may be liable.

6.15. Employees

"To the Knowledge of any of the Sellers and the directors and officers (and employees with responsibility for employment matters) of the Target and its Subsidiaries, no executive, key employee, or group of employees has any plans to terminate employment with any of the Target and its Subsidiaries. None of the Target and its Subsidiaries is a party to or bound by any collective bargaining agreement, nor has any of them experienced any strikes, grievances, claims of unfair labor practices, or other collective bargaining disputes. None of the Target and its Subsidiaries has committed any unfair labor practice. None of the Sellers and the directors and officers (and employees with responsibility for employment matters) of the Target and its Subsidiaries has any Knowledge of any organizational effort presently being made or threatened by or on behalf of any labor union with respect to employees of any of the Target and its Subsidiaries."

Comments: Generally, the employment relationship between an employee and employer is on an "at will" basis-that is, it can be terminated at any time by either party for any reason or for no reason. However, the nature and obligation of that relationship can change if the parties have entered into an employment contract for a fixed period of time. Buyer should also learn about the Target's employment agreements, benefit arrangements, and pension and insurance obligations.

6.16. Intellectual Property

"§___ of the Disclosure Schedule identifies each patent or registration which has been issued to any of the Target and its Subsidiaries with respect to any of its intellectual property, identifies each pending patent application or application for registration which any of the Target and its Subsidiaries has made with respect to any of its intellectual property, [and identifies each license, agreement, or other permission which any of the Target and its Subsidiaries has granted to any third party with respect to any of its intellectual property]."

Comments: Intellectual property assets include, but may not be limited to, patents; trademarks; copyrights; mask works; and trade secrets.

6.17. Brokers or Finders

“The Sellers have no Liability or obligation to pay any fees or commissions to any broker, finder, or agent with respect to the transactions contemplated by this Agreement for which the Buyer could become liable or obligated.”

Comments: If obligations for brokers' or finders' fees or agents' commissions have been incurred, the SPA should specify whether Sellers, Buyer, or a Target will bear the financial liability for these payments. If a Target will assume this obligation, the parties should carefully consider the tax ramifications (e.g., whether the payments would be deemed a constructive dividend).

7. REPRESENTATIONS AND WARRANTIES OF BUYER

In an acquisition in which the purchase price is paid at the closing in cash, Sellers are interested primarily in Buyer's due organization, the power of Buyer and the authority of Buyer's agents to execute a binding SPA, and Buyer's obligations to finders or brokers.

When promissory notes or stock in Buyer represent a substantial part of the purchase price, Sellers may want to learn as much about Buyer's financial condition as Buyer wants to know about the financial condition of the Target, and Sellers may ask for representations concerning the accuracy of Buyer's financial statements and the ranking of the notes in Buyer's debt hierarchy, especially if Buyer is newly organized or has a questionable future.

7.1. Organization and Good Standing

“The Buyer is a corporation duly organized, validly existing, and in good standing under the laws of the jurisdiction of its incorporation.”

Comments: This representation parallels that given by Sellers. This representation is relevant to Buyer's ability to enter into the SPA and complete the acquisition.

7.2. Authority; No Conflict

“The Buyer has full power and authority (including full corporate power and authority) to execute and deliver this Agreement and to perform its obligations hereunder. This Agreement constitutes the valid and legally binding obligation of the Buyer, enforceable in accordance with its terms and conditions. The Buyer need not give any notice to, make any filing with, or obtain any authorization, consent, or approval of any government or governmental agency in order to consummate the transactions contemplated by this Agreement.”

Neither the execution and the delivery of this Agreement, nor the consummation of the transactions contemplated hereby, will [(A)] violate any constitution, statute, regulation, rule, injunction, judgment, order, decree, ruling, charge, or other restriction of any government, governmental agency, or court to which the Buyer is subject or any provision of its charter or bylaws [or (B) conflict with, result in a breach of, constitute a default under, result in the acceleration of, create in any party the right to accelerate, terminate, modify, or cancel, or require any notice under any agreement, contract, lease, license, instrument, or other arrangement to which the Buyer is a party or by which it is bound or to which any of its assets is subject].”

Comments: This representation provides that Buyer has full authority to execute the SPA, and parallels the representation given by Sellers.

7.3. Investment Intent

“The Buyer is not acquiring the Target Shares with a view to or for sale in connection with any distribution thereof within the meaning of the Securities Act.”

Comments: The sale of shares in an acquisition such as that contemplated by the SPA is normally exempt from the registration requirements of the Securities Act which applies to a private sale between non-issuers and non-underwriters.

7.4. Brokers or Finders

“The Buyer has no liability or obligation to pay any fees or commissions to any broker, finder, or agent with respect to the transactions contemplated by this Agreement for which any Seller could become liable or obligated.”

Comments: This representation parallels the representation given by Sellers.

8. COVENANTS OF SELLERS PRIOR TO CLOSING DATE

8.1. Operation of the Businesses

“[The Sellers will not cause or permit any of the Target and its Subsidiaries to engage in any practice, take any action, or enter into any transaction outside the Ordinary Course of Business. Without limiting the generality of the foregoing,] the Sellers will not cause or permit any of the Target and its Subsidiaries to engage in any practice, take any action, or enter into any transaction outside the Ordinary Course of Business the primary purpose or effect of which will be to generate or preserve Cash.”

Comments: Under this section, Sellers may only operate the Target in the ordinary course of business. Sellers are prohibited from taking certain actions that could adversely affect the value of the Target or interfere with Buyer’s plans for Target’s businesses. If Buyer is uncomfortable with the leeway that the ordinary course of business restriction leaves Sellers, Buyer may want to provide a list of activities it considers to be outside of the ordinary course of business and perhaps set dollar limits on the Target’s right to take specific types of action without Buyer’s approval. Because many companies are not accustomed to operating under such restrictions, Sellers may have to implement new procedures to ensure that the restrictions will be honored.

8.2. Negative Covenant

“Except as otherwise expressly permitted by this Agreement, between the date of this Agreement and the Closing Date, Sellers will not, and will cause the Target not to, without the prior consent of Buyer, take any affirmative action, or fail to take any reasonable action within their or its control, as a result of which any of the changes or events listed in §___ of this Agreement.”

Comments: The preceding section requires Sellers to cause each Target to conduct its business between the signing of the SPA and the closing only in the ordinary course of business. This section eliminates any risk to Buyer that certain items specified in the SPA could be deemed to be within the ordinary course of business by expressly prohibiting the Target from taking such actions without Buyer’s prior consent. If a Hart-Scott-Rodino filing is required as part of the

transaction pay attention to what types of controls and involvement the parties may have prior to the closing.

8.3. Required Approvals

“As promptly as practicable after the date of this Agreement, Sellers will, and will cause each Target to, make all filings required by Legal Requirements to be made by them in order to consummate the Contemplated Transactions. Between the date of this Agreement and the Closing Date, Sellers will, and will cause each Target to, (a) cooperate with Buyer with respect to all filings that Buyer elects to make or is required by Legal Requirements to make in connection with the Contemplated Transactions, and (b) cooperate with Buyer in obtaining all consents identified in Schedule ___.”

Comment: This section requires Sellers to make all necessary filings as promptly as practicable and to cooperate with Buyer in obtaining the approvals required by Buyer from governmental bodies and private parties needed to complete the acquisition.

8.4. Notification

“Between the date of this Agreement and the Closing Date, each Seller will promptly notify Buyer in writing if such Seller or any Target becomes aware of any fact or condition that causes or constitutes a Breach of any of Sellers’ representations and warranties as of the date of this Agreement, or if such Seller or any Target becomes aware of the occurrence after the date of this Agreement of any fact or condition that would (except as expressly contemplated by this Agreement) cause or constitute a Breach of any such representation or warranty had such representation or warranty been made as of the time of occurrence or discovery of such fact or condition. Should any such fact or condition require any change in the Disclosure Schedule if the Disclosure Schedule were dated the date of the occurrence or discovery of any such fact or condition, Sellers will promptly deliver to Buyer a supplement to the Disclosure Statement specifying such change. During the same period, each Seller will promptly notify Buyer of the occurrence of any Breach of any covenant of Sellers in this §___ or of the occurrence of any event that may make the satisfaction of the condition in Section 7 impossible or unlikely.”

Comment: This section requires Sellers to notify Buyer if they discover that a representation made when they signed the SPA was inaccurate or that a representation will be inaccurate as if made on the closing date because of occurrences after the SPA was signed.

8.5. No Negotiation

“Until such time, if any, as this Agreement is terminated pursuant to §___, Sellers will not, and will cause each Target not to, directly or indirectly solicit, initiate, or encourage any inquires or proposals from, discuss or negotiate with, provide any non-public information to, or consider the merits of any unsolicited inquires or proposals from, any Person (other than Buyer) relating to any transaction involving the sale of the business pr assets (other than in the Ordinary Course of Business) of any Target, or any merger, consolidation, business combination, or similar transaction involving any Target.”

Comment: This section is commonly called a “no shop” provision.

9. TERMINATION

9.1. Termination Events

“Certain of the Parties may terminate this Agreement as provided below:

(i) the Buyer and the Requisite Sellers may terminate this Agreement by mutual written consent at any time prior to the Closing;

(ii) the Buyer may terminate this Agreement by giving written notice to the Requisite Sellers on or before the [30th] day following the date of this Agreement if the Buyer is not [reasonably] satisfied with the results of its continuing business, legal, and accounting due diligence regarding the Target and its Subsidiaries;

(iii) the Buyer may terminate this Agreement by giving written notice to the Requisite Sellers at any time prior to the Closing (A) in the event any of the Sellers has breached any material representation, warranty, or covenant contained in this Agreement in any material respect, the Buyer has notified the Requisite Sellers of the breach, and the breach has continued without cure for a period of [30 days] after the notice of breach or (B) if the Closing shall not have occurred on or before _____, 20__, by reason of the failure of any condition precedent under §__ hereof (unless the failure results primarily from the Buyer itself breaching any representation, warranty, or covenant contained in this Agreement); and

(iv) the Requisite Sellers may terminate this Agreement by giving written notice to the Buyer at any time prior to the Closing (A) in the event the Buyer has breached any material representation, warranty, or covenant contained in this Agreement in any material respect, any of the Sellers has notified the Buyer of the breach, and the breach has continued without cure for a period of [30 days] after the notice of breach or (B) if the Closing shall not have occurred on or before _____, 20__, by reason of the failure of any condition precedent under §__ hereof (unless the failure results primarily from any of the Sellers themselves breaching any representation, warranty, or covenant contained in this Agreement).

Comments: Under basic principles of contract law, one party has the right to terminate its obligations under an agreement in the event of a material breach by the other party or the nonfulfillment of a condition precedent to the terminating party's obligation to perform.

9.2. Effect of Termination

“If any Party terminates this Agreement pursuant to §__ above, all rights and obligations of the Parties hereunder shall terminate without any Liability of any Party to any other Party (except for any Liability of any Party then in breach).”

Comments: This section provides that if the SPA is terminated through no fault of the non-terminating party, neither party has any further obligations under the SPA.

10. INDEMNIFICATION; REMEDIES

10.1. Survival; Right to Indemnification Not Affected by Knowledge

"All representations, warranties, covenants, and obligations in this Agreement, the Disclosure Schedule, the supplements to this Disclosure Schedule, the certificate delivered pursuant to §___, and any other certificate or document delivered pursuant to this Agreement will survive the Closing. The right to indemnification, payment of Damages or other remedy based on such representations, warranties, covenants, and obligations will not be affected by any investigation conducted with respect to, or any Knowledge acquired (or capable of being acquired) at any time, whether before or after the execution and delivery of this Agreement or the Closing Date, with respect to the accuracy or inaccuracy of or compliance with, any such representation, warranty, covenant, or obligation. The waiver of any condition based on the accuracy of any representation or warranty, or on the performance of or compliance with any covenant or obligation, will not affect the right to indemnification, payment of Damages, or other remedy based on such representation, warranties, covenants, and obligations."

Comments: The representations made by Sellers in acquisitions of private companies are typically intended to provide a basis for post-closing liability if they prove inaccurate. In acquisitions of public companies without controlling stockholders, Sellers' representations typically terminate at the closing and thus serve principally as information gathering mechanisms, closing conditions, and a basis for liability if the closing does not occur. The indemnification provisions along with the representations and warranties tend to be among the most heavily negotiated parts of SPAs.

10.2. Indemnification and Payment of Damages by Sellers

"(i) In the event any of the Sellers breaches any of their representations, warranties, and covenants contained herein (other than the covenants in §___ above and the representations and warranties in §___ above), and, if there is an applicable survival period pursuant to §___ above, provided that the Buyer makes a written claim for indemnification against any of the Sellers pursuant to §___ below within such survival period, then each of the Sellers agrees to indemnify the Buyer from and against his or its Allocable Portion of any Adverse Consequences the Buyer shall suffer through and after the date of the claim for indemnification (but excluding any Adverse Consequences the Buyer shall suffer after the end of any applicable survival period) caused [proximately] by the breach; provided, however, that the Sellers shall not have any obligation to indemnify the Buyer from and against any Adverse Consequences caused by the breach of any representation or warranty of the Sellers contained in §___ above."

"(ii) In the event any of the Sellers breaches any of his or its covenants in §___ above or any of his or its representations and warranties in §___ above, and, if there is an applicable survival period pursuant to §___ above, provided that the Buyer makes a written claim for indemnification against the Sellers pursuant to §___ below within such survival period, then the Sellers agree to indemnify the Buyer from and against the entirety of any Adverse Consequences the Buyer shall suffer through and after the date of the claim for indemnification (but excluding any Adverse Consequences the Buyer shall suffer after the end of any applicable survival period) caused [proximately] by the breach."

Comments: Although the inaccuracy of a representation that survives the closing may give rise to a claim for damages for breach of the SPA without any express indemnification provision, it is customary in the acquisition of a privately held company for Buyer to be given a clearly specified right of indemnification for breaches of representations, covenants, and

obligations and for certain other liabilities. Indemnification provisions should be carefully tailored to the type and structure of the acquisition, the identity of the parties, and the specific business risks associated with the Target. In the absence of an explicit provision to the contrary, Buyer's remedies for inaccuracies in Sellers' representations may not be limited to those provided by the indemnification provisions. Buyer may also have causes of action based on breach of contract, fraud and misrepresentation, federal securities laws, and other federal and state statutory claims until the expiration of the applicable statute of limitations. Sellers therefore may want to add a clause providing that the indemnification provisions are the sole remedy for any claims relating to the sale of the shares. Liabilities arising under the federal securities laws cannot be waived by an exclusivity clause. Note the survival provision.

10.3. Indemnification and Payment of Damages by Buyer

"In the event the Buyer breaches any of its representations, warranties, and covenants contained herein, and, if there is an applicable survival period pursuant to §___ above, provided that any of the Sellers makes a written claim for indemnification against the Buyer pursuant to §___ below within such survival period, then the Buyer agrees to indemnify each of the Sellers from and against the entirety of any Adverse Consequences the Sellers shall suffer through and after the date of the claim for indemnification (but excluding any Adverse Consequences the Sellers shall suffer after the end of any applicable survival period) caused [proximately] by the breach."

Comments: In general, the indemnification by Buyer is similar to that of Sellers. The significance of Buyer's indemnity will depend to a large extent on the type of consideration being paid and, as a result, on the breadth of Buyer's representations, warranties and potential liability

10.4. Time Limitations

"If the Closing occurs, Sellers will have no liability (for indemnification or otherwise) with respect to any representation or warranty, or covenant or obligation to be performed and complied with prior to the Closing Date, other than those in §§___, ___, and ___, unless on or before _____ Buyer notifies Sellers of a claim specifying the factual basis of that claim in reasonable detail to the extent then known by Buyer; a claim with respect to §§___, ___, and ___, or a claim for indemnification or reimbursement not based upon any representation or warranty or any covenant or obligation to be performed and complied with prior to the Closing Date, may be made at any time. If the Closing occurs, Buyer will have no liability (for indemnification or otherwise) with respect to any representation or warranty, or covenant or obligation to be performed and complied with prior to the Closing Date, unless on or before _____ Sellers notify Buyer of a claim specifying the factual basis of that claim in reasonable detail to the extent then known by Sellers."

Comment: It is customary for an SPA to specify the time period within which a claim for indemnification must be made. Sellers will want short time periods and Buyers will want longer periods for the indemnity obligation to survive. Consider whether it makes sense to have different time periods for different representations and warranties.

10.5. Limitations on Amount—Sellers

"Sellers will have no liability (for indemnification or otherwise) with respect to the matters described in §___ until the total of all Damages with respect to such matters exceeds \$_____, and then only for the amount by which such Damages exceed \$_____. Sellers will have no liability (for indemnification or otherwise) with respect to the matters described in §___ until the

total of all Damages with respect to such matters exceeds \$_____, and then only to the amount by which such Damages exceed \$_____. However, this §___ will not apply to any Breach of any of Sellers' representations and warranties of which either Seller had Knowledge at any time prior to the date on which such representation and warranty is made or any intentional Breach by either Seller of any covenant or obligation, and Sellers will be jointly and severally liable for all Damages with respect to such Breaches."

Comments: This section provides Sellers with a safety net, or "basket," but does not establish a ceiling, or "cap." The basket is a minimum amount that must be exceeded before any indemnification is owed-in effect, it is a deductible. The purpose of the basket or "threshold" deductible is to recognize that representations concerning an ongoing business are unlikely to be perfectly accurate and to avoid disputes over insignificant amounts.

10.6. Limitations on Amount—Buyer

"Buyer will have no liability (for indemnification or otherwise) with respect to the matters described in §___ until the total of all Damages with respect to such matters exceeds \$_____, and then only for the amount by which such Damages exceed \$_____. However, this §___ will not apply to any Breach of any of Buyer's representations and warranties of which Buyer had Knowledge at any time prior to the date on which such representation and warranty is made or any intentional Breach by Buyer of any covenant or obligation, and Buyer will be liable for all Damages with respect to such Breaches."

Comment: In its first draft, Buyer often suggests a basket below which it is not required to respond in damages to breaches of its representations, typically the same dollar amount as that used for Sellers' basket. Is this important to the Buyer?

11. GENERAL PROVISIONS

11.1. Expenses

"Each of the Parties, the Target, and its Subsidiaries will bear his or its own costs and expenses (including legal fees and expenses) incurred in connection with this Agreement and the transactions contemplated hereby. The Sellers agree that none of the Target and its Subsidiaries has borne or will bear any of the Sellers' costs and expenses (including any of their legal fees and expenses) in connection with this Agreement or any of the transactions contemplated hereby."

Comment: Buyer and Sellers often agree that expenses will be paid by the party incurring the expense.

11.2. Public Announcements

"No Party shall issue any press release or make any public announcement relating to the subject matter of this Agreement [prior to the Closing] without the prior written approval of the Buyer and the Requisite Sellers; provided, however, that any Party may make any public disclosure it believes in good faith is required by applicable law or any listing or trading agreement concerning its publicly-traded securities (in which case the disclosing Party will use its [reasonable] best efforts to advise the other Parties prior to making the disclosure)."

Comments: Buyer may want to control the timing and content of public announcements. Sellers may suggest that control of public announcements be at least mutual. Buyer sometimes

will negotiate for the additional right to visit with key customers or suppliers to obtain business information or to gain assurances that their relationship with the Target will continue.

11.3. Confidentiality

“Each of the Sellers will treat and hold as such all of the Confidential Information, refrain from using any of the Confidential Information except in connection with this Agreement, and deliver promptly to the Buyer or destroy, at the request and option of the Buyer, all tangible embodiments (and all copies) of the Confidential Information which are in his or its possession. In the event that any of the Sellers is requested or required (by oral question or request for information or documents in any legal proceeding, interrogatory, subpoena, civil investigative demand, or similar process) to disclose any Confidential Information, that Sellers will notify the Buyer promptly of the request or requirement so that the Buyer may seek an appropriate protective order or waive compliance with the provisions of this §____. If, in the absence of a protective order or the receipt of a waiver hereunder, any of the Sellers is, on the advice of counsel, compelled to disclose any Confidential Information to any tribunal or else stand liable for contempt, that Sellers may disclose the Confidential Information to the tribunal; provided, however, that the disclosing Sellers shall use their [reasonable] best efforts to obtain, at the [reasonable] request of the Buyer, an order or other assurance that confidential treatment will be accorded to such portion of the Confidential Information required to be disclosed as the Buyer shall designate. The foregoing provisions shall not apply to any Confidential Information which is generally available to the public immediately prior to the time of disclosure.”

Comments: This section imposes certain confidentiality obligations on the parties. The parties should consider the scope of the information subject to the confidentiality covenant. In addition, Buyer should consider whether information furnished after the SPA is signed is subject to this confidentiality covenant. See Part VI, The Nuts and Bolts of Ancillary Documents dealing with Confidentiality.

11.4. Additional Sections

- (i) Section Headings, Construction;
- (ii) Notices;
- (iii) Specific Performance;
- (iv) Incorporation of Exhibits, Annexes, and Schedules;
- (v) Entire Agreement;
- (vi) Modification;
- (vii) Assignments, Successors, and No Third-Party Rights;
- (viii) Severability;
- (ix) Time of Essence;
- (x) Governing Law;
- (xi) Counterparts;
- (xii) Further Assurances; and
- (xiii) Jurisdiction; Service of Process, Mediation and Arbitration.

12. CLOSING COMMENTS

12.1. Advantages of an Asset Purchase Compared to a Stock Purchase

- (i) In an asset acquisition, Buyer is able to specify the liabilities it is willing to assume while leaving other liabilities behind. In a stock purchase, Buyer purchases stock in a company that may have unknown or uncertain liabilities. If it is important to a Buyer

that the Buyer avoid a liability of the target company, then the Buyer should structure the transaction as an asset purchase.

(ii) If the purchase price exceeds the aggregate tax basis of the assets being acquired, Buyer receives a stepped-up basis in the assets equal to the purchase price. The transaction may be structured as a stock purchase with a 338(h)(10) election to achieve the benefits of an asset purchase for tax purposes but a stock purchase for corporate purposes.

(iii) By purchasing assets rather than stock, Buyer avoids the problems presented by minority shareholders who refuse to sell their shares; however, a shareholder vote will be acquired and this problem may be avoidable in certain circumstances if the transaction is structured as a cash out/subsidiary merger.

(iv) Goodwill and non-compete payments can be amortized by Buyer for tax purposes over a period of years.

12.2. Disadvantages of an Asset Purchase Compared to a Stock Purchase

(i) It is necessary for the Target's assets to be transferred into the name of Buyer. This is not required in a stock transaction. If there are a large number of assets, this may be cumbersome (but necessary).

(ii) In a stock transaction the Buyer may be able to obtain the Target's nonassignable contracts, permits, and licenses without the consent of the other party to the contract, permit, or license. Third party consents may not be required in a stock transaction.

(iii) If the Target does not have a large number of shareholders, a stock transaction will normally be less complicated.

(iv) If all of the business is being acquired (including all of the liabilities), it is usually preferable to keep the business in a separate entity.

(v) In states that impose sales or transfer taxes on the sale of assets, a stock transaction can avoid some or all of these taxes that apply in the event of an asset transaction.