Asset Purchase Agreement (Pro-Seller Long Form)

by Practical Law Corporate & Securities
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Maintained • **USA (National/Federal)**

A long-form agreement for the purchase and sale of a division or line of business of a private US corporation, drafted in favor of the seller. It can be used by a seller when it has control of the initial draft (such as in an auction) or as a reference when reviewing a buyer's initial draft. This Standard Document assumes, among other things, a single corporate buyer and a single corporate seller. It also assumes that the signing and closing of the transaction are not simultaneous. This Standard Document has integrated notes with important explanations and drafting and negotiating tips.

Drafting Note: Read This Before Using Document

Asset purchase agreements vary in length and complexity depending on a variety of factors (such as the relationship between the parties, whether signing and closing are simultaneous or separate, the size of the deal, the assets being purchased and the liabilities being assumed). This asset purchase agreement is a long-form purchase agreement that includes **representations and warranties**, **covenants**, **conditions precedent**,

termination and **indemnification** provisions, but the scope of these provisions has been limited in favor of the seller. Although a seller generally prefers minimal representations and warranties, covenants and closing conditions and no indemnification provisions, it is often better (and is more typical) for the seller to present a buyer with a more reasonable draft (see Drafting Note, Other Considerations). The seller should determine if this asset purchase agreement is appropriate for the transaction.

Links and cross-references are provided to more detailed Practice Notes and Checklists where relevant.

Assumptions

This asset purchase agreement assumes that:

- **There is a single corporate buyer and a single corporate seller.** If there are additional buyers or sellers, adjustments must be made. For example, the buyers or sellers must determine whether their obligations are **joint**, **several** or **joint and several**, and amend the agreement accordingly (for an example of a provision for several and joint and several liability, see Standard Document, Boilerplate Clauses: Sections 24 and 25).

- **The acquisition is an arm's-length transaction.** Affiliated parties (such as a **parent company** and subsidiary) usually do not need comprehensive representations and warranties or broad indemnification rights. For an example of an agreement where a parent company transfers assets to a subsidiary, see Standard Document, Contribution Agreement.

- **The signing and closing are not simultaneous.** If signing and closing are simultaneous, the asset purchase agreement does not need sections containing pre-closing covenants (Article VI), conditions precedent (Article VII), or termination rights (Article IX).

- **The deal is large enough to warrant a long-form agreement.** If the size of the deal is relatively small, the parties may decide it is not worth the cost and time it would take to negotiate a long-form asset purchase agreement and can instead use either:
    - a short-form asset purchase agreement. For an example of a short-form purchase agreement, see Standard Document, Asset Purchase Agreement (Pro-Buyer Short Form); or
    - a bill of sale and assignment and assumption agreement. For an example of a bill of sale or an assignment and assumption agreement, see Standard Documents, Bill of Sale (Asset Acquisition) and Assignment and Assumption Agreement.

- **The acquisition involves the sale of a division or line of business of the seller.** If the acquisition involves the sale of all or substantially all of the seller's assets (rather than just a division or line of business), the seller and its stockholders should consider structuring the transaction as a stock acquisition (assuming there is no reason the transaction must be structured as an asset deal (such as regulations applicable to the target business or significant liability issues that cause the buyer to insist on an asset deal)). In asset acquisitions, the seller generally recognizes taxable income, gain or loss on the sale of its assets and its stockholders generally recognize taxable income, gain or loss on the distribution of any proceeds from the sale. This potentially results in double taxation (at the entity and stockholder level). This double taxation can be avoided by structuring the transaction as a

stock acquisition which only involves a single level of taxation (at the stockholder level). The relative inefficiency of two levels of taxation is somewhat reduced by the 21% corporate income tax rate that applies beginning in 2018. For more information on the tax consequences of asset acquisitions, see Practice Note, Asset Acquisitions: Tax Overview. For an example of a pro-seller stock purchase agreement, see Standard Document, Stock Purchase Agreement (Auction Form).

In addition, if the acquisition involves the sale of all or substantially all of the seller's assets (rather than just a division or line of business), the buyer will likely have greater concerns about the seller's ability to pay post-closing liabilities (such as indemnification obligations) because the seller will be a shell company after the closing (and typically liquidated). To pre-emptively address these concerns, the seller should consider either:

- adding its stockholders as parties to the agreement for purposes of paying the post-closing liabilities; or
- requiring its stockholders to enter into a separate indemnification or guaranty agreement.

If its stockholders are unwilling to be parties to the purchase agreement or a separate indemnification or guaranty agreement, the seller can consider offering to **escrow** a portion of the purchase price to ensure funds are available to cover post-closing liabilities.

If the acquisition involves the sale of only certain assets (such as specified items of equipment), the seller's representations can be limited to those regarding the condition of those specified assets and its authority and ability to sell them. For an example of an asset purchase agreement for the sale of certain assets, see Standard Document, Asset Purchase Agreement (Specified Assets) (although this document is drafted in favor of the buyer, the drafting notes contain negotiating tips for a seller which can be used to tailor the agreement).

- **Both the buyer and the seller are US corporations and the target business is located in the US.** If any of the parties is organized or operates in, or the target business is located in, a foreign jurisdiction, the asset purchase agreement may need to be modified to comply with applicable laws. The seller should consult local counsel in any non-US jurisdiction to revise this asset purchase agreement as appropriate. In some cases, this asset purchase agreement may not be relevant or applicable and the seller may need to start with a different form altogether.

- **The transaction requires filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act).** If HSR Act filings are not required for the transaction, references to the HSR Act and its required filings in Section 4.03, Section 5.03, Section 6.06 and Section 7.01 can be deleted. The government, however, can investigate a transaction even if it is not reportable under the HSR Act. As a result, the parties should include a closing condition that there not be any governmental order that makes the transaction illegal (for example, see Section 7.01(b)). For more information on the HSR Act, see Practice Note, Hart-Scott-Rodino Act: Overview.

- **The transaction does not involve a filing with the Committee on Foreign Investment in the United States (CFIUS).** If a CFIUS filing is required (or will be filed voluntarily), the parties should revise Section 6.06 and Section 7.01 to specifically address the CFIUS filing and approval (see Legal Update, FIRRMA Signed into Law, Expanding Scope of CFIUS Review; for an explanation of the final regulations issued in January 2020 by the US Department of Treasury on behalf of CFIUS implementing the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) and the filings that are mandatory and

voluntary under FIRRMA, see Legal Update, Skadden: CFIUS' Final Rules: Broader Reach, Narrow Exceptions and Foretelling Future Change).

- **The seller is not requesting the buyer use buyer-side representation and warranty insurance (R&W insurance).** Buyers sometimes obtain R&W insurance to shift some of the business risks of an acquisition to an insurer in exchange for paying the policy premium. Sellers sometimes propose this approach in auction deals. If the seller wants the buyer to obtain buyer-side R&W insurance, the seller should revise this purchase agreement accordingly. For information on R&W insurance, and examples of how to incorporate R&W insurance into a transaction, see Practice Notes, Representation and Warranty Insurance for M&A Transactions, and Incorporating Representation and Warranty Insurance into M&A Transactions, Standard Document, Stock Purchase Agreement (Representation & Warranty Insurance, Pro-Buyer) and Standard Clause, Purchase Agreement: Representation and Warranty Insurance Provisions.

Other assumptions related to specific sections of the asset purchase agreement are discussed in the relevant drafting notes, including the following:

- All assets necessary for the division or line of business are owned by the seller (see Drafting Note, Purchased Assets).
- No subsidiary stock is included in the assets being transferred (see Drafting Note, Purchased Assets).
- The consideration is in cash and there is no **purchase price adjustment** or escrow (see Drafting Note, Purchase Price).
- The buyer is not financing the transaction (see Drafting Note, Sufficiency of Funds).

Other Considerations

While buyer's counsel typically prepares the first draft of an asset purchase agreement, there may be circumstances (such as an auction) when seller's counsel prepares the first draft. Although the seller may be tempted to make the agreement one-sided, it may be better off presenting a more reasonable draft to the buyer. This reduces the time and expense it takes to get to the final version. In addition, the buyer is less likely to propose wholesale amendments if the initial draft is reasonable and appears to have considered at least some of the buyer's likely concerns. It is often better for the seller to address potential buyer concerns in its initial draft so that it can control the drafting and the scope of these provisions.

The drafting notes in this Standard Document identify:

- Areas where a seller may want to take a more aggressive position.
- Issues that a buyer may want to consider and raise during negotiations.

This asset purchase agreement is not industry-specific. Most of the representations and warranties, covenants, conditions precedent, and indemnification obligations are drafted to work for a broad range of companies. These

may need to be modified depending on the industry in which the target business operates. For example, if the target business is engaged in the utilities industry, the asset purchase agreement must be revised to account for applicable federal and state regulations (see Practice Note, What's Market: M&A Agreements in the Utilities Industry).

Appropriate specialists (such as tax, employee benefits, labor and employment, environmental, intellectual property, and real estate attorneys) should be consulted when preparing or reviewing an asset purchase agreement. Where appropriate, the seller should also consult with industry specialists to ensure relevant industry concerns and issues are adequately addressed.

COVID-19 Considerations

The outbreak of the 2019 novel coronavirus disease (COVID-19 outbreak) has had a significant impact on some target businesses and their M&A transactions. This Standard Document does not address any issues related to the COVID-19 outbreak, government mandates in response to the COVID-19 outbreak, or related changes in federal and state law and regulations. For information on key COVID-19 outbreak related issues to consider when entering into a private M&A transaction, including drafting and negotiating issues, see COVID-19 Issues in Private M&A Transactions Checklist.

Bracketed Language

Bracketed items in ALL CAPS should be completed with the facts of the transaction. Bracketed items in sentence case are either optional provisions or include alternative language choices to be selected, added, or deleted at the discretion of the drafting party.

END DRAFTING NOTE

ASSET PURCHASE AGREEMENT

[between/among]

[SELLER NAME]

and

[BUYER NAME]

dated as of

[Date]

ASSET PURCHASE AGREEMENT

This Asset Purchase Agreement (this "**Agreement**"), dated as of [DATE], is entered into between [SELLER NAME], a [STATE OF ORGANIZATION] corporation ("**Seller**") and [BUYER NAME], a [STATE OF ORGANIZATION] corporation ("**Buyer**").

Drafting Note: Who Should Be Party to the Agreement?

If the seller does not directly own any of the assets used in the acquired business (for example, an asset is actually owned by a subsidiary of the seller), the seller should include the owner of those assets as a party to the asset purchase agreement.

If a party wants the obligations of the other party to be guarantied by a third party, it may consider having that third party be a party to the asset purchase agreement rather than just relying on a guaranty. A party may want this because guaranties can be more difficult to enforce in certain circumstances.

For example, if a buyer is a new subsidiary set up solely to acquire the target business, a seller may want the buyer's parent company as a party to the agreement so that it is directly obligated to pay the purchase price and any deferred payments (such as purchase price adjustments) and indemnification obligations. Similarly, if the seller is a subsidiary, the buyer may require the seller's parent company to be a party so that it is directly obligated under the indemnification provisions of the asset purchase agreement.
END DRAFTING NOTE

RECITALS

WHEREAS, Seller is engaged through its [NAME] Division in the business of [DESCRIPTION OF TARGET BUSINESS] (the "**Business**"); and

WHEREAS, Seller wishes to sell and assign to Buyer, and Buyer wishes to purchase and assume from Seller, substantially all the assets and liabilities of the Business, subject to the terms and conditions set forth herein;

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

ARTICLE I

DEFINITIONS

Drafting Note: Definitions

Article I provides specific meanings to particular words used in the agreement to avoid ambiguity.

Some terms are defined in the body of the document; these are included in Article I with a cross-reference to the section where the term is defined.

After each round of revisions, review the definitions carefully to see if any terms have been added or deleted or if any cross-references have changed.

The terms used in the agreement should be consistent throughout the document. Where a capitalized term is used in the document, do not introduce it without capital letters later on or use a different word or phrase to mean the same thing.
END DRAFTING NOTE

The following terms have the meanings specified or referred to in this Article I:

"**Affiliate**" of a Person means any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such Person. The term "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise.

"**Agreement**" has the meaning set forth in the preamble.

"**Allocation Schedule**" has the meaning set forth in Section 2.06.

"**Assigned Contracts**" has the meaning set forth in Section 2.01(c).

"**Assignment and Assumption Agreement**" has the meaning set forth in Section 3.02(a)(ii).

"**Assignment and Assumption of Lease**" has the meaning set forth in Section 3.02(a)(iv).

"**Assumed Liabilities**" has the meaning set forth in Section 2.03.

"**Audited Financial Statements**" has the meaning set forth in Section 4.04.

"**Balance Sheet**" has the meaning set forth in Section 4.04.

"**Balance Sheet Date**" has the meaning set forth in Section 4.04.

"**Benefit Plan**" has the meaning set forth in Section 4.14(a).

"**Bill of Sale**" has the meaning set forth in Section 3.02(a)(i).

"**Books and Records**" has the meaning set forth in Section 2.01(j).

"**Business**" has the meaning set forth in the recitals.

"**Business Day**" means any day except Saturday, Sunday or any other day on which commercial banks located in [LOCATION] are authorized or required by Law to be closed for business.

"**Buyer**" has the meaning set forth in the preamble.

"**Buyer Benefit Plans**" has the meaning set forth in Section 6.04(c).

"**Buyer Closing Certificate**" has the meaning set forth in Section 7.03(d).

"**CERCLA**" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601 et seq.

"**Closing**" has the meaning set forth in Section 3.01.

"**Closing Date**" has the meaning set forth in Section 3.01.

"**Code**" means the Internal Revenue Code of 1986, as amended.

"**Confidentiality Agreement**" means the Confidentiality Agreement, dated as of [DATE], between Buyer and Seller.

Drafting Note: Definition: Confidentiality Agreement

The seller generally requires the buyer to enter into a confidentiality agreement before allowing the buyer to begin its due diligence review (for information on confidentiality agreements in asset purchases and other M&A transactions, see Practice Note, Confidentiality Agreements: Mergers and Acquisitions, Standard Document, Confidentiality Agreement: Mergers and Acquisitions and Confidentiality Agreements for M&A Transactions: A Checklist for Buyers and Sellers. If the parties have entered into a different agreement addressing confidentiality of information about the target business, they should use that agreement in place of the confidentiality agreement throughout the purchase agreement.
END DRAFTING NOTE

"**Contracts**" means all legally binding written contracts, leases, mortgages, licenses, instruments, notes, commitments, undertakings, indentures and other agreements.

Drafting Note: Definition: Contracts

The buyer may want to expand the definition to include oral contracts and agreements.
END DRAFTING NOTE

["**Data Room**" means the electronic documentation site established by [NAME OF VIRTUAL DATA ROOM PROVIDER] on behalf of Seller containing the documents set forth in the index included in Section [1.01(a)] of the Disclosure Schedules.]

Drafting Note: Definition: Data Room

Include this term if the seller has set up a data room to store due diligence materials. It can be used by the seller to qualify its representations and warranties with information contained in a data room (see Article IV and Drafting Note, Introduction to Representations). This term can also be used in the asset purchase agreement whenever the seller is required to deliver documents and information to the buyer.
END DRAFTING NOTE

"**Deed**" has the meaning set forth in Section 3.02(a)(iii).

"**Direct Claim**" has the meaning set forth in Section 8.05(c).

"**Disclosure Schedules**" means the Disclosure Schedules delivered by Seller and Buyer concurrently with the execution and delivery of this Agreement.

"**Dollars or $**" means the lawful currency of the United States.

"**Drop Dead Date**" has the meaning set forth in Section 9.01(b)(i).

"**Employees**" means those Persons employed by Seller who worked [exclusively/primarily] for the Business immediately prior to the Closing.

"**Encumbrance**" means any lien, pledge, mortgage, deed of trust, security interest, charge, claim, easement, encroachment or other similar encumbrance.

Drafting Note: Definition: Encumbrance

The buyer may want to expand the list to include other types of encumbrances and restrictions, such as options, rights of first refusal or offer and transfer, use or voting restrictions. For an example of a more comprehensive definition, see the definition of "Encumbrance" in Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Article I.

END DRAFTING NOTE

["**Environmental Attributes**" means any emissions and renewable energy credits, energy conservation credits, benefits, offsets and allowances, emission reduction credits or words of similar import or regulatory effect (including emissions reduction credits or allowances under all applicable emission trading, compliance or budget programs, or any other federal, state or regional emission, renewable energy or energy conservation trading or budget program) that have been held, allocated to or acquired for the development, construction, ownership, lease, operation, use or maintenance of the Business or the Purchased Assets or as of: (a) the date of this Agreement; and (b) future years for which allocations have been established and are in effect as of the date of this Agreement.]

Drafting Note: Definition: Environmental Attributes

Include this term if environmental attributes are specifically included as either purchased assets in Section 2.01 or excluded assets in Section 2.02. Although not yet market in all transactions, sellers should consider marketing environmental attributes, if any, as part of an asset sale, if the target business operates in the energy, utility, industrial or manufacturing sectors. In these sectors, the existence and allocation of environmental attributes can have a significant impact on how the target business and its operations are assessed and valued. Alternatively, to avoid any potential future controversy with the buyer, if environmental attributes exist and the seller does not intend to market them with the underlying asset(s), these environmental attributes should be specifically carved-out of the transaction as excluded assets.

END DRAFTING NOTE

"**Environmental Claim**" means any Governmental Order, action, suit, claim, investigation or other legal proceeding by any Person alleging liability of whatever kind or nature (including liability or responsibility for the costs of enforcement proceedings, investigations, cleanup, governmental response, removal or remediation, natural resources damages, property damages, personal injuries, medical monitoring, penalties, contribution, indemnification and injunctive relief) arising out of, based on or resulting from: (a) the presence, Release of, or exposure to, any Hazardous Materials; or (b) any actual or alleged non-compliance with any Environmental Law or term or condition of any Environmental Permit.

"**Environmental Law**" means any applicable Law, and any Governmental Order or binding agreement with any Governmental Authority: (a) relating to pollution (or the cleanup thereof) or the protection of natural resources, endangered or threatened species, human health or safety, or the environment (including ambient air, soil, surface water or groundwater, or subsurface strata); or (b) concerning the presence of, exposure to, or the management, manufacture, use, containment, storage, recycling, reclamation, reuse, treatment, generation, discharge, transportation, processing, production, disposal or remediation of any Hazardous Materials. The term "Environmental Law" includes, without limitation, the following (including their implementing regulations and any state analogs): the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601 et seq.; the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. §§ 6901 et seq.; the Federal Water Pollution Control Act of 1972, as amended by the Clean Water Act of 1977, 33 U.S.C. §§ 1251 et seq.; the Toxic Substances Control Act of 1976, as amended, 15 U.S.C. §§ 2601 et seq.; the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001 et seq.; the Clean Air Act of 1966, as amended by the Clean Air Act Amendments of 1990, 42 U.S.C. §§ 7401 et seq.; and the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. §§ 651 et seq.

"**Environmental Notice**" means any written directive, notice of violation or infraction, or notice respecting any Environmental Claim relating to actual or alleged non-compliance with any Environmental Law or any term or condition of any Environmental Permit.

"**Environmental Permit**" means any Permit, letter, clearance, consent, waiver, closure, exemption, decision or other action required under or issued, granted, given, authorized by or made pursuant to Environmental Law.

"**ERISA**" means the Employee Retirement Income Security Act of 1974, as amended, and the regulations promulgated thereunder.

"**Excluded Assets**" has the meaning set forth in Section 2.02.

"**Excluded Liabilities**" has the meaning set forth in Section 2.04.

"**Financial Statements**" has the meaning set forth in Section 4.04.

"**FIRPTA Certificate**" has the meaning set forth in Section 7.02(g).

["**Fraud**" means, with respect to a party, an actual and intentional misrepresentation of a material existing fact with respect to the making of any representation or warranty in Article III or Article IV, made by such party, (a) with respect to Seller, to Seller's Knowledge or (b) with respect to Buyer, to Buyer's actual knowledge, of its falsity and made for the purpose of inducing the other party to act, and upon which the other party justifiably relies with resulting Losses.]

Drafting Note: Definition: Fraud

Include this term if the optional carve-out to the exclusive remedies provision is included in Section 8.07.

Seller

The seller prefers to narrowly define fraud. This definition is advantageous to the seller because it is limited to:

- Intentional and material misrepresentations.
- Article III representations, and not representations outside of Article III.
- Misrepresentations made with actual knowledge of a defined set of persons (see definition of Knowledge).
- Misrepresentations the buyer justifiably relies on.
- Misrepresentations resulting in actual out-of-pocket losses (see definition of Losses).
- Misrepresentations made with the intent to induce the buyer to act.

For a discussion regarding the concerns for undefined fraud, see Drafting Note, Exclusive Remedies.

Buyer

The buyer usually prefers to have fraud undefined because undefined fraud is broad. Undefined fraud can include several types of fraud, such as:

- Intentional fraud.
- Constructive fraud.
- Promissory fraud.
- Equitable fraud.

Sellers are increasingly trying to define fraud and exclude any types of fraud that are not intentional fraud. If fraud is defined, the buyer should try to expand the definition by:

- Using undefined knowledge.
- Deleting the reference to Article III.

The buyer could also try to simply refer to "intentional fraud."
END DRAFTING NOTE

"**GAAP**" means United States generally accepted accounting principles in effect from time to time.

"**Governmental Authority**" means any federal, state, local or foreign government or political subdivision thereof, or any agency or instrumentality of such government or political subdivision, or any self-regulated organization or other non-governmental regulatory authority or quasi-governmental authority (to the extent that the rules, regulations or orders of such organization or authority have the force of Law), or any arbitrator, court or tribunal of competent jurisdiction.

Drafting Note: Definition: Governmental Authority

While this is a relatively reasonable definition of "Governmental Authority," the seller may want to narrow it further by deleting references to self-regulated organizations or other non-governmental regulatory authorities or quasi-governmental authorities. If the seller narrows the definition in this manner, the buyer will most likely try to add them back.

END DRAFTING NOTE

"**Governmental Order**" means any order, writ, judgment, injunction, decree, stipulation, determination or award entered by or with any Governmental Authority.

"**Hazardous Materials**" means: (a) any material, substance, chemical, waste, product, derivative, compound, mixture, solid, liquid, mineral or gas, in each case, whether naturally occurring or man-made, that is hazardous, acutely hazardous, toxic, or words of similar import or regulatory effect under Environmental Laws; and (b) any petroleum or petroleum-derived products, radon, radioactive materials or wastes, asbestos in any form, lead or lead-containing materials, urea formaldehyde foam insulation and polychlorinated biphenyls.

"**HSR Act**" means the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.

"**Indemnified Party**" has the meaning set forth in Section 8.05.

"**Indemnifying Party**" has the meaning set forth in Section 8.05.

"**Intellectual Property**" means any and all of the following arising pursuant to the Laws of any jurisdiction throughout the world: (a) trademarks, service marks, trade names, and similar indicia of source of origin, all registrations and applications for registration thereof, and the goodwill connected with the use of and symbolized by the foregoing; (b) copyrights and all registrations and applications for registration thereof; (c) trade secrets and know-how; (d) patents and patent applications; (e) internet domain name registrations; and (f) other intellectual property and related proprietary rights.

Drafting Note: Definition: Intellectual Property

This definition refers generally to all IP and related rights arising under US and foreign law and specifically to all of the common forms of IP that arise under US law. It covers both registered and unregistered IP. For an overview of the various types of IP rights arising under US law, see Practice Note, Intellectual Property: Overview.

IP is defined without referring to the seller or any other owner of the IP, so that the term can be used to refer to different categories of IP of the target business or third parties as the provisions require, including as part of the definition of Intellectual Property Assets (see Drafting Note, Definition: Intellectual Property Assets).

Seller

It is typically reasonable for the seller to include a basic IP definition that captures all forms of IP and related rights, and rely on exceptions and qualifiers to limit the scope of the representations and warranties.

The seller sometimes may seek to limit the jurisdictional scope of the definition to include only those nations (and multinational jurisdictions, such as the European Union) in which the target business operates or in which the seller actually owns any IP to be transferred. However, this position is usually not acceptable to the buyer unless the boundaries of the target business or transferred IP, including any plans for expansion, are well-defined.

Buyer

If the purchased IP is modest or presents few concerns, the buyer may find a short IP definition like this one acceptable.

However, if the agreement includes more complex IP representations and warranties, the buyer may want to include a comprehensive definition with detailed descriptions of each category of IP and related rights (for example, see the definition of "Intellectual Property" in Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Article I).

In either case, the buyer should seek a broad definition covering all categories of IP and jurisdictions, even where the purchased IP may not include certain types of IP (such as patents), so that the representations and warranties are not unintentionally narrowed. For example, limitations in the scope of the IP definition may limit the seller's non-infringement representations (see Section 4.10(b)). The buyer also typically prefers a definition with worldwide scope to ensure that:

- The target business's operations are not subject to IP-related territorial constraints.
- The seller's non-infringement representations are not limited to specific jurisdictions.

Depending on the nature of the target business, the buyer may seek to expand the IP definition to cover social media accounts, including Facebook and Twitter and all related content. The buyer can include these in the definition next to the references to domain name registrations.

IP-related proceeds and claims and causes of action will not automatically transfer along with the corresponding purchased IP to the buyer. Instead, they must be expressly assigned. If the buyer wants to ensure these get transferred, it must ensure that either the IP definition or the definition of the purchased assets in Section 2.01 specifically includes all IP-related proceeds and claims and causes of actions to be transferred, whether accruing before or after the transaction. The failure to include them properly as part of the assignment of the purchased assets may prevent the buyer from being

able to fully exploit the purchased IP. To ensure IP-related proceeds and claims and causes of action are included, the buyer could add the following to this definition of IP or to the general definition of Purchased Assets in Section 2.01:

"the right to all past and future income, royalties, damages and payments due with respect to the foregoing, including rights to damages and payments for past, present or future infringements or misappropriations thereof"

In this purchase agreement, all rights to actions, suits or claims by the seller are specifically excluded from the purchased assets (see Section 2.02(h)). If the buyer adds the language to include IP-related proceeds and claims and causes of actions in the definition of IP or purchased assets, it needs to carve any IP-related claims and causes of action being transferred to the buyer out of the excluded assets.
END DRAFTING NOTE

"**Intellectual Property Agreements**" means all licenses, sublicenses and other agreements by or through which other Persons grant Seller or Seller grants any other Persons any exclusive or non-exclusive rights or interests in or to any Intellectual Property that is used [exclusively/primarily] in the Business.

"**Intellectual Property Assets**" means all Intellectual Property that is owned by Seller and [exclusively/primarily] used in connection with the Business, including the Intellectual Property Registrations set forth on Section 4.10(a) of the Disclosure Schedules.

Drafting Note: Definition: Intellectual Property Assets

The definition of IP assets is defined to include any IP owned by the seller that is used exclusively or primarily in the target business. However, because it may be difficult to identify and schedule unregistered IP, such as know-how or trade secrets, the provision refers only to the related schedule of applicable IP registrations. It is also appropriate to include a schedule of registrations because they are typically covered by separate IP assignment agreements (see Drafting Note, Intellectual Property Assignments).

The definition of IP assets does not include IP agreements. IP agreements are included in assigned contracts in Section 2.01(c).

Buyer

If any unregistered IP, such as software, is material to the target business, the buyer may wish to have that IP scheduled to ensure that it is included in the purchased assets.

END DRAFTING NOTE

"**Intellectual Property Registrations**" means all Intellectual Property Assets that are subject to any issuance, registration, application or other filing by, to or with any Governmental Authority or authorized private registrar in any jurisdiction, including registered trademarks, domain names, and copyrights, issued and reissued patents and pending applications for any of the foregoing.

"**Interim Balance Sheet**" has the meaning set forth in Section 4.04.

"**Interim Balance Sheet Date**" has the meaning set forth in Section 4.04.

"**Interim Financial Statements**" has the meaning set forth in Section 4.04.

"**Inventory**" has the meaning set forth in Section 2.01(b).

"**Knowledge of Seller or Seller's Knowledge**" or any other similar knowledge qualification, means the actual knowledge of those persons listed on Section [1.01(b)] of the Disclosure Schedules.

Drafting Note: Definition: Knowledge of Seller or Seller's Knowledge

Seller

Sellers commonly seek to provide that many representations and warranties are not absolute, but are only given "to the knowledge of seller," which shifts the risk of unknown matters to the buyer. To maximize the limiting effect of this qualifier, the seller should define "seller's knowledge" as narrowly as possible. This definition limits seller's knowledge to the actual knowledge of certain specified individuals, without any requirement for the seller to make inquiries. The seller should try to limit the individuals on the list to those individuals involved in the negotiation of the purchase agreement to minimize the number of people who would need to review and comment on the accuracy of the representations and warranties in the asset purchase agreement.

Buyer

The buyer should try to expand the definition of "seller's knowledge" because it is used to qualify certain representations and warranties of the seller. It can try to broaden the definition by:

- Including constructive knowledge.
- Requiring due inquiry (or at a minimum, reasonable inquiry) about whether a representation or warranty is true. In some cases, the buyer may want to be more specific about what is considered due inquiry (or whichever standard is used). For example, the definition could require "due inquiry" to include the inquiry of a director's or officer's direct reports or target employees having responsibility relating to the relevant matter.
- Replacing the list of specific individuals with a broad category, such as "the directors and officers of Seller." If the buyer cannot replace the list, it should ensure the list includes persons with the knowledge necessary to give the representations and warranties in Article IV (for example, the list should contain individuals with knowledge of and responsibility for company-wide business, financial, and legal matters, and important technology and intellectual property used in the target business).

For example, the buyer can try to revise the definition as follows:

"'Knowledge of Seller or Seller's Knowledge' means the actual or constructive knowledge of any director or officer of Seller, after due inquiry."
END DRAFTING NOTE

"**Law**" means any statute, law, ordinance, regulation, rule, code, order, constitution, treaty, common law, judgment, decree, other requirement or rule of law of any Governmental Authority.

"**Leased Real Property**" has the meaning set forth in Section 4.09(b).

"**Leases**" has the meaning set forth in Section 4.09(b).

"**Losses**" means actual out-of-pocket losses, damages, liabilities, costs or expenses, including reasonable attorneys' fees.

Drafting Note: Definition: Losses

The term "Losses" is used in:

- The definition of Fraud the in this Article I.
- The indemnification provisions in Article VIII.

Seller

The seller wants the definition to be as narrow as possible to minimize its indemnification obligations. The definition used in this asset purchase agreement is narrow because it only includes actual out-of-pocket losses. As an alternative, instead of using the phrase "actual out-of-pocket," the seller can limit the definition by expressly excluding punitive, incidental, consequential, special or indirect damages (including loss of revenue, diminution in value and any damages based on any type of multiple) from the definition.

If the seller wants to take a more moderate approach, it can remain silent on the issue by not including the phrase "actual out-of-pocket" or the express exclusions of certain types of damages (although this may lead to more disputes and subject the seller to how a court interprets the scope of this term). However, if it uses the more moderate approach, the seller should resist any express inclusion of punitive, incidental, consequential, special or indirect damages.

Buyer

The buyer should try to expand the type of losses included in this definition. How much it tries to expand it depends on how much negotiating leverage it thinks it has. At the very least, the buyer should try to delete the phrase "actual out-of-pocket" from the definition and add to the list of various types of losses. For example, it can try to revise the definition to read:

""Losses" means losses, damages, liabilities, claims, Taxes, liens, deficiencies, judgments, interest, awards, penalties, fines, costs or expenses of whatever kind, including reasonable attorneys' fees and the cost of enforcing any right to indemnification hereunder."

If the buyer wants to be more aggressive, it can try to include punitive, incidental, consequential, special or indirect damages (including loss of revenue, diminution in value and any damages based on any type of multiple) in the definition. If it can add these types of damages to this definition, it should either delete Section 8.04(e) or revise it to allow these types of damages.
END DRAFTING NOTE

"**Material Adverse Effect**" means any event, occurrence, fact, condition or change that is materially adverse to (a) the business, results of operations, financial condition or assets of the Business, taken as a whole, or (b) the ability of Seller to consummate the transactions contemplated hereby[; *provided, however,* that "Material Adverse Effect" shall not include any event, occurrence, fact, condition or change, directly or indirectly, arising out of or attributable to: (i) general economic or political conditions; (ii) conditions generally affecting the industries in which the Business operates; (iii) any changes in financial, banking or securities markets in general, including any disruption thereof and any decline in the price of any security or any market index or any change in prevailing interest rates; (iv) acts of war (whether or not declared), armed hostilities or terrorism, or the escalation or worsening thereof; (v) any action required or permitted by this Agreement or any action taken (or omitted to be taken) with the written consent of or at the written request of Buyer; (vi) any matter of which Buyer is aware on the date hereof; (vii) any changes in applicable Laws or accounting rules (including GAAP) [or the enforcement, implementation or interpretation thereof]; (viii) the announcement, pendency or completion of the transactions contemplated by this Agreement, including losses or threatened losses of employees, customers, suppliers, distributors or others having relationships with the Seller and the Business; (ix) any natural or man-made disaster or acts of God; [or] (x) [any epidemics, pandemics, disease outbreaks, or other public health emergencies; or (xi)] any failure by the Business to meet any internal or published projections, forecasts or revenue or earnings predictions (provided that the underlying causes of such failures (subject to the other provisions of this definition) shall not be excluded).

Drafting Note: Definition: Material Adverse Effect

Also referred to as an MAE. The term **Material Adverse Change** (MAC) is used in some cases. These terms are used as a materiality threshold to measure the negative effect of certain events on the seller or the target business. They can be used to qualify the seller's representations or warranties or as a condition to closing, either through a:

- Bring down (a condition that requires the representations and warranties to be true and correct as of the closing date) of the representation that no MAE has occurred since the balance sheet date.
- Specific MAE closing condition allowing the buyer to terminate the deal if the seller suffers an event that causes an MAE on the target business.

For more information on MAE or MAC provisions, see Practice Note, Material Adverse Change Provisions: Mergers and Acquisitions.

Seller

Carve-Outs

This MAE definition is drafted narrowly. The seller can try to further limit the scope of this definition by adding additional carve-outs, such as any effects:

- That are eventually cured by the seller.
- Resulting from the identity of the buyer.
- Resulting from seasonal changes in the target business.
- Resulting from any increase in competition in any market in which the target business operates.

Disproportionate Effects

The seller generally prefers to reject attempts by the buyer to exclude any events or changes that have a disproportionate effect on the target business from some of the carve-outs. However, this is a relatively common exception and the seller may need to agree to it to get all the carve-outs it wants. Alternatively, the seller may request to limit the disproportionate effects exception to the MAE carve-outs by providing that to the extent any events or changes have a disproportionate effect on the target business, only the incremental disproportionate impact will be considered in determining whether an MAE has occurred. For example, it can add the following to the end of a disproportionate effects exception proposed by the buyer:

"[(in which case, only the incremental disproportionate adverse effect may be taken into account in determining whether a Material Adverse Effect has occurred)]"

It is common for the disproportionate effects language to measure the effects against the target business versus participants in the industries in which the target business operates (like the language contained in the definition above). The parties may also further negotiate the comparison group for the disproportionate effects exception to the MAE carve-outs (for example, by limiting it to a specified business type, geographic area, or companies that are of a similar size or similarly situated). The seller's preference is to narrowly define the disproportionate effects carve-out to include as narrow a comparison group as possible; conversely a buyer's preference is to define the comparison group broadly.

Similarly Situated Companies Qualifier to Disproportionate Effects Carve-Out

A recent Delaware Court of Chancery case demonstrates the importance for sellers of defining the disproportionate effects carve-out narrowly (and the danger for a buyer in agreeing to a "similarly situated" companies' qualifier, particularly as it relates to changes in law or regulations). In *Bardy Diagnostics Inc. v. Hill-Rom, Inc.* the court found that notwithstanding an 86% reduction in Medicare reimbursement rates that adversely affected the price for the target company's sole product, no MAE had occurred because the change in law MAE carve-out contained a disproportionate effects qualifier for "similarly situated" companies operating in the same industries. Under these circumstances, the court held that the comparison group included only one other company that had been similarly affected by the reduction in Medicare reimbursement rates, and therefore the target company had

not experienced an MAE. In arriving at this conclusion that the similarly situated companies' qualifier required a "more granular parsing of a company's situation than mere participation in the market," the court specifically noted that other litigated cases had involved broader language that compared the target company to companies operating in the same industries without the similarly situated companies' qualifier. (2021 WL 2886188, at *35-36 (Del. Ch. July 9, 2021).)

Long-Term Effects

Although courts generally require an MAE to affect the target business for a "commercially reasonable period," the seller may want to expressly state that an MAE only includes events that are expected to have long-term effects to ensure short-term changes are not considered an MAE.

Buyer

The buyer should try to broaden the definition of "Material Adverse Effect" for the target business by:

- Adding the phrase "individually or in the aggregate" after "...any event, occurrence, fact, condition or change that is..."
- Including events that "could reasonably be expected to have" a material adverse effect.
- Replacing "financial condition" with "condition (financial or otherwise)."
- Including materially adverse effects on the value of the purchased assets.
- Deleting some of the carve-outs (although some of the carve-outs included in the definition are relatively common).
- Adding exceptions for any events or changes that have a disproportionate effect on the target business, particularly for changes in laws or accounting rules, changes in industry conditions, war or terrorism and changes in economies or securities or financial markets.

For a buyer-friendly definition of "Material Adverse Effect," see Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form).

As evidenced in MAC-related cases such as *Hexion Specialty Chemicals v. Huntsman Corporation*, it is difficult for buyers to prove that an MAE has occurred (965 A.2d 715 (Del. Ch. 2008)). In fact, until the recent Delaware Court of Chancery's decision in *Akorn, Inc. v. Fresenius Kabi AG*, no Delaware court had ever previously found that an MAE had occurred (2018 WL 4719347 (Del. Ch. Oct. 1, 2018), *aff'd* 2018 WL 6427137 (2018)). That *Akorn* did not signal a change in the difficulty of proving an MAE is evidenced by the Delaware Court of Chancery's subsequent decision in *Channel Medsystems, Inc. v. Boston Scientific Corp.*, where the court found that the buyer had failed to prove an MAE notwithstanding the post-signing discovery of fraud and the target company's falsification of reports submitted to the FDA for the approval of its sole product (2019 WL 6896462 (Del. Ch. Dec. 18, 2019)). For further information on *Akorn*, see Legal Updates, Akorn v. Fresenius Kabi: Delaware Court

of Chancery Finds Target Company Suffered MAC Allowing Buyer to Terminate Merger Agreement and Legal Update, Delaware Supreme Court Affirms Chancery Court Decision in "Akorn," Allowing Termination of Merger Agreement Based on MAC.

If the buyer can afford to be more aggressive with its comments, it can improve its chances of proving an MAE occurred by setting out specific, objective tests for what constitutes an MAE. For example, if the buyer believes that the loss of a key customer or negative results from a clinical trial for a drug in development would constitute an MAE, it should explicitly state that in the definition. However, it can be difficult to convince the seller to deviate from the standard MAE definition. It may be easier for the buyer to include these objective tests as a separate closing condition in Section 7.02 or as a termination right in Section 9.01 (see Drafting Note, Conditions to Obligations of Buyer and Drafting Note, Termination).

Hexion and *Akorn* also confirmed that an MAE must be expected to affect the target company on a long-term basis. The buyer can try to override this requirement by expressly stating that an MAE can be an event that is materially adverse on a short-term basis.

From a timing perspective, the *Channel Medsystems* court noted in dicta that an acquisition agreement that may be terminated by the buyer if an MAE may "reasonably be expected" requires the buyer to prove that as of the termination date of the agreement, the facts and circumstances that led the buyer to terminate the agreement would reasonably be expected to have an MAE on the target company around the time the parties expected the transaction to close (2019 WL 6896462, at *28 (Del. Ch. Dec. 18, 2019)).

END DRAFTING NOTE

"**Material Contracts**" has the meaning set forth in Section 4.06(a).

"**Owned Real Property**" has the meaning set forth in Section 4.09(a).

"**Permits**" means all permits, licenses, franchises, approvals, authorizations and consents required to be obtained from Governmental Authorities.

"**Permitted Encumbrances**" means (a) liens for Taxes not yet due and payable or being contested in good faith by appropriate procedures; (b) mechanics', carriers', workmen's, repairmen's or other like liens arising or incurred in the ordinary course of business; (c) easements, rights of way, zoning ordinances and other similar encumbrances affecting Real Property; (d) other than with respect to Owned Real Property, liens arising under original purchase price conditional sales contracts and equipment leases with third parties entered into in the ordinary course of business; and (e) other imperfections of title or Encumbrances, if any, that have not had, and would not have, a Material Adverse Effect.

Drafting Note: Definition: Permitted Encumbrances

Buyer

The buyer should try to narrow the definition of "Permitted Encumbrances" by:

- Deleting liens for taxes being contested in subsection (a).
- Adding the phrase "which are not, individually or in the aggregate, material to the Business" to subsections (b), (c) and (d).
- Deleting subsection (e).

In addition, the buyer may want to further narrow the permitted encumbrance in subsection (c) by adding the following phrase:

"which do not prohibit or interfere with the current operation of any Real Property and which do not render title to any Real Property unmarketable"

END DRAFTING NOTE

"**Person**" means an individual, corporation, partnership, joint venture, limited liability company, Governmental Authority, unincorporated organization, trust, association or other entity.

"**Purchase Price**" has the meaning set forth in Section 2.05.

"**Purchased Assets**" has the meaning set forth in Section 2.01.

"**Qualified Benefit Plan**" has the meaning set forth in Section 4.14(b).

"**Real Property**" means, collectively, the Owned Real Property and the Leased Real Property.

"**Release**" means any actual or threatened release, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, abandonment, disposing or allowing to escape or migrate into or through the environment (including, without limitation, ambient air (indoor or outdoor), surface water, groundwater, land surface or subsurface strata or within any building, structure, facility or fixture).

"**Representative**" means, with respect to any Person, any and all directors, officers, employees, consultants, financial advisors, counsel, accountants and other agents of such Person.

"**Seller**" has the meaning set forth in the preamble.

"**Seller Closing Certificate**" has the meaning set forth in Section 7.02(d).

"**Tangible Personal Property**" has the meaning set forth in Section 2.01(e).

"**Taxes**" means all federal, state, local, foreign and other income, gross receipts, sales, use, production, ad valorem, transfer, franchise, registration, profits, license, lease, service, service use, withholding, payroll, employment, unemployment, estimated, excise, severance, environmental, stamp, occupation, premium, property (real or personal), real property gains, windfall profits, customs, duties or other taxes, fees, assessments or charges of any kind whatsoever, together with any interest, additions or penalties with respect thereto and any interest in respect of such additions or penalties.

"**Tax Return**" means any return, declaration, report, claim for refund, information return or statement or other document required to be filed with respect to Taxes, including any schedule or attachment thereto, and including any amendment thereof.

"**Third-Party Claim**" has the meaning set forth in Section 8.05(a).

"**Transaction Documents**" means this Agreement, the Bill of Sale, the Assignment and Assumption Agreement, Deeds, Assignment and Assumption of Leases, [LIST OTHER TRANSACTION DOCUMENTS] and the other agreements, instruments and documents required to be delivered at the Closing.

Drafting Note: Definition: Transaction Documents

This term should include the asset purchase agreement and all of the documents required for the transaction. These documents are usually listed in the closing deliverables sections (see Section 3.02). If there are any documents executed before or at the same time as the asset purchase agreement, those documents should also be included in this definition.
END DRAFTING NOTE

"**Transferred Employee**" has the meaning set forth in Section 6.04(a).

"**WARN Act**" means the federal Worker Adjustment and Retraining Notification Act of 1988, and similar state, local and foreign laws related to plant closings, relocations, mass layoffs and employment losses.

ARTICLE II

PURCHASE AND SALE

Drafting Note: Purchased Assets

The definition of purchased assets included in Section 2.01 is illustrative. The type of assets included in this definition varies from deal to deal, depending on:

- The nature of the target business.
- The assets required to operate the target business.
- The assets the seller wants to retain.

For example, the stock of subsidiaries is not included in the purchased assets in this Section 2.01, but if a portion of the target business is conducted through the seller's subsidiaries (and all the assets of these subsidiaries are used in the target business), the seller should add the stock of the subsidiaries to the definition of purchased assets (or add the subsidiaries as a party to the agreement). Also, this Section 2.01 does not include cash in the purchased assets, but there may be circumstances when it is easier for the seller to leave the cash with the target business and include it in the purchased assets.

The seller should tailor the list of assets in Section 2.01 to its particular deal.

Seller

Although the list of assets included in Section 2.01 is fairly long, the purchased assets are defined narrowly and limited to assets that are exclusively or primarily related to the target business. This is particularly important when the seller is selling a line of business (rather than all of its assets) because it does not want to inadvertently agree to transfer assets that it may need for one of its other businesses.

While it requires more work, the seller should generally try to list the items included in the purchased assets on a schedule to the purchase agreement (for example, see Section 2.01(c), Section 2.01(e) and Section 2.01(g)). However, if the number of items that needs to be listed for a particular purchased asset is too great, the seller can include a general description of the asset but should ensure the description is as narrow as possible and only includes assets that the seller owns or has the right to transfer and that are used exclusively or primarily in the acquired business.

For example, in Section 2.01(e), if tangible property being transferred is too numerous to list, the seller should consider defining tangible personal property with a general statement (such as "all furniture, fixtures, equipment, supplies and other tangible personal property owned by Seller and used [exclusively/primarily] in the Business ") and listing the tangible personal property to be excluded from transfer in Section 2.02.

Buyer

A buyer, however, should try to be as inclusive as possible when it is purchasing a division or line of business to ensure it is acquiring all the assets it needs to operate the acquired business, even if those assets are not used primarily or exclusively for the acquired business.

If there are assets that are shared with the seller's other businesses, the parties must determine who gets these assets and work out a transition arrangement for either the buyer or seller. For example, if these assets stay with the seller, the parties may need to enter into a transition services agreement in which the seller (or seller's affiliate) continues to provide certain services to the target business for a period of time after the closing (for an example of a transition services agreement, see Standard Document, Transition Services Agreement). Also, if software is shared among the target business and the seller's other businesses, the buyer may want to arrange for a license or sublicense to ensure it has access to that software after the closing.

In addition, the buyer will want to ensure to add that it is acquiring assets free and clear of all encumbrances other than permitted encumbrances by including the first bracketed phrase in Section 2.01.
END DRAFTING NOTE

Section 2.01 Purchase and Sale of Assets. Subject to the terms and conditions set forth herein, at the Closing, Seller shall sell, assign, transfer, convey and deliver to Buyer, and Buyer shall purchase from Seller, [free and clear of all Encumbrances other than Permitted Encumbrances,] all of Seller's right, title and interest in, to and under

the following assets, properties and rights of Seller, to the extent that such assets, properties and rights exist as of the Closing Date and [exclusively/primarily] relate to the Business (collectively, the "**Purchased Assets**"):

(a) all accounts or notes receivable of the Business;

(b) all inventory, finished goods, raw materials, work in progress, packaging, supplies, parts and other inventories of the Business ("**Inventory**");

(c) all Contracts set forth on Section 2.01(c) of the Disclosure Schedules, the Leases set forth on Section 4.09(b) of the Disclosure Schedules and the Intellectual Property Agreements set forth on Section 4.10(a) of the Disclosure Schedules (collectively, the "**Assigned Contracts**");

(d) all Intellectual Property Assets;

(e) all furniture, fixtures, equipment, supplies and other tangible personal property of the Business listed on Section 2.01(e) of the Disclosure Schedules (the "**Tangible Personal Property**");

(f) all Owned Real Property and Leased Real Property;

(g) all Permits, including Environmental Permits, [and Environmental Attributes] listed on Section 2.01(g) of the Disclosure Schedules[, but only to the extent such Permits [and Environmental Attributes] may be transferred under applicable Law];

Drafting Note: Permits

Seller

The seller should include the language in brackets at the end of Section 2.01(g) above if it is not sure at signing whether there are any limitations on the transferability of the permits (or the environmental attributes) listed on the disclosure schedule.

Buyer

The buyer should require the seller to assist the buyer in obtaining non-transferable permits. For example, it should consider adding the following to Section 2.01(g):

"(but if any Permit cannot be transferred under applicable Law, Seller agrees to cooperate with and reasonably assist Buyer in obtaining such Permit);"

END DRAFTING NOTE

(h) all prepaid expenses, credits, advance payments, security, deposits, charges, sums and fees [set forth on Section 2.01(h) of the Disclosure Schedules/to the extent related to any Purchased Assets];

(i) all of Seller's rights under warranties, indemnities and all similar rights against third parties to the extent related to any Purchased Assets;

(j) originals, or where not available, copies, of all books and records, including books of account, ledgers and general, financial and accounting records, machinery and equipment maintenance files, customer lists, customer purchasing histories, price lists, distribution lists, supplier lists, production data, quality control records and procedures, customer complaints and inquiry files, research and development files, records and data (including all correspondence with any Governmental Authority), sales material and records, strategic plans, internal financial statements and marketing and promotional surveys, material and research, that [exclusively/primarily] relate to the Business or the Purchased Assets, other than books and records set forth in Section 2.02(d) ("**Books and Records**"); and

(k) all goodwill associated with any of the assets described in the foregoing clauses.

Section 2.02 Excluded Assets. Other than the Purchased Assets subject to Section 2.01, Buyer expressly understands and agrees that it is not purchasing or acquiring, and Seller is not selling or assigning, any other assets or properties of Seller, and all such other assets and properties shall be excluded from the Purchased Assets (the "**Excluded Assets**"). Excluded Assets include the following assets and properties of Seller:

Drafting Note: Excluded Assets

Seller

The seller should define excluded assets broadly to include all of its assets and properties other than the purchased assets. This is especially important when the seller is only selling a division or line of business because it does not want to inadvertently agree to transfer assets it needs for one of its other businesses.

While the seller does not need to specifically list the items it wants to exclude, it is advisable to include an illustrative list like the one included in this Section 2.02 (which will vary from deal to deal).

Buyer

The buyer, however, will prefer a narrow definition of excluded assets that specifically lists each item that is being excluded from the deal. This way it can easily identify the excluded assets to determine if it needs any of those assets for the ownership and operation of the target business and the purchased assets. If there are any excluded assets that the buyer believes it is necessary for the target business or the purchased assets, it should work out an arrangement with the seller for continued use of those assets for a specified period of time after the closing.

END DRAFTING NOTE

(a) all cash and cash equivalents, bank accounts and securities of Seller;

(b) all Contracts that are not Assigned Contracts;

(c) all Intellectual Property other than the Intellectual Property Assets;

(d) the corporate seals, organizational documents, minute books, stock books, Tax Returns, books of account or other records having to do with the corporate organization of Seller, all employee-related or employee benefit-related files or records, other than personnel files of Transferred Employees, [ANY OTHER EXCLUDED BOOKS AND RECORDS] and any other books and records which Seller is prohibited from disclosing or transferring to Buyer under applicable Law and is required by applicable Law to retain;

Drafting Note: Excluded Books and Records

The seller can either list excluded books and records in Section 2.02(d) or, if it does not know at signing which books and records it wants to retain, the seller can add an exclusion for books and records it determines are necessary or advisable to retain.
END DRAFTING NOTE

(e) all insurance policies of Seller and all rights to applicable claims and proceeds thereunder;

(f) [subject to Section 6.04(d),] all Benefit Plans and trusts or other assets attributable thereto;

(g) all Tax assets (including duty and Tax refunds and prepayments) of Seller [or any of its Affiliates];

(h) all rights to any action, suit or claim of any nature available to or being pursued by Seller, whether arising by way of counterclaim or otherwise;

(i) [all assets, properties and rights used by Seller in its businesses other than the Business;]

Drafting Note: Assets of Other Seller Businesses

Section 2.02(i) is not necessary because the definition of purchased assets is limited to assets, properties and rights exclusively or primarily relate to the target business. However, a seller may want to include assets of its other businesses in the definition of excluded assets to ensure these assets are not included in the deal.
END DRAFTING NOTE

(j) [the assets, properties and rights specifically set forth on Section 2.02(j) of the Disclosure Schedules;]

(k) the rights which accrue or will accrue to Seller under the Transaction Documents; and

(l) [[ANY OTHER EXCLUDED ASSETS].]

Section 2.03 Assumed Liabilities. Subject to the terms and conditions set forth herein, Buyer shall assume and agree to pay, perform and discharge when due any and all liabilities and obligations of Seller arising out of or relating to the Business or the Purchased Assets [prior to,] on or after the Closing, other than the Excluded Liabilities (collectively, the "**Assumed Liabilities**"), including, without limitation, the following:

Drafting Note: Assumed Liabilities

Seller

Section 2.03 defines what liabilities are being assumed by the buyer and tends to be one of the more negotiated sections of the purchase agreement. Sellers generally want the buyer to assume the liabilities of the target business:

- Without having to specifically list them out.
- Related to periods before, on, or after the closing.

Section 2.03 provides for the buyer to assume all liabilities arising out of or relating to the target business and the purchased assets, but also includes an illustrative, non-exhaustive list of different types of liabilities. If there are any particular liabilities the seller wants the buyer to assume, especially those which are not typically assumed, the seller should add them to this section so that it is clear the buyer is assuming them.

Sellers generally want to be free of the target business once the sale is finalized and prefer the buyer to assume all liabilities, including those that arise before the closing. If the seller has the negotiating leverage and wants the buyer to assume pre-closing liabilities, it should include the bracketed language in Section 2.03 and Section 2.03(e) and delete Section 2.04(a).

Buyer

Buyers, on the other hand, generally prefer the assumed liabilities to be specifically identified so they know exactly what they are assuming in the deal. For an example of an assumed liabilities section with more specifically identified liabilities, see Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Section 2.03.

Buyers also typically prefer to assume liabilities of the target business only to the extent they relate to periods on or after the closing. This concept, often referred to as the "our watch, your watch" approach, is a common method of dividing the liabilities between the buyer and seller in asset acquisitions. If the buyer wants to limit the assumed liabilities in this manner, it should delete the bracketed language in Section 2.03 and Section 2.03(e) and include Section 2.04(a).

END DRAFTING NOTE

(a) all trade accounts payable of Seller to third parties in connection with the Business that remain unpaid as of the Closing Date;

Drafting Note: Accounts Payable

Buyer

The buyer will want to try to limit its assumption of trade accounts payable to those that are:

- Not delinquent.
- Either reflected on the most recent balance sheet or incurred in the ordinary course of business since the date of the most recent balance sheet.

END DRAFTING NOTE

(b) all liabilities and obligations arising under or relating to the Assigned Contracts;

Drafting Note: Assigned Contracts

The buyer will want to limit its assumption of liabilities under the assigned contracts to the extent that the liabilities:

- Are required to be performed after the closing date.
- Were incurred in the ordinary course of business.
- Do not relate to any failure to perform, improper performance, warranty or other breach, default or violation by the seller on or before the closing.

END DRAFTING NOTE

(c) except as specifically provided in Section 6.04, all liabilities and obligations of Buyer or its Affiliates relating to employee benefits, compensation or other arrangements with respect to any Transferred Employee arising on or after the Closing;

(d) all liabilities and obligations for (i) Taxes relating to the Business, the Purchased Assets or the Assumed Liabilities for any taxable period ending after the Closing Date and (ii) Taxes for which Buyer is liable pursuant to Section 6.11;

(e) all other liabilities and obligations arising out of or relating to Buyer's ownership or operation of the Business and the Purchased Assets [prior to,] on or after the Closing;

(f) [all liabilities and obligations of Seller set forth on Section 2.03(f) of the Disclosure Schedules; and]

(g) [[ANY OTHER ASSUMED LIABILITIES].]

Section 2.04 Excluded Liabilities. Buyer shall not assume and shall not be responsible to pay, perform or discharge any of the following liabilities or obligations of Seller (collectively, the "**Excluded Liabilities**"):

Drafting Note: Excluded Liabilities

Seller

The seller generally wants to limit what is included in excluded liabilities because it will continue to be responsible for these liabilities after the closing. For this reason, Section 2.04 contains a specific list of what liabilities and obligations are being excluded. This is a fairly standard list, but the scope of excluded liabilities varies from deal to deal depending on the specific facts of the transaction and the negotiating leverage of the parties.

Buyer

However, the buyer will want the description of excluded liabilities to be broad and comprehensive. For example, it may prefer to define excluded liabilities as "all liabilities other than assumed liabilities." Even when a buyer can negotiate this broad definition, it usually also includes an exhaustive list of specific liabilities it is not assuming, including any liabilities the buyer may discover during its due diligence review of the target business. The buyer will either set the list out in Section 2.04 or in the disclosure schedules.

For an example of a buyer-friendly excluded liabilities provision, see Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Section 2.04.

END DRAFTING NOTE

(a) [any liabilities or obligations arising out of or relating to Seller's ownership or operation of the Business and the Purchased Assets prior to the Closing Date;]

Drafting Note: Pre-closing Liabilities

Delete this section if pre-closing liabilities are included in the definition of Assumed Liabilities in Section 2.03 (see Drafting Note, Assumed Liabilities).

Buyer

If this section is deleted, the buyer should consider:

- Including additional specific pre-closing liabilities (such as, existing litigation, certain pre-closing environmental liabilities, indebtedness, or liabilities arising out of pre-closing breaches of Assigned Contracts) in Section 2.04 as Excluded Liabilities.
- Including specific indemnities in Section 8.02 for certain pre-closing liabilities.

END DRAFTING NOTE

(b) any liabilities or obligations relating to or arising out of the Excluded Assets;

(c) any liabilities or obligations for (i) Taxes relating to the Business, the Purchased Assets or the Assumed Liabilities for any taxable period ending on or prior to the Closing Date and (ii) any other Taxes of Seller [or any stockholders or Affiliates of Seller] (other than Taxes allocated to Buyer under Section 6.11) for any taxable period;

Drafting Note: Excluded Tax Liabilities

Taxes of the seller or relating to the target business for pre-closing periods are typically carved out of the asset purchase agreement. In this purchase agreement, the buyer is responsible for transfer taxes under Section 6.11. To ensure there is no ambiguity or conflict between Section 2.04(c) and Section 6.11, the seller should carve out the transfer taxes from this provision.

Buyer

The buyer may want to draft this provision more broadly to protect itself from successor tax liability by also excluding any liability or obligation for:

"other Taxes of Seller (or any stockholder or Affiliate of Seller) of any kind or description (including any liability or obligation for Taxes of Seller (or any stockholder or Affiliate of Seller) that becomes a liability or obligation of Buyer under any common law doctrine of de facto merger or transferee or successor liability or otherwise by operation of contract or Law);"
END DRAFTING NOTE

(d) except as specifically provided in Section 6.04, any liabilities or obligations of Seller relating to or arising out of (i) the employment, or termination of employment, of any Employee prior to the Closing, or (ii) workers' compensation claims of any Employee which relate to events occurring prior to the Closing Date; and

(e) any liabilities or obligations of Seller arising or incurred in connection with the negotiation, preparation, investigation and performance of this Agreement, the other Transaction Documents and the transactions contemplated hereby and thereby, including, without limitation, fees and expenses of counsel, accountants, consultants, advisers and others;

(f) [any liabilities and obligations of Seller set forth on Section 2.04(f) of the Disclosure Schedules; and]

(g) [[ANY OTHER EXCLUDED LIABILITIES].]

Section 2.05 Purchase Price. The aggregate purchase price for the Purchased Assets shall be $[NUMBER] (the "**Purchase Price**"), plus the assumption of the Assumed Liabilities. The purchase price shall be paid by wire transfer of immediately available funds to an account designated in writing by Seller to Buyer no later than [two/[NUMBER]] Business Days prior to the Closing Date.

Drafting Note: Purchase Price

Purchase Price Adjustment

This asset purchase agreement does not include a purchase price adjustment because sellers generally prefer not to include it. However, the buyer often requests one for items such as working capital, funded indebtedness and company transaction expenses. The seller may prefer to include an adjustment in the initial draft so that it can include terms that are more seller-friendly. For an example of a working capital purchase price adjustment, see Standard Clause, Stock Purchase Agreement: Working Capital Purchase Price Adjustment Provision (although this Standard Clause is meant for use with a stock purchase agreement and is drafted in favor of the buyer, the seller can use it as a starting point and customize it in its favor).

If the seller includes a purchase price adjustment in the initial draft of the asset purchase agreement, it should ensure there are no overlapping recovery rights for the buyer. For example, the seller should

ensure that Article VIII (Indemnification) does not result in the seller indemnifying the buyer for a liability that the seller has already paid for with a purchase price adjustment by adding the following to Section 8.04:

"No Losses may be claimed under Section 8.02 or Section 8.03 by any Indemnifying Party to the extent such Losses are included in the calculation of any adjustment to the Purchase Price pursuant to Section [XX]."

Escrows

As with the purchase price adjustment, this asset purchase agreement does not include an escrow because sellers generally prefer to have the entire purchase price paid to them at closing. However, buyers often request an escrow of a portion of the purchase price to secure potential indemnification claims against the seller and, in some cases, payment of any purchase price adjustment by the seller. The seller may want to pre-emptively include the escrow arrangement in the initial draft so that it can draft more seller-friendly terms (such as shorter escrow periods and capping its indemnification obligations to the amount held in escrow). For an example of escrow provisions, see Standard Clause, Purchase Agreement: Escrow Provisions. For an example of an escrow agreement, see Standard Document, Escrow Agreement.

Multiple Sellers

If there are multiple sellers, set out how the purchase price is to be allocated among them in Section 2.05 (or by reference to the corresponding section in the disclosure schedules).

Cash Consideration

In most transactions, cash payments are made by "wire transfer of immediately available funds." Therefore, the wire transfer is made using the Fedwire Funds Service and credited as soon as the seller's bank receives it. The purchase price can also be paid by certified or cashier's check. However, this is rare because most closings are completed by exchanging documents over e-mail, fax or overnight courier (when an original is required) rather than at a physical location.

Other Forms of Consideration

This asset purchase agreement assumes the purchase price will be paid in cash. If the buyer proposes to pay all or a portion of the purchase price with a **promissory note** or its stock, it should revise Article II to reflect this and to require the promissory note or the stock certificates to be delivered at the closing.

If the parties cannot agree on the value of the target business, the seller may want to consider proposing an **earn-out**. While an earn-out can potentially provide the seller with an opportunity to get a higher purchase price for the target business and to benefit from synergies achieved by the target business being integrated with the buyer's business, there are several disadvantages (for further discussion of the disadvantages of an earn-out, see Practice Note, Earn-outs: Disadvantages of an Earn-out). The

seller should consider all the advantages and disadvantages before proposing an earn-out. For more information on earn-outs and an example of an earn-out clause, see Practice Note, Earn-outs and Standard Clauses, Purchase Agreement: Earn-Out with EBITDA Targets and Purchase Agreement: Earn-Out with Milestones.

A variety of commercial and tax considerations determine the nature and structure of the consideration. The tax consequences to the parties vary depending on the type of consideration, so the parties should consult a tax specialist at the structuring stage of the transaction. For a discussion of these considerations, see Practice Notes, Asset Acquisitions: Overview and Asset Acquisitions: Tax Overview.

END DRAFTING NOTE

Section 2.06 Allocation of Purchase Price. Within [NUMBER] days after the Closing Date, Seller shall deliver a schedule allocating the Purchase Price (including any Assumed Liabilities treated as consideration for the Purchased Assets for Tax purposes) (the "**Allocation Schedule**"). The Allocation Schedule shall be prepared in accordance with Section 1060 of the Code. The Allocation Schedule shall be deemed final unless Buyer notifies Seller in writing that Buyer objects to one or more items reflected in the Allocation Schedule within [NUMBER] days after delivery of the Allocation Schedule to Buyer. In the event of any such objection, Seller and Buyer shall negotiate in good faith to resolve such dispute; *provided, however*, that if Seller and Buyer are unable to resolve any dispute with respect to the Allocation Schedule within [NUMBER] days after the delivery of the Allocation Schedule to Buyer, such dispute shall be resolved by [NAME OF INDEPENDENT ACCOUNTANT] or, if [NAME OF INDEPENDENT ACCOUNTANT] is unable to serve, another impartial nationally recognized firm of independent certified public accountants mutually appointed by Buyer and Seller. The fees and expenses of such accounting firm shall be borne equally by Seller and Buyer. Seller and Buyer agree to file their respective IRS Forms 8594 and all federal, state and local Tax Returns in accordance with the Allocation Schedule.

Drafting Note: Allocation of Purchase Price

The parties must agree on an allocation of the purchase price among the purchased assets. This allocation is important to the seller because it determines the amount and character (capital versus ordinary) of any gain or loss recognized in the transaction. It is also important to the buyer because it determines, among other matters, the amount of depreciation and amortization deductions for certain assets. Because of changes made by 2017 tax reform, the buyer will have an incentive to allocate purchase price to tangible depreciable property eligible for 100 percent bonus depreciation.

Section 2.06 sets out a specific process by which an allocation is determined. The seller may want to provide for a more general process, such as:

"Seller and Buyer agree that the Purchase Price and the Assumed Liabilities (plus other relevant items) shall be allocated among the Purchased Assets for all purposes (including Tax and financial accounting) [in accordance with Section 2.06 of the Disclosure Schedules/in a manner consistent with Sections

338 and 1060 of the Code and the regulations thereunder/as agreed by their respective accountants, negotiating in good faith on their behalf]."

Regardless of which process is chosen, the seller should require that both parties file all tax returns (including amended returns and claims for refund) and information reports in a manner consistent with the allocation.
END DRAFTING NOTE

Section 2.07 Non-assignable Assets.

Drafting Note: Non-assignable Assets

Some purchased assets, such as contracts and permits, are not transferable without the consent of a third party or governmental authority. Section 2.07 is important for the seller because it ensures that performance of the asset purchase agreement and the other transaction documents do not trigger a breach or default under any of the assigned contracts or permits or violate applicable law. This provision also ensures the transaction will close with no change to the purchase price if a consent is not obtained and sets out the parties' post-closing obligations.
END DRAFTING NOTE

(a) Notwithstanding anything to the contrary in this Agreement, and subject to the provisions of this Section 2.07, to the extent that the sale, assignment, transfer, conveyance or delivery, or attempted sale, assignment, transfer, conveyance or delivery, to Buyer of any Purchased Asset would result in a violation of applicable Law, or would require the consent, authorization, approval or waiver of a Person who is not a party to this Agreement or an Affiliate of a party to this Agreement (including any Governmental Authority), and such consent, authorization, approval or waiver shall not have been obtained prior to the Closing, this Agreement shall not constitute a sale, assignment, transfer, conveyance or delivery, or an attempted sale, assignment, transfer, conveyance or delivery, thereof; *provided, however,* that, subject to the satisfaction or waiver of the conditions contained in Article VII, the Closing shall occur notwithstanding the foregoing without any adjustment to the Purchase Price on account thereof. Following the Closing, Seller and Buyer shall use commercially reasonable efforts, and shall cooperate with each other, to obtain any such required consent, authorization, approval or waiver, or any release, substitution or amendment required to novate all liabilities and obligations under any and all Assigned Contracts or other liabilities that constitute Assumed Liabilities or to obtain in writing the unconditional release of all parties to such arrangements, so that, in any case, Buyer shall be solely responsible for such liabilities and obligations from and after the Closing Date; *provided, however,* that neither Seller nor Buyer shall be required to pay any

consideration therefor. Once such consent, authorization, approval, waiver, release, substitution or amendment is obtained, Seller shall sell, assign, transfer, convey and deliver to Buyer the relevant Purchased Asset to which such consent, authorization, approval, waiver, release, substitution or amendment relates for no additional consideration. Applicable sales, transfer and other similar Taxes in connection with such sale, assignment, transfer, conveyance or license shall be paid by Buyer in accordance with Section 6.11.

Drafting Note: Obtaining Consents After Closing

Seller

While Section 2.07(a) is already drafted in favor of the seller, the seller may want to further limit its obligations relating to consents by adding some parameters to its agreement to obtain consents and to cooperate with the buyer. For example, it may want to:

- Require delivery of only those consents for purchased assets that are material to the target business.
- Obligate only the buyer to obtain consents and only be required to cooperate with the buyer.
- Specify that its obligations end by a certain date.

Buyer

Section 2.07 also benefits the buyer, but the buyer may want to obligate only the seller to obtain required consents. If it can shift the obligation, it should also try to change the required efforts standard to "reasonable best efforts" (which is arguably a higher standard) and have the seller be responsible for reasonable costs of obtaining the consents.

In addition, this asset purchase agreement does not require all consents to be obtained before closing as a closing condition (see Drafting Note, Conditions to Obligations of Buyer). This means that even if the seller cannot obtain the consent for, and is not required to transfer under this Section 2.07(a), a purchased asset that is important to the target business, the buyer must still proceed with the closing (assuming the exclusion of that purchased asset does not cause an MAE or another failure of a closing condition) without an adjustment to the purchase price. The buyer should try to add either:

- A closing condition that requires the seller to obtain all material third-party consents by the closing. This provides the buyer a right to waive a required consent that the seller may not be able to obtain before it must close.

- A termination right that allows the buyer to terminate the agreement if consents for the transfer of certain assets cannot be obtained by the closing.
- A right to renegotiate the purchase price if certain purchased assets cannot be transferred.

END DRAFTING NOTE

(b) To the extent that any Purchased Asset and/or Assumed Liability cannot be transferred to Buyer following the Closing pursuant to this Section 2.07, Buyer and Seller shall use commercially reasonable efforts to enter into such arrangements (such as subleasing, sublicensing or subcontracting) to provide to the parties the economic and, to the extent permitted under applicable Law, operational equivalent of the transfer of such Purchased Asset and/or Assumed Liability to Buyer as of the Closing and the performance by Buyer of its obligations with respect thereto. Buyer shall, as agent or subcontractor for Seller pay, perform and discharge fully the liabilities and obligations of Seller thereunder from and after the Closing Date. To the extent permitted under applicable Law, Seller shall, at Buyer's expense, hold in trust for and pay to Buyer promptly upon receipt thereof, such Purchased Asset and all income, proceeds and other monies received by Seller to the extent related to such Purchased Asset in connection with the arrangements under this Section 2.07. Seller shall be permitted to set off against such amounts all direct costs associated with the retention and maintenance of such Purchased Assets. Notwithstanding anything herein to the contrary, the provisions of this Section 2.07 shall not apply to any consent or approval required under any antitrust, competition or trade regulation Law, which consent or approval shall be governed by Section 6.06.

Drafting Note: Post-closing Arrangements for Non-Assignable Assets

Section 2.07(b) requires the parties to enter into arrangements that effectively transfer the benefits and obligations under a purchased asset or assumed liability after the parties determine that a required consent cannot be obtained. The parties should consider adding a time limit to when this determination must be made.

END DRAFTING NOTE

ARTICLE III

CLOSING

Section 3.01 Closing. Subject to the terms and conditions of this Agreement, the consummation of the transactions contemplated by this Agreement (the "**Closing**") shall take place at the offices of [NAME OF [SELLER'S/ BUYER'S] LAW FIRM], [ADDRESS] or remotely by exchange of documents and signatures (or their electronic counterparts), at [TIME], [TIME ZONE] time, on the [second/[NUMBER]] Business Day after all of the conditions to Closing set forth in Article VII are either satisfied or waived (other than conditions which, by their nature, are to be satisfied on the Closing Date), or at such other time, date or place as Seller and Buyer may mutually agree upon in writing. The date on which the Closing is to occur is herein referred to as the "**Closing Date**".

Drafting Note: Closing

The parties should decide whether the closing must be on a particular date (for example, at the end of the fiscal quarter). The parties should also ensure that the chosen date is a weekday so that banks can make wire transfers and other businesses (such as corporate service companies) and government agencies can provide any last minute closing items (such as certificates of good standing).

While closings are often held at the offices of buyer's counsel, the seller may want to specify its counsel's offices as the closing location if it controls the initial draft. In most cases, the specified location is irrelevant because most closings are now completed by exchanging documents using e-mail, or overnight courier, rather than at a physical location. However, the asset purchase agreement typically also refers to a physical location.

Section 3.01 expressly contemplates that the closing may take place either at the referenced physical location or remotely via electronic delivery. If the parties prefer to provide for only a remote closing (or alternatively only a physical closing), then Section 3.01 should be revised accordingly.
END DRAFTING NOTE

Section 3.02 Closing Deliverables.

Drafting Note: Closing Deliverables

Section 3.02 sets out all of the items required to be delivered to effect the transactions covered by the asset purchase agreement (such as the purchase price and the documents required for the transfer of the assets and liabilities). Although these documents are commonly listed separately in the closing

section, they can also be listed in the closing conditions section (see Section 7.02 and Section 7.03) with a cross-reference to those sections placed here.
END DRAFTING NOTE

(a) At the Closing, Seller shall deliver to Buyer the following:

(i) a bill of sale in the form of Exhibit A hereto (the "**Bill of Sale**") and duly executed by Seller, transferring the tangible personal property included in the Purchased Assets to Buyer;

Drafting Note: Bill of Sale

For an example of a bill of sale, see Standard Document, Bill of Sale (Asset Acquisition).
END DRAFTING NOTE

(ii) an assignment and assumption agreement in the form of Exhibit B hereto (the "**Assignment and Assumption Agreement**") and duly executed by Seller, effecting the assignment to and assumption by Buyer of the Purchased Assets and the Assumed Liabilities;

Drafting Note: Assignment and Assumption Agreement

For an example of an assignment and assumption agreement, see Standard Document, Assignment and Assumption Agreement.

Most of the assigned contracts can be transferred to the buyer in one assignment. However, certain assigned contracts may require a separate assignment and assumption agreement if the other party to the agreement requires certain additional terms or the contract being assigned or applicable law requires the consent to be in a certain form. For example, assignments of leases are often listed as a separate

closing deliverable because local law requires the assignments to be in a certain form for filing (see Section 3.02(a)(iv)).

Intellectual Property Assignments

While IP is transferred under the asset purchase agreement and the assignment and assumption agreement, the buyer often asks for separate short-form assignment agreements reflecting the transfer of registered IP. This is because the buyer must record these agreements in the relevant IP registries, such as the US Patent and Trademark Office and US Copyright Office, to:

- Be identified as the record owner of each purchased IP registration.
- Protect its ownership interest in the purchased IP registrations, including giving it priority against later recorded transfers.

The short-form agreements enable the buyer to:

- Limit disclosure of the transaction's terms because recordation in each office is by design a public disclosure of the recorded document.
- Satisfy the filing requirements for each IP registry.

The buyer must confirm the specific documents and requirements necessary to effect the transfer of the registered IP with the registries in each relevant jurisdiction.

Depending on the circumstances, the buyer may request either:

- A single intellectual property assignment agreement covering multiple types of IP (see Standard Document, Intellectual Property Assignment Agreement (Short-form)).
- Different assignments for each type of relevant IP (see Standard Documents, Patent Assignment Agreement (Short-form), Trademark Assignment Agreement (Short-form), Copyright Assignment Agreement (Short-form) and Domain Name Transfer Agreement.

END DRAFTING NOTE

(iii) with respect to each parcel of Owned Real Property, a special warranty deed in the form of Exhibit C hereto (each, a "**Deed**") and duly executed and notarized by Seller;

Drafting Note: Deeds

Deeds vary from state to state and local real estate counsel should be consulted to ensure that the proper form of deed is delivered at the closing. The type of deed to be delivered governs the scope of title warranties offered by the seller to the buyer.

Seller

Sellers generally prefer to deliver deeds with limited or no warranties against title claims. A deed with limited warranties only provides the seller's warranties against acts affecting title to the real property that occurred during the seller's ownership of the real property. There is no uniformity among jurisdictions for the names used for deeds with limited warranties. However, a deed with no warranties is often called a quitclaim deed.

This asset purchase agreement assumes that the owned real property is located solely in one jurisdiction and that a special warranty deed is a deed with warranties limited to the seller's acts during the seller's ownership of the real property. In circumstances where the seller is not very familiar with the title of the real property (for example, real property acquired by merger with another company), the seller should consider providing a deed with no warranties.

Buyer

Buyers generally prefer to receive deeds with full warranties against not only the sellers acts, but against any prior owner's acts that affected title to the real property. There is no uniformity among jurisdictions for the name used for a full warranty deed. For example, it could be called a bargain and sale deed with covenants or a general warranty deed.

END DRAFTING NOTE

(iv) with respect to each Lease, an Assignment and Assumption of Lease substantially in the form of Exhibit D (each, an "**Assignment and Assumption of Lease**"), duly executed by Seller and, if necessary, Seller's signature shall be witnessed and/or notarized;

Drafting Note: Assignment and Assumption of Lease

If the leased real property is located in several jurisdictions, the parties should confirm with local counsel that the form being attached is enforceable in each jurisdiction. For example, certain jurisdictions require that when signatories sign an instrument transferring title to a real estate interest, their signatures must be either witnessed, acknowledged by a notary, or both.
END DRAFTING NOTE

(v) the Seller Closing Certificate;

(vi) the FIRPTA Certificate;

(vii) the certificates of the Secretary or Assistant Secretary of Seller required by Section 7.02(e) and Section 7.02(f);

(viii) such other customary instruments of transfer, assumption, filings or documents, in form and substance reasonably satisfactory to Buyer, as may be required to give effect to this Agreement; and

(ix) [OTHER SELLER DELIVERABLES].

(b) At the Closing, Buyer shall deliver to Seller the following:

(i) the Purchase Price by wire transfer of immediately available funds to an account designated in writing by Seller to Buyer no later than [two/[NUMBER]] Business Days prior to the Closing Date;

(ii) the Assignment and Assumption Agreement duly executed by Buyer;

(iii) with respect to each Lease, an Assignment and Assumption of Lease duly executed by Buyer and, if necessary, Buyer's signature shall be witnessed and/or notarized;

(iv) the Buyer Closing Certificate;

(v) the certificates of the Secretary or Assistant Secretary of Buyer required by Section 7.03(e) and Section 7.03(f); and

(vi) [OTHER BUYER DELIVERABLES].

ARTICLE IV

REPRESENTATIONS AND WARRANTIES OF SELLER

Drafting Note: Representations and Warranties of Seller

Seller

Article IV, which contains the seller's representations and warranties (referred to as representations in these drafting notes), tends to be one of the most negotiated sections of the asset purchase agreement. Parties focus heavily on the seller's representations and warranties because many of the other sections rely on how they are drafted. For example:

- The bring down in the closing conditions (a condition that requires the representations and warranties to be true and correct as of the closing date).
- Indemnification.
- Termination.

For a discussion of the purposes served by the seller's representations, see Practice Note, Asset Purchase Agreement Commentary: Representations and Warranties.

When the seller prepares the initial draft, it can control the scope of the representations. The seller usually wants to limit the scope of its representations because it wants to minimize the buyer's opportunities to terminate

the asset purchase agreement (due to a breach of a representation) or to raise a claim for indemnification. However, the seller should resist making the asset purchase agreement too one-sided and excluding many of the representations customarily included in asset purchase agreements, such as representations about:

- The seller's organization, authority and ability to transfer the purchased assets (including its title to the purchased assets and its authority to enter into and perform its obligations under the assets purchase agreement).
- The purchased assets and assumed liabilities.

Unless the seller has significant leverage, excluding customary representations will likely invite the buyer to make wholesale changes to the draft and the negotiations will then become a battle of the forms.

Qualifying the Representations

To shorten the negotiating process, the seller is better off including customary representations but narrowing the scope of the representations and adding qualifications and exceptions, such as:

- **Materiality.** A representation can be qualified by what is material or what might cause an MAE (see Drafting Note, Definition: Material Adverse Effect). For example, the seller may represent and warrant that "Seller is not a party to any material legal action" or "Seller is not a party to any legal action that would have a material adverse effect on the Business or the Purchased Assets." Materiality can also be quantified by adding a threshold dollar amount or percentage to the representation. For example, the seller may represent and warrant that "Seller has not made any capital expenditures over $[NUMBER] since the date of its most recent balance sheet which would constitute an Assumed Liability."
- **Knowledge.** Using a knowledge qualifier shifts the allocation of risk of unknown facts from the seller to the buyer. If a representation is untrue or incorrect because of an event that the seller did not know about (subject to the definition of seller's knowledge), the buyer cannot claim a breach of the representation if it is qualified by knowledge. For further discussion, see Drafting Note, Definition: Knowledge of Seller or Seller's Knowledge.
- **Specific time periods.** The seller can try to limit the representation so that it only covers a specified time period. For example, the seller may represent and warrant that "since January 1, 2017, the Business and the Real Property have been and are in compliance with all applicable environmental laws". This type of limitation may be appropriate if the seller did not own the real property before a certain date or if a certain period is no longer relevant to the financial condition, business and operations of the target business (for example, because the applicable statute of limitations has expired).
- **Disclosure schedules.** The seller can try to limit a representation by including exceptions to it in the disclosure schedules. For example, the seller can limit its exposure under the litigation representation (Section 4.11) by listing all litigation claims relating to or affecting the target business as exceptions to the representation in its disclosure schedules. Unless the buyer negotiates a special indemnity from the seller for these disclosed litigation claims, the seller is not obligated to indemnify the buyer if the buyer eventually suffers a loss from any of those claims.

- **Range.** The seller can try to limit the range that a representation covers. For example, the seller may limit its compliance representation (Section 4.12) to current compliance with laws and omit any representation about past compliance.

- **Data room.** The seller can try to limit its representations by excluding any information that it provides to the buyer in a data room. For example, if the data room contained information about a potential violation of applicable law by the seller which affects the target business, the buyer could not recover any losses based on that violation under an indemnification claim against the seller even if the seller did not disclose it in the disclosure schedules. Most buyers resist this limitation and want full and proper disclosure of all potential issues to be included in the disclosure schedules for certainty.

Many of the representations in Article III are qualified by what may cause an MAE, instead of what is material. This favors the seller because an MAE qualifier creates a higher threshold than a materiality qualifier. For example, a compliance with laws representation qualified by materiality can be breached if the seller is not in compliance in all material respects with applicable law. However, if this representation included an MAE qualifier, even a material non-compliance would not cause a breach of the representation if the non-compliance would not have an MAE on the target business. Although the seller prefers MAE qualifiers, it should expect resistance from the buyer. Even if the buyer is willing to accept a materiality qualifier in a representation, it may not be willing to accept an MAE qualifier, particularly in light of how difficult it is for a buyer to prove that an MAE has occurred (see Drafting Note, Definition: Material Adverse Effect and Practice Note, Material Adverse Change Provisions: Mergers and Acquisitions).
When determining the representations to include in the initial draft, the seller should consider how easily it can give a representation and how much investigation is necessary, as well as how much time it needs to prepare the necessary **disclosure schedules**.

Buyer

The buyer generally wants the seller's representations to be broader and more comprehensive so that it has more disclosure information, as well as a greater foundation for its termination and indemnification rights. However, the buyer should consider certain other factors when commenting on the representations in the seller's initial draft. For example:

- Whether each representation is appropriate for the target business.

- How much it needs or wants to complete the deal.

Additional Representations

This asset purchase agreement includes representations customarily included in asset purchase agreements, but excludes some representations that the buyer may want. If the buyer can afford to be more aggressive, it should consider adding additional representations, such as those covering:

- **Inventory.** While inventory is a balance sheet item and covered by the financial statements representation (see Section 4.04), the buyer may want a separate representation covering the quality and quantity, and the status of the seller's ownership of, the inventory.

- **Accounts receivable.** As with inventory, accounts receivables are a balance sheet item and covered by the financial statements representation, but the buyer may want a separate representation covering their validity and collectability, especially if they form a large part of the purchased assets.

- **Customers and suppliers.** If the target business relies heavily on certain material customers or suppliers, the buyer may want a representation covering those material customers and suppliers to get reassurances that they will continue their relationship with the target business after the closing.

- **Full disclosure (also known as a 10b-5 representation).** The buyer may want a representation that the disclosures made in the asset purchase agreement and other documents delivered to the buyer do not contain any misstatements or omissions of a material fact that would make the disclosures misleading (for further discussion, see Drafting Note, No Other Representations and Warranties).

- **Related party transactions.** The buyer may want a representation requiring the seller to disclose whether any person related to or affiliated with the seller (such as an officer, director, stockholder or affiliate) is involved in any business arrangement with the target business, especially if it involves a service or product that is important to the target business. Related party transactions can affect the buyer in acquisitions because the related party may not be willing to continue the arrangement after the sale or may only be willing to continue providing the relevant service or product on terms that are much less favorable to the target business.

- **Other industry-specific representations.** For example, if the target business is engaged in manufacturing, the buyer should consider including a product liability and warranty representation.

For examples of the types of comprehensive representations that buyers generally want (including the ones mentioned above), see Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Article IV.

Remove Materiality Qualifiers

The buyer typically wants to make some of the included representations more comprehensive and remove some of the qualifiers (these are discussed in more detail in the drafting notes for the representations). The buyer also wants to delete MAE and materiality qualifiers, especially if its indemnification rights are subject to a **basket** (see Drafting Note, Baskets). A buyer is more willing to agree to materiality qualifiers if the asset purchase agreement contains a double materiality scrape that applies to both the determination of:

- The amount of losses.

- Whether there has been an inaccuracy in or breach of a representation.

(see Drafting Note, Materiality Scrape)

Remove Knowledge Qualifiers

Except for the few representations that are typically qualified by knowledge (such as the representation for threatened litigation), the buyer wants to delete most knowledge qualifiers because these qualifiers shift the risk of unknown facts from the seller to the buyer.

Effect of Representation and Warranty Insurance

Representation and warranty insurance (R&W insurance) provides coverage for indemnification claims a buyer may have for losses resulting from breaches of a seller's representations and warranties in an asset purchase agreement. The use of R&W insurance has been increasing substantially, primarily due to:

- Lower premiums.
- Better terms, such as higher coverage limits, longer policy periods and narrower exclusions.
- More efficient underwriting.
- Greater exposure to, and acceptance among, insurers, and potential insureds.

The use of R&W insurance in a transaction can affect the negotiation of the representations and warranties. On the one hand, R&W insurance might be expected to yield more buyer-friendly representations and warranties because the seller may be more willing to give the buyer the representations it wants if it knows the buyer can recover for breaches from a third-party insurer. On the other hand, the insurer reviews the asset purchase agreement and sets the price of coverage on the basis of the representations and warranties and its expectation that it might have to pay out on the policy. That consideration may keep the representations and warranties from becoming too buyer-friendly.

For more information on R&W insurance, see Practice Notes, Representation and Warranty Insurance for M&A Transactions and Incorporating Representation and Warranty Insurance into M&A Transactions and Standard Clause, Purchase Agreement: Representation and Warranty Insurance Provisions.
END DRAFTING NOTE

Except as set forth in the Disclosure Schedules, Seller represents and warrants to Buyer that the statements contained in this Article IV are true and correct as of the date hereof.

Drafting Note: Introduction to Representations

This introductory language to the seller's representations applies to all of the seller's representations and includes an exception for matters disclosed in the seller's disclosure schedules.

Seller

If the seller wants to be more aggressive and has set up a data room, it could try to also include an exception for any information provided in the data room. However, buyers generally resist this exception because it increases their risk of losing their right to indemnification for a breach of representation. For example, the buyer may miss something in the data room that affects the accuracy of a representation, but it could not claim that a representation has been breached because information in the data room is an exception to the representation.

Disclosure Schedules

The seller should make it clear that information contained in one section of the disclosure schedules applies to all other applicable sections of the disclosure schedules by either including:

- Cross-references to the sections with the relevant disclosure in all other applicable sections of the disclosure schedules.
- Language in the asset purchase agreement that states that information provided in any section of the disclosure schedules constitutes disclosure for purposes of each section of the asset purchase agreement where such information is relevant (see Section 10.04).

Buyer

The buyer may want to revise this introduction so that the seller represents and warrants that the statements in Article IV will be true and correct as of the closing date (as well as on the signing date). This ensures the buyer has a basis for an indemnification claim for breach of a representation if something happens between the signing and closing that causes a representation to be untrue or incorrect. This issue can also be addressed in the indemnification provisions (see Drafting Note, Indemnification by Seller).

END DRAFTING NOTE

Section 4.01 Organization and Qualification of Seller. Seller is a corporation duly organized, validly existing and in good standing under the Laws of the state of [STATE OF ORGANIZATION] and has all necessary corporate power and authority to own, operate or lease the properties and assets now owned, operated or leased by it and to carry on the Business as currently conducted. Seller is duly licensed or qualified to do business and is in good standing in each

jurisdiction in which the ownership of the Purchased Assets or the operation of the Business as currently conducted makes such licensing or qualification necessary, except where the failure to be so licensed, qualified or in good standing would not have a Material Adverse Effect.

Drafting Note: Qualification of Seller

Seller

While Section 4.01 contains a common formulation of the foreign qualification representation, the seller can try to limit it even further by only providing a representation about good standing in certain foreign jurisdiction that it lists in a disclosure schedule.

Buyer

The buyer may want the seller to list the jurisdictions in which it is qualified to do business in a disclosure schedule by adding:

"Section 4.01 of the Disclosure Schedules sets forth each jurisdiction in which Seller is licenses or qualified to do business."

However, the buyer should ensure the seller's qualification representation is not limited to these jurisdictions.

END DRAFTING NOTE

Section 4.02 Authority of Seller. Seller has all necessary corporate power and authority to enter into this Agreement and the other Transaction Documents to which Seller is a party, to carry out its obligations hereunder and thereunder and to consummate the transactions contemplated hereby and thereby. The execution and delivery by Seller of this Agreement and any other Transaction Document to which Seller is a party, the performance by Seller of its obligations hereunder and thereunder and the consummation by Seller of the transactions contemplated hereby and thereby have been duly authorized by all requisite corporate action on the part of Seller. This Agreement has been duly executed and delivered by Seller, and (assuming due authorization, execution and delivery by Buyer) this Agreement constitutes a legal, valid and binding obligation of Seller, enforceable against Seller in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or similar Laws affecting creditors' rights generally and by general principles of equity (regardless of whether enforcement is sought in a proceeding at law or in equity). When each other Transaction Document to which Seller is or will be a party has been duly executed and delivered by Seller (assuming due authorization, execution and delivery by each other party thereto), such Transaction Document will constitute a legal and binding obligation of Seller enforceable against

it in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or similar Laws affecting creditors' rights generally and by general principles of equity (regardless of whether enforcement is sought in a proceeding at law or in equity).

Drafting Note: Authority of Seller

This representation refers to the seller's corporate power and authority and corporate actions when entering into and approving the transaction. This limits the representation to applicable corporate laws and the seller's certificate of incorporation and by-laws. If it was not limited this way and stated "full power and authority" and "all requisite actions," it would cover all applicable laws and regulations, which is covered by other representations in this asset purchase agreement.

Buyer

The enforceability representation in the third and fourth sentences of Section 4.02 includes exceptions for laws affecting creditors' rights and general principles of equity. This exception is often included in legal opinions, but the buyer should resist including this exception to the seller's representation. Even if the agreement is unenforceable as a matter of law under laws affecting creditors' rights or general principles of equity, the buyer still wants the ability to bring a breach of representation claim against the seller. However, sellers often successfully include this exception.

If the buyer cannot delete the exception for creditors' rights and general principles of equity in the seller's representation, it should ensure it is also included in the buyer's enforceability representation.
END DRAFTING NOTE

Section 4.03 No Conflicts; Consents. The execution, delivery and performance by Seller of this Agreement and the other Transaction Documents to which it is a party, and the consummation of the transactions contemplated hereby and thereby, do not and will not: (a) result in a violation or breach of any provision of the certificate of incorporation or by-laws of Seller; (b) result in a violation or breach of any provision of any Law or Governmental Order applicable to Seller, the Business or the Purchased Assets; or (c) [except as set forth in Section 4.03 of the Disclosure Schedules,] require the consent, notice or other action by any Person under, conflict with, result in a violation or breach of, constitute a default under or result in the acceleration of any Material Contract; except in the cases of clauses (b) and (c), where the violation, breach, conflict, default, acceleration or failure to give notice would not have a Material Adverse Effect. No consent, approval, Permit, Governmental Order, declaration or filing with, or notice to, any Governmental Authority is required by or with respect to Seller in connection with the execution and delivery of this Agreement or any of the other Transaction Documents and the consummation of the transactions contemplated hereby and thereby, except for such filings as may be required under the HSR Act [and as set forth in Section 4.03 of the Disclosure Schedules] and such

consents, approvals, Permits, Governmental Orders, declarations, filings or notices which, in the aggregate, would not have a Material Adverse Effect.

Drafting Note: No Conflict; Consents

The first part of this representation specifically deals with whether the execution, delivery and performance of the asset purchase agreement violates, breaches or conflicts with the seller's charter and by-laws, any applicable laws or governmental orders and any of the material contracts (as defined in Section 4.06). This representation is qualified by MAE, except for the portion related to no violations or breaches with the seller's charter and by-laws.

Subsection (c) and the second part of this representation inform the buyer of the consents and approvals required for the transaction (although they are subject to an MAE qualifier which severely limits the seller's disclosure obligations). This representation must be supplemented by a covenant requiring the seller to obtain those consents and approvals (see Section 6.06) before the closing.

Seller

The seller should set out all material third-party consents in the disclosure schedules. If any governmental consents (other than under the HSR Act) are required (for example, if the seller is a cable television company, it needs consent from the Federal Communications Commission), the seller should add them to the exceptions at the end of the second sentence or disclose them on a disclosure schedule.

Buyer

The buyer should try to make the representation in Section 4.03 more comprehensive by:

- Expanding the list of adverse consequences in subsection (c) to include events that:
    - with or without notice or lapse of time or both, would constitute a default under a material contract; and
    - would create in any party the right to accelerate, terminate, modify or cancel a material contract.
- Expanding the scope of subsection (c) to cover all contracts, licenses and permits (rather than limiting it to material contracts).

- Adding a subsection (d) which states that the asset purchase agreement and the acquisition will not result in the creation or imposition of any encumbrance on any of the purchased assets.

- Removing the MAE qualifiers or at least replacing the MAE qualifiers with a materiality qualifier. For example, the buyer could revise subsection (b) so that it only covers violations or breaches of material provisions of applicable law.

For an example of a more comprehensive no conflicts representation, see Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Section 4.03.
END DRAFTING NOTE

Section 4.04 Financial Statements. Copies of the audited financial statements consisting of the balance sheet of the Business as at [DATE OF FISCAL YEAR END] in each of the years [YEAR 1], [YEAR 2] and [YEAR 3] and the related statements of income and retained earnings, stockholders' equity and cash flow for the years then ended (the "**Audited Financial Statements**"), and unaudited financial statements consisting of the balance sheet of the Business as at [DATE OF MOST RECENT QUARTER END] and the related statements of income and retained earnings, stockholders' equity and cash flow for the [three-/six-/nine- month] period then ended (the "**Interim Financial Statements**" and together with the Audited Financial Statements, the "**Financial Statements**") [are included in the Disclosure Schedules/have been delivered to Buyer/have been made available to Buyer in the Data Room]. The Financial Statements have been prepared in accordance with GAAP applied on a consistent basis throughout the period involved, subject, in the case of the Interim Financial Statements, to normal and recurring year-end adjustments and the absence of notes. The Financial Statements fairly present in all material respects the financial condition of the Business as of the respective dates they were prepared and the results of the operations of the Business for the periods indicated. The balance sheet of the Business as of [DATE OF MOST RECENT FISCAL YEAR END] is referred to herein as the "**Balance Sheet**" and the date thereof as the "**Balance Sheet Date**" and the balance sheet of the Business as of [DATE OF MOST RECENT FISCAL QUARTER END] is referred to herein as the "**Interim Balance Sheet**" and the date thereof as the "**Interim Balance Sheet Date**".

Drafting Note: Financial Statements

The representation in Section 4.04 is standard for a business with audited GAAP financial statements. If the audited financial statements are the most recent financial statements of the target business, references to the interim financial statements and balance sheet can be deleted. Each of the parties should consult with their accountants when drafting and negotiating this provision.

The substance of this representation changes if the financial statements of the target business are:

- **Not audited.** In some cases, the seller may not have audited financial statements for the target business or may account for it as part of a larger consolidated group. In these cases, the buyer

must accept unaudited financial statements, but the seller should expect the buyer and its accounting advisors to conduct a more thorough review of the financial condition of the target business (including, perhaps, completing an audit of the financial statements whether as a closing condition or otherwise).

- **Not in accordance with GAAP.** In that case, the accounting principles, policies and procedures used in the seller's preparation of the financial statements should be disclosed in a disclosure schedule and the seller should represent that the financial statements have been prepared in accordance with these disclosed accounting principles. The seller should expect the buyer and its accounting advisors to spend additional time reviewing and getting comfortable with these accounting principles, policies and procedures.

Seller

The "fairly present" standard in the representation is qualified by materiality. The seller may prefer to use a GAAP qualifier by revising the third sentence as follows:

"The Financial Statements fairly present the financial condition of the Business as of the respective dates they were prepared and the results of the operations of the Business for the periods indicated, all in accordance with GAAP."

Doing this limits the representation by subjecting it to the conventions, rules, and procedures of GAAP, which allows the seller to rely on certain assumptions. If the seller wants to take a more aggressive approach, it can try to include both materiality and GAAP qualifiers.

Section 4.04 does not include an undisclosed liabilities representation. Sellers will often argue an undisclosed liabilities representation is not necessary in an asset deal because buyers only become liable for liabilities they assume under the purchase agreement. However, most buyers will still try to negotiate this representation into the agreement. In some cases, the seller may want to pre-emptively add an undisclosed liability representation that is drafted in its favor. For example, it may want to include one that is limited to GAAP liabilities, such as:

"Seller has no liabilities, obligations or commitments with respect to the Business of a type required to be reflected on a balance sheet prepared in accordance with GAAP, except (a) those which are adequately reflected or reserved against in the Balance Sheet as of the Balance Sheet Date; and (b) those which have been incurred in the ordinary course of business since the Balance Sheet Date which are not material in amount."

Limiting the scope of the undisclosed liabilities representation to only those liabilities required to be disclosed by GAAP subjects the representation to the conventions, rules and procedures of GAAP, which allows the seller to rely on certain assumptions. This also would exclude unknown contingent liabilities from being covered by the representation because GAAP only requires accruals for contingent liabilities if it is probable that an asset has been impaired or a liability has been incurred and the amount of the loss can be reasonably estimated. Alternatively the undisclosed liabilities representation can be qualified with a:

- Materiality or MAE qualifier to ensure immaterial inaccuracies or omissions do not cause a breach of the representation.

- Knowledge qualifier to limit the scope of the representation to only those liabilities known by the seller.

Buyer

In the representation about the financial statements being in compliance with GAAP, the buyer should limit the qualification for interim financial statements with materiality. For example, it could revise the second sentence of the representation as follows:

"The Financial Statements have been prepared in accordance with GAAP applied on a consistent basis throughout the period involved, subject, in the case of the Interim Financial Statements, to normal and recurring year-end adjustments (the effect of which, individually or in the aggregate, will not be materially adverse) and the absence of notes (that, if presented, would not differ materially from those presented in the Audited Financial Statements)."

If the buyer wants to be aggressive, it could try to delete the materiality qualifier in the "fairly presents" representation.

The buyer may also want to consider adding:

- A representation that the financial statements delivered to the buyer are complete and correct by adding the phrase "complete and correct" at the beginning of the first sentence in Section 4.04.

- A representation that the seller has a standard system of accounting for the target business established and administered in accordance with GAAP. For example:

  "Seller maintains a standard system of accounting for the Business established and administered in accordance with GAAP."

- A representation relating to internal accounting controls of the seller. This representation is based on Section 13(b)(2) of the Securities Exchange Act of 1934, as amended (Exchange Act). While private companies need not comply with Section 13(b)(2), a buyer may want to ask for an internal accounting control representation because:

  - it assures the buyer that the financial statements were based on reliable information; and

  - for a buyer that is a public company, it save the time and expense of making internal accounting controls of the target business compliant with these Exchange Act requirements after the closing.

  The following is an example of an internal accounting control representation that the buyer can add:

  "Seller has established and maintains a system of "internal controls over financial reporting" (as defined in Rules 13a-15(f) and 15d-15(f) of the Exchange Act) sufficient to provide reasonable assurance (x) regarding the reliability of Seller's financial reporting and the preparation of financial

statements for external purposes in accordance with GAAP, (y) that receipts and expenditures of the Business are being made only in accordance with the authorization of Seller's management and directors, and (z) regarding prevention or timely detection of the unauthorized acquisition, use or disposition of assets of the Business that could have a material effect on financial statements of the Business."

- A representation that there are no undisclosed liabilities of the target business. For example:

  "Seller has no liabilities, obligations or commitments with respect to the Business of any nature whatsoever, asserted or unasserted, known or unknown, absolute or contingent, accrued or unaccrued, matured or unmatured or otherwise ("**Liabilities**"), except (a) those which are adequately reflected or reserved against in the [Interim] Balance Sheet as of the [Interim] Balance Sheet Date, and (b) those which have been incurred in the ordinary course of business since the [Interim] Balance Sheet Date and which, individually or in the aggregate, are not material in amount."

  The seller will most likely resist this representation and argue it is overbroad and otherwise covered by the other specific representations. Alternatively, it may try to narrow this representation by limiting it to liabilities required to be disclosed under GAAP (*see above*) or qualifying it with knowledge, materiality or MAE qualifiers.

- A representation that the seller has not entered into any off-balance sheet transactions involving the target business.

END DRAFTING NOTE

Section 4.05 Absence of Certain Changes, Events and Conditions. Except as expressly contemplated by this Agreement [or as set forth on Section 4.05 of the Disclosure Schedules], from the [Interim] Balance Sheet Date until the date of this Agreement, Seller has operated the Business in the ordinary course of business in all material respects and there has not been, with respect to the Business, any:

Drafting Note: Absence of Certain Changes, Events and Conditions

The representation in Section 4.05 assures the buyer that, from the date of the most recent balance sheet through the signing date, the seller has operated the target business in the ordinary course of business and there has not been an MAE or certain other changes, events and conditions. Buyers often attempt to:

- Expand the time period covered by the representation.

- Delete the materiality qualifier from the ordinary course representation.
- Expand the list of changes, events and conditions.

Period Covered by Representation

The seller typically wants the period covered by the representation to be as short as possible. If there has been an interim balance sheet since the last audited balance sheet, the seller will typically use the most recent interim balance sheet date.

However, the buyer should try to use the date of the most recent audited balance sheet because the information contained in those statements are reviewed and audited by an independent third party. The buyer should also have the period covered by the representation extend through the closing date, rather than end on the signing date.

Ordinary Course of Business

The buyer should delete the materiality qualifier and specify that the target business has been operated in the ordinary course of business "consistent with past practice."

Changes, Events and Conditions

The seller usually tries to keep the list of changes, events and conditions as short as possible and only include those items that are most commonly given. Because the covenant prohibiting the seller from engaging in certain activities between the signing and closing (see Section 6.01) is usually based on the list contained in this representation, the seller should exclude anything that could limit the seller's ability to operate the target business. An aggressive seller may try to leave out the list altogether and only represent that the target business has been operated in the ordinary course and that no change, event or condition has occurred that has had an MAE by revising Section 4.05 as follows:

"Except as expressly contemplated by the Agreement [or as set forth on Section 4.05 of the Disclosure Schedules], from the [Interim] Balance Sheet Date until the date of this Agreement, (a) Seller has operated the Business only in the ordinary course of business in all material respects and (b) there has not been, with respect to the Business, any event, occurrence or development that has had a Material Adverse Effect."

The buyer should try to expand the list of changes, events and conditions to include anything that has a material impact on the target business, including actions that may relate to its operations. The buyer should consider adding items such as:

- Material changes in any method of accounting or accounting practice for the target business.
- Material damage, destruction or loss, or any material interruption in use, of any purchased assets.

- Capital investments above a certain dollar threshold.
- Entry into an agreement that would constitute a material contract.
- Any loan to (or forgiveness of any loan to) any directors, officers or employees of the target business.
- Acceleration, termination, modification or cancellation of an assigned contract.
- Adoption, modification or termination of any collective bargaining or other agreement with a union.

Most of the items listed in this Section 4.05 include a threshold or a materiality qualifier. The buyer should ensure it is comfortable with the threshold amounts and consider deleting any materiality qualifiers which are not appropriate.
END DRAFTING NOTE

(a) event, occurrence or development that has had a Material Adverse Effect;

Drafting Note: No Material Adverse Effect

The representation in Section 4.05(a) is sometimes drafted as a separate section. The parties usually negotiate the definition of "Material Adverse Effect" heavily (see Drafting Note, Definition: Material Adverse Effect).

Buyer

This representation is limited to events, occurrences or developments that have had an MAE. The buyer should try to expand the scope to include events, occurrences or developments that "could reasonably be expected to have" an MAE. Other formulations, such as "may," "could," "is reasonably likely to," "would" or "will," can also be used. Some people are sensitive to the choice of these words, while others think there is little difference between them. For example, some believe that a circumstance which "could" be likely to have a material adverse affect on the target business is different (and more likely to be triggered) than something which "would" have that effect. Using "could" is arguably more advantageous for the seller. In practice, both

terms are used extensively and the choice of one over the other should not usually be a major issue for either party.
END DRAFTING NOTE

(b) incurrence of any indebtedness for borrowed money in connection with the Business in an aggregate amount exceeding $[NUMBER], except unsecured current obligations and liabilities incurred in the ordinary course of business;

(c) sale or other disposition of any of the Purchased Assets shown or reflected in the Balance Sheet, except for the sale of Inventory in the ordinary course of business and except for any Purchased Assets having an aggregate value of less than $[NUMBER];

(d) cancellation of any debts or claims or amendment, termination or waiver of any rights constituting Purchased Assets, except in the ordinary course of business;

(e) capital expenditures in an aggregate amount exceeding $[NUMBER] which would constitute an Assumed Liability;

(f) imposition of any Encumbrance upon any of the Purchased Assets, except for Permitted Encumbrances;

(g) increase in the compensation of any Employees, other than as provided for in any written agreements or in the ordinary course of business;

(h) adoption, termination, amendment or modification of any Benefit Plan, the effect of which in the aggregate would increase the obligations of Seller by more than [PERCENTAGE]% of its existing annual obligations to such plans;

(i) adoption of any plan of merger, consolidation, reorganization, liquidation or dissolution or filing of a petition in bankruptcy under any provisions of federal or state bankruptcy Law or consent to the filing of any bankruptcy petition against it under any similar Law;

(j) purchase or other acquisition of any property or asset that constitutes a Purchased Asset for an amount in excess of $[NUMBER], except for purchases of Inventory or supplies in the ordinary course of business; or

(k) any agreement to do any of the foregoing, or any action or omission that would result in any of the foregoing.

Section 4.06 Material Contracts.

(a) Section 4.06(a) of the Disclosure Schedules lists each of the following Contracts (x) by which any of the Purchased Assets are bound or affected or (y) to which Seller is a party or by which it is bound in connection with the Business or the Purchased Assets (together with all Leases listed in Section 4.09(b) of the Disclosure Schedules and all Intellectual Property Agreements listed in Section 4.10(a) of the Disclosure Schedules, collectively, the "**Material Contracts**"):

(i) all Contracts involving aggregate consideration in excess of $[NUMBER] or requiring performance by any party more than one year from the date hereof, which, in each case, cannot be cancelled without penalty or without more than [180/[NUMBER]] days' notice;

(ii) all Contracts that relate to the sale of any of the Purchased Assets, other than in the ordinary course of business, for consideration in excess of $[NUMBER];

(iii) all Contracts that relate to the acquisition of any business, a material amount of stock or assets of any other Person or any real property (whether by merger, sale of stock, sale of assets or otherwise), in each case involving amounts in excess of $[NUMBER];

(iv) except for agreements relating to trade payables, all Contracts relating to indebtedness (including, without limitation, guarantees), in each case having an outstanding principal amount in excess of $[NUMBER];

(v) all Contracts between or among the Seller on the one hand and any Affiliate of Seller on the other hand;

(vi) all collective bargaining agreements or Contracts with any labor organization, union or association.

(b) [Except as set forth on Section 4.06(b) of the Disclosure Schedules,] Seller is not in breach of, or default under, any Material Contract, except for such breaches or defaults that would not have a Material Adverse Effect.

Drafting Note: Material Contracts

What Constitutes a Material Contract?

Section 4.06(a) requires the seller to disclose to the buyer all material contracts relating to the target business or the purchased assets. It specifically lists the types of contracts the seller must disclose. The list included here is illustrative. The types of agreements and the criteria for disclosure may vary, depending on the size and nature of the target business.

Seller. The seller wants to limit what constitutes a "Material Contract" to reduce its disclosure obligation. To do so, it should try to include a high materiality threshold by selecting a sufficiently high dollar amount threshold for each type of contract, as applicable.

Buyer. The buyer should try to add additional categories of agreements to the definition of "Material Contracts." For example, it can add:

- Requirement contracts.
- Indemnification agreements.
- Employment agreements or contracts with independent contractors that cannot be terminated without notice or payments.
- Agreements with governmental authorities.
- Noncompete agreements.
- Joint venture agreements.
- Personal property leases.

Often buyers also include a catchall category, such as:

"any other Contract that is material to the Business and not previously disclosed pursuant to this Section 4.06."

For an example of a more expansive list of categories, see Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Section 4.07.

Status of Material Contracts

Section 4.06(b) requires the seller to assure the buyer that the seller is not in breach of or default under any material contract.

Buyer. The buyer should try to expand this representation to include representations relating to:

- Enforceability of the material contracts.
- Whether any counterparties to the material contracts is in breach of or default under any material contract.
- Whether any event has occurred that would constitute a default under a material contract or cause a termination or acceleration of a material contract.

The buyer should also try to delete the MAE qualifier, especially if the buyer's indemnification rights are subject to a basket (see Drafting Notes, Baskets and Materiality Scrape).

For a more aggressive approach, the buyer can try to have the representation relating to enforceability of the material contracts to include enforceability against the other parties to the material contracts,

For an example of a more comprehensive representation about the status of material contracts, see Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Section 4.07(b).

END DRAFTING NOTE

Section 4.07 Title to Tangible Personal Property. [Except as set forth in Section 4.07 of the Disclosure Schedules,] Seller has good and valid title to, or a valid leasehold interest in, all Tangible Personal Property included in the Purchased Assets, free and clear of Encumbrances except for Permitted Encumbrances.

Drafting Note: Title to Tangible Personal Property

Buyer

If there are any liens or other title defects listed on Section 4.07 of the disclosure schedules, the buyer should ensure they are removed or corrected by the closing date by adding a closing condition (see Drafting Note, Conditions to Obligations of Buyer).
END DRAFTING NOTE

Section 4.08 Sufficiency of Assets. The Purchased Assets are sufficient for the continued conduct of the Business after the Closing in substantially the same manner as conducted prior to the Closing and constitute all of the rights, property and assets necessary to conduct the Business as currently conducted.

Drafting Note: Sufficiency of Assets

The sufficiency of assets representation is relatively standard in an asset purchase agreement where the buyer is acquiring the assets of an ongoing business or where the target business shares services or assets with the seller's other businesses. This representation assures the buyer that it can operate the target business as it is currently being conducted.

Buyer

This asset purchase agreement does not contain a representation covering the condition of the tangible personal property being acquired. The seller may feel it is enough to only give a representation regarding its title to the assets and having the buyer inspect the condition of the properties and assets itself. However, most buyers want some comfort from the seller that the purchased assets are in good condition and suitable for their purpose. The buyer should consider adding a representation such as:

"[Except as set forth in Section 4.08 of the Disclosure Schedules,] the Tangible Personal Property included in the Purchased Assets are structurally sound, are in good operating condition and repair, and are adequate for the uses to which they are being put, and none of the Tangible Personal Property is in need of maintenance or repairs except for ordinary, routine maintenance and repairs that are not material in nature or cost."

The buyer may also want to add a representation that the excluded assets are not material to the target business.

END DRAFTING NOTE

Section 4.09 Real Property.

Drafting Note: Real Property

The scope of the seller's real property representation depends on whether real property is included in the purchased assets and the importance of the real property to the target business. If real property is significant, the representation should be more comprehensive and detailed. However, the seller generally limits the representation by including materiality and knowledge qualifiers.

The real property representations should be reviewed by the parties' real property specialists.
END DRAFTING NOTE

(a) Section 4.09(a) of the Disclosure Schedules sets forth all material real property owned by Seller and [primarily/exclusively] used in connection with the Business (collectively, the "**Owned Real Property**"). Seller has [good and marketable] fee simple title to the Owned Real Property, free and clear of all Encumbrances, except [(A)] Permitted Encumbrances [and (B) those Encumbrances set forth on Section 4.09(a) of the Disclosure Schedules].

Drafting Note: Owned Real Property

Seller

For a more aggressive approach, the seller should delete the representation that it has marketable title to the owned real property by deleting the bracketed phrase "good and marketable" from the second sentence of Section 4.09(a). However, if the seller cannot negotiate the "good and marketable" language out of this representation, it should ensure that a **title insurance policy** most likely can be issued. The seller should also consider adding that the title to the owned real property is being transferred subject to the "Permitted Encumbrances" and **Schedule B exceptions**. The Schedule B exceptions can be expressly

listed on the disclosure schedule related to Permitted Encumbrances. Schedule B exceptions can be found in a current title commitment or the seller's own title insurance policy.

If the purchased assets do not include any owned real property, this representation can be deleted.

Buyer

The buyer should include legal descriptions of the real property in the disclosure schedules rather than just the street addresses because the legal descriptions are more accurate descriptions of the real property. In addition, the buyer should try to expand the definition of "Owned Real Property" by including:

- The buildings and improvements located on the real property. In some cases, the buildings and improvements may be owned by a party other than the seller. Having these items included in the definition of "Owned Real Property" leaves no room for ambiguity as to the property being transferred.

- All real property (not just material real property) that is used in or necessary for the target business.

The buyer should also consider requiring the seller to represent that it has delivered or made available all documents related to the owned real property (such as deeds, title insurance policies and surveys). For example, it could add:

"With respect to the Owned Real Property, Seller [has delivered to Buyer/made available to Buyer in the Data Room] true, complete and correct copies of the deeds, mortgages or deeds of trust, and any other instruments (as recorded) by which Seller acquired such Owned Real Property, and copies of all title insurance policies, opinions, appraisals, abstracts and surveys in the possession of Seller and relating to the Owned Real Property."

The buyer should also consider adding that:

- Seller has not leased or otherwise granted anyone else the right to use or occupy the real property.

- There are no unrecorded options, rights of first offer, or rights of first refusal to purchase the owned real property.

END DRAFTING NOTE

(b) Section 4.09(b) of the Disclosure Schedules sets forth all material real property leased by Seller and [primarily/exclusively] used in connection with the Business (collectively, the "**Leased Real Property**"), and a list,

as of the date of this Agreement, of all leases for each Leased Real Property involving annual payments of at least $[NUMBER] (collectively, the "**Leases**").

Drafting Note: Leased Real Property

Buyer

Section 4.09(b) only requires the seller to list material leased property and leases for that leased property with annual payments over a certain amount. The buyer should consider removing these limitations and require the scope of the representation to cover all leased property and all leases. In addition, the buyer should consider requiring the seller to represent that it has delivered or made available all copies of the leases by adding:

"With respect to the Leased Real Property, Seller [has delivered to Buyer/made available to Buyer in the Data Room] true, complete and correct copies of the Leases, including, without limitation, all modifications, extensions or amendments thereto."

While Section 4.06 covers whether the seller is in default under any of the leases (as a result of leases being included in the definition of "Material Contracts"), the buyer should try to add the following representations relating to the leases:

- There are no defaults or events of default by any tenant or landlord under any lease.
- No security deposit is being held under any lease other than those disclosed in the disclosure schedules.
- The seller has a valid and subsisting leasehold estate in and the right to peaceful and undisturbed possession of the leased real property for the full term of the respective lease.
- The leases are in full force and effect and are enforceable according to their respective terms (though most sellers are not willing to represent as to enforceability of a lease).
- The seller is in possession of the demised premises under the leases and has not subleased, assigned or otherwise granted anyone the right to use or occupy any portion of the leased real property.
- The seller has not assigned, pledged, mortgaged or otherwise transferred any lease or granted a lien on its leasehold interest in the leased real property.
- Neither the seller nor any landlord under any lease has exercised any option to:

- cancel or terminate the lease;
- lease additional premises;
- reduce or relocate the premises; or
- purchase the property.

END DRAFTING NOTE

(c) Seller has not received any written notice of existing, pending or threatened (i) condemnation proceedings affecting the Real Property, or (ii) zoning, building code or other moratorium proceedings, or similar matters which would reasonably be expected to materially and adversely affect the ability to operate the Real Property as currently operated. Neither the whole nor any material portion of any Real Property has been damaged or destroyed by fire or other casualty.

Section 4.10 Intellectual Property.

Drafting Note: Intellectual Property

The seller's IP representations must be tailored for a particular transaction depending on various factors, such as whether the purchased assets and assumed liabilities:

- Include a diversified IP portfolio or only certain key IP assets.
- Are the assets and liabilities of a mature company or a startup company.

The representations are also generally impacted by:

- The relative bargaining position of the parties.
- The specific facts learned through or concerns raised by the buyer's due diligence investigation (for more information, see IP Due Diligence Issues in M&A Transactions Checklist).

However, when the seller controls the initial draft, it will try to limit the scope of the IP representations. For example, the representations in Section 4.10 only cover matters regarding the:

- Scheduling of the IP registrations and applications and IP agreements being transferred.
- Seller's ownership and right to use IP necessary to conduct the target business as currently conducted.
- Seller's knowledge of material infringement matters.

The representations in Section 4.10 assume that the purchased IP used in the target business (whether owned by the seller or licensed by the seller from third parties) is not critical to the operations of the target business, although the target business may use a variety of IP.

Buyer

The representations in this Section 4.10 are limited in scope. For example, they do not include typical provisions regarding the validity and enforceability of the target business's IP. For an example of more comprehensive buyer-friendly IP representations, including basic representations concerning information technology (IT) assets and privacy and data security matters, see Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Section 4.11.

If the target business operates in certain industries or includes a valuable IP portfolio, the number and scope of the IP representations may need to be expanded. For example, additional representations may be necessary to address:

- Material patent rights or research and development activities, including use of government funding and obligations due to participation in standards-setting organizations or patent pools (see Standard Clause, Patent Representations: Asset Purchase).
- Material proprietary or licensed software, including use of **open-source software** (see Standard Clause, Software Representations: Asset Purchase).
- Privacy and data security practices, where the collection and use of **personal information** are integral to the target business (see Standard Clause, Privacy and Data Security Representations: Asset Purchase).

The buyer's due diligence is critical to identifying these additional areas of focus. For more information on IP due diligence, see IP Due Diligence Issues in M&A Transactions Checklist.

The buyer should also consider that other representations in the asset purchase agreement may more generally cover IP matters, for example, the representations relating to:

- The absence of certain changes (Section 4.05).
- Material contracts (Section 4.06).

- Legal proceedings and governmental orders (Section 4.11).
- Compliance with laws (Section 4.12).

Therefore, the buyer must review all relevant representations in the agreement and consider whether those representations sufficiently cover IP matters or whether, based on the circumstances of the transaction, more specific IP representations directed to these matters should be included in this Section 4.10.
END DRAFTING NOTE

(a) Section 4.10(a) of the Disclosure Schedules lists (i) all Intellectual Property Registrations and (ii) all Intellectual Property Agreements [that are material to the conduct of the Business] (excluding shrink-wrap, click-wrap, or other similar agreements for commercially available off-the-shelf software [with annual license or subscription fees or a replacement value of less than $[NUMBER]]). Except [as set forth in Section 4.10(a) of the Disclosure Schedules, or] as would not have a Material Adverse Effect, Seller owns or has the right to use all Intellectual Property Assets and the Intellectual Property licensed to Seller under the Intellectual Property Agreements.

Drafting Note: Ownership and Right to Use Intellectual Property

The first part of this representation requires the seller to schedule registered IP assets (including pending applications for registration) and IP agreements included in the purchased assets. The second part addresses the seller's ownership and rights to use the IP assets and IP agreements included in the purchased assets.

Buyer

A buyer often seeks to expand the first part of the representation, for example, by requiring the seller to:

- Schedule material unregistered IP included in the purchased assets (for example, material unregistered trademarks or copyrights (including software)).
- Represent that:

- its ownership of or rights to use the IP assets and IP agreements included in the purchased assets are free and clear of encumbrances other than permitted encumbrances;
- the IP registrations have been properly maintained;
- the IP agreements are valid, binding and enforceable and that none of the parties to the IP agreements are in breach; and
- the seller has provided the buyer with true and complete copies of the IP agreements.

The buyer may seek to modify the second part of the representation by deleting the MAE qualifier in the second sentence (especially if the buyer's indemnification rights are subject to a basket (see Drafting Notes, Baskets and Materiality Scrape)).

For an example of more comprehensive, buyer-friendly representations, see Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Section 4.11(a) through Section 4.11(f).

Seller

Even where the seller includes a materiality qualifier in the first part of the representation, it will typically still exclude certain types of agreements from the disclosure requirement. At a minimum, a seller will typically exclude agreements for shrink-wrap, click-wrap, or other similar commercially available off-the-shelf software. This exclusion is often limited to agreements with an aggregate acquisition price or annual licensing fee under a certain dollar amount (for example, $25,000), depending on the size of the target business.

END DRAFTING NOTE

(b) Except [as set forth in Section 4.10(b) of the Disclosure Schedules, or] as would not have a Material Adverse Effect, to Seller's Knowledge: (i) the conduct of the Business as currently conducted does not infringe, misappropriate, dilute or otherwise violate the Intellectual Property of any Person; and (ii) no Person is infringing, misappropriating or otherwise violating any Intellectual Property Assets. Notwithstanding anything to the contrary in this Agreement, this Section 4.10(b) constitutes the sole representation and warranty of the Seller under this Agreement with respect to any actual or alleged infringement, misappropriation or other violation by Seller of any Intellectual Property of any other Person.

Drafting Note: Non-Infringement

This section includes two non-infringement representations. Subsection (i) is directed toward infringement by the seller of IP owned by a third party and subsection (ii) is directed to third-party infringement of the seller's IP included in the purchased assets.

The last sentence ensures that the representations in this section are the only non-infringement representations that the parties have negotiated in the agreement. This helps to avoid future disputes about whether other provisions also address infringement, such as:

- The representation in Section 4.10(a) that the seller owns or has a right to use the IP assets and IP agreements included in the purchased assets.
- Other general provisions in the agreement that may be read to cover infringement, such as representations about the title to the purchased assets or the seller's compliance with laws.

Buyer

The buyer should try to remove the MAE qualifiers set out in this representation and the knowledge qualifier for subsection (i). Depending on the circumstances and the allocation of risk between the parties, a buyer sometimes agrees to a knowledge qualifier concerning the target business's infringement of patents because patent infringement is a strict liability offense.

The buyer should also consider expanding the representation to include past infringements that might not be ongoing or past claims of infringement. It can consider compromising by only asking the seller to provide a representation on past infringement or claims of infringement for a limited time period. In this case, it should seek to have the representations extend for a sufficient period into the past to capture potential claims still within the applicable statute of limitations. For example, the statute of limitations for obtaining damages for patent infringement is six years (35 U.S.C. § 286).

If the target business's pipeline products or services are important, the buyer may also seek to include future infringement within the scope of the representations. It can consider limiting the coverage for future infringement to specific products and services.

For an example of a more comprehensive, buyer-friendly representation, see Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Section 4.11(f) and Section 4.11(g).
END DRAFTING NOTE

Section 4.11 Legal Proceedings; Governmental Orders.

(a) [Except as set forth in Section 4.11(a) of the Disclosure Schedules,] there are no actions, suits, claims, investigations or other legal proceedings pending or, to Seller's Knowledge, threatened against or by Seller relating to or affecting the Business, the Purchased Assets or the Assumed Liabilities, which if determined adversely to Seller would result in a Material Adverse Effect.

Drafting Note: Legal Proceedings of Seller

Buyer

The buyer should try to expand the scope of this representation by:

- Deleting the MAE qualifier (especially if the buyer's indemnification rights are subject to a basket (see Drafting Notes, Baskets and Materiality Scrape)).
- Adding additional examples of the types of legal proceedings covered by the representation, including demands, arbitrations, inquiries, audits, notices of violation, citations, summons, subpoenas, or investigations of any nature (civil, criminal, administrative, regulatory, or otherwise), whether at law or in equity.
- Adding a representation that there are no actions that would prevent or delay the transaction.
- Adding a representation that there are no events that could give rise to an action against the seller.

For an example of a more expansive representation covering legal proceedings, see Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Section 4.16(a).
END DRAFTING NOTE

(b) [Except as set forth in Section 4.11(b) of the Disclosure Schedules,] there are no outstanding Governmental Orders and no unsatisfied judgments, penalties or awards against or affecting the Business or the Purchased Assets which would have a Material Adverse Effect.

Drafting Note: Governmental Orders and Judgments

The buyer should try to expand the scope of this representation by:

- Deleting the MAE qualifier (especially if the buyer's indemnification rights are subject to a basket (see Drafting Notes, Baskets and Materiality Scrape)).
- If there are governmental orders listed in the disclosure schedule, adding a representation assuring compliance with the governmental orders.

For an example of a more expansive representation covering governmental orders and judgments, see Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Section 4.16(b).
END DRAFTING NOTE

Section 4.12 Compliance With Laws; Permits.

(a) [Except as set forth in Section 4.12(a) of the Disclosure Schedules,] Seller is in compliance with all Laws applicable to the conduct of the Business as currently conducted or the ownership and use of the Purchased Assets, except where the failure to be in compliance would not have a Material Adverse Effect.

Drafting Note: Compliance with Laws

Seller

Section 4.12(a) has a narrow scope because it only includes representations about current compliance with laws applicable to the target business and the purchased assets. The seller should avoid giving representations about past compliance because:

- Any past compliance is irrelevant if it has been cured.

- If the seller had a predecessor company, the seller does not want to be liable for any prior violations of that company.

Because the representations and warranties are brought down at closing, the seller must ensure the target business is conducted according to any changes in law that take effect between the signing and closing.

Buyer

The buyer should try to expand the scope of the representation by:

- Including past compliance because it does not want to be liable for any losses that may arise based on past violations not disclosed by the seller. It can attempt to compromise by only asking the seller to provide a past compliance representation for a limited time period (such as the prior three-year period).

- Deleting the MAE qualifier (especially if the buyer's indemnification rights are subject to a basket (see Drafting Notes, Baskets and Materiality Scrape)).

For an example of a more expansive representation about compliance with laws, see Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Section 4.17(a).
END DRAFTING NOTE

(b) All Permits required for Seller to conduct the Business as currently conducted or for the ownership and use of the Purchased Assets have been obtained by Seller and are valid and in full force and effect, except where the failure to obtain such Permits would not have a Material Adverse Effect.

Drafting Note: Permits

The buyer should revise the representation to also:

- Cover whether all fees and charges for the permits have been paid.

- List all current permits issued to the seller which are related to the target business or the purchased assets.

- Provide assurances that nothing has occurred that could cause a revocation, suspension, lapse or other limitation of a permit.

The buyer should also attempt to delete the MAE or materiality qualifier, especially if the buyer's indemnification rights are subject to a basket (see Drafting Notes, Baskets and Materiality Scrape).

For an example of a more expansive representation about compliance with laws, see Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Section 4.17(b).
END DRAFTING NOTE

(c) None of the representations and warranties in Section 4.12 shall be deemed to relate to environmental matters (which are governed by Section 4.13), employee benefits matters (which are governed by Section 4.14), employment matters (which are governed by Section 4.15) or tax matters (which are governed by Section 4.16).

Drafting Note: Specialized Regulatory Representations

The seller must carve out from the compliance with laws representation any regulatory representations covered in more detail in other sections of the asset purchase agreement (for example, representations regarding compliance with environmental laws is dealt with in detail in Section 4.13). These regulatory representations are highly technical and are usually heavily negotiated by legal specialists. In addition, the seller should not permit Section 4.12 to become a backdoor tactic for a buyer to avoid the limitations negotiated into these regulatory representations.

The buyer often agrees to include this carve-out, but it should review the representations in the other sections more carefully to ensure the other sections capture everything that should be covered.
END DRAFTING NOTE

Section 4.13 Environmental Matters.

Drafting Note: Environmental Matters

While certain environmental matters can be covered by the representations in Section 4.11 and Section 4.12, they are typically covered in a separate section that specifically relates to compliance with environmental laws because the risks and costs of noncompliance with these laws can be large. All environmental representations should be reviewed by the parties' environmental specialists.

Seller

The need for and extent of environmental representations vary according to the nature of the target business and the location of the properties being transferred. However, the seller generally limits the scope of the environmental representations in its initial draft. For example, the seller may limit the scope to only cover the seller's current compliance with environmental laws and permits and the release of hazardous materials or substances on the real property being transferred.

The seller may also limit its environmental representations with:

- Exceptions disclosed in the disclosure schedules. The seller typically tries to disclose as much as it can in the disclosure schedules to reduce the potential for future claims for breaches of representations based on non-disclosure of material conditions. It can do this by describing its exceptions with broad and general language or incorporating by reference in the disclosure schedules environmental reports and publicly available databases.

- Materiality, MAE and/or knowledge qualifiers.

- Limitations to certain time periods (for example, the period during which the seller actually owned or operated the site or sites).

- Limitations to certain sites if the transaction involves a portfolio of sites (particularly in transactions where only a small subset of sites have environmental issues).

Buyer

The representations in this Section 4.13 are limited in scope. For example, the representations do not cover former sites owned, operated or leased by the seller. While the asset purchase agreement limits the buyer's assumption of liabilities to those expressly set out in the agreement (see Section 2.03 and Section 2.04), certain federal and state laws may supersede the limitations set out in the agreement and impose liability on the buyer. This can be the case with certain environmental laws (such as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), and state analogs), so it is important for the buyer to know about all of the seller's environmental liabilities, including any historic liabilities associated with any sites formerly owned, operated or leased by the seller in connection with the target business. It should try to obtain this information through the seller's environmental representations by expanding the scope of the representations to include former sites.

Depending on the nature of the target business, the buyer may seek to add representations regarding climate change related assets and risks. Although not yet market in all transactions, climate change related representations are becoming more common where the target business operates in the energy, utility, industrial or manufacturing sectors. In these sectors, the existence and allocation of "environmental attributes" (for example, emissions and renewable energy credits, benefits, offsets and allowances under applicable emission or renewable energy trading or budget programs) can have a significant impact on how a buyer assesses and values the target business.

The existence of climate change-related risks and liabilities also may significantly impact a buyer's valuation of the target business, as well as implicate various requirements and guidelines regarding disclosure of the impacts of climate change on the target business' operations and vice versa. The buyer should carefully evaluate the nature and extent of any climate change-related assets and risks and, based on deal specifics, seek inclusion of appropriate representations.

In addition, the buyer may want to add the following representation to get comfort that the target business has not retained or assumed any environmental liabilities:

"Seller has not retained or assumed, by contract or operation of Law, any liabilities or obligations of third parties under Environmental Law."

The buyer should also try to:

- Delete the MAE or materiality qualified in this representation, especially if the buyer's indemnification rights are subject to a basket (see Drafting Notes, Baskets and Materiality Scrape)).
- Delete the knowledge qualifiers.
- Resist the incorporation of the environmental reports by reference to the disclosure schedules and require the seller to provide specific, targeted disclosures.

For a more comprehensive representation regarding environmental matters, including climate change related assets and risks, see Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Section 4.18.

END DRAFTING NOTE

(a) Except [as set forth in Section 4.13(a) of the Disclosure Schedules, or] as would not have a Material Adverse Effect, to Seller's Knowledge, the operations of Seller with respect to the Business and the Purchased Assets are in compliance with all Environmental Laws. Seller has not received from any Person, with respect to the Business or the Purchased Assets, any: (i) Environmental Notice or Environmental Claim; or (ii) written request for information pursuant to Environmental Law, which, in each case, either remains pending or unresolved, or is the source of ongoing obligations or requirements as of the Closing Date.

(b) Except [as set forth in Section 4.13(b) of the Disclosure Schedules, or] as would not have a Material Adverse Effect, to Seller's Knowledge, Seller has obtained and is in material compliance with all material Environmental Permits (each of which is disclosed in Section 4.13(b) of the Disclosure Schedules) necessary for the conduct of the Business as currently conducted or the ownership, lease, operation or use of the Purchased Assets.

(c) None of the Real Property is listed on, or has been proposed for listing on, the National Priorities List (or CERCLIS) under CERCLA, or any similar state list.

Drafting Note: CERCLA

This subsection can be deleted if the Purchased Assets do not include real property.
END DRAFTING NOTE

(d) Except [as set forth in Section 4.13(d) of the Disclosure Schedules, or] as would not have a Material Adverse Effect, to Seller's Knowledge, there has been no Release of Hazardous Materials in contravention of Environmental Law with respect to the Business, the Purchased Assets or any Real Property, and Seller has not received any Environmental Notice that the Business or any of the Purchased Assets or Real Property has been contaminated with any Hazardous Material which would reasonably be expected to result in an Environmental Claim against, or a violation of Environmental Law or term of any Environmental Permit by, Seller.

(e) Seller has previously [delivered to Buyer/made available to Buyer in the Data Room] any and all material environmental reports, studies, audits, records, sampling data, site assessments and other similar documents with respect to the Business, the Purchased Assets or any Real Property which are in the possession or control of Seller.

(f) The representations and warranties set forth in this Section 4.13 are the Seller's sole and exclusive representations and warranties regarding environmental matters.

Drafting Note: Exclusivity of Environmental Representations

This section ensures that the representations in Section 4.13 are the only representations covering environmental matters (see Drafting Note, Specialized Regulatory Representations). For this reason, the buyer should attempt to expand the scope of Section 4.13 to be as comprehensive as possible.
END DRAFTING NOTE

Section 4.14 Employee Benefit Matters.

Drafting Note: Employee Benefit Matters

The representations in Section 4.14 assume the seller maintains its own employee benefit plans (separate from those of any of its affiliates) and that the buyer is not assuming any of the seller's employee benefit plans. These representations are fairly typical, but their scope can be expanded or limited depending on the deal and the types of benefit plans the seller has in place. For example, where the seller is an affiliate of the entity sponsoring the benefit plans, the scope of the representations may need to be broadened to include the affiliate. Additionally the representations may need to be augmented to take into account a particular type of plan sponsored by the seller.

If the buyer assumes any of the seller's employee benefit plans, the buyer will likely request more comprehensive representations for the assumed plans.

There are various federal laws, including the **Employee Retirement Income Security Act of 1974** (ERISA), and the **Internal Revenue Code** (the Code), governing employee benefits. Both parties should engage employee benefits specialists when preparing or reviewing these representations. If the target business has employees outside of the U.S., the buyer should engage employee benefits specialists in those jurisdictions where the target business has employees.

Buyer

In addition to the other buyer issues discussed in the drafting notes to the subsections in Section 4.14, the buyer should try to delete the:

- MAE or materiality qualifiers in this representation, especially if the buyer's indemnification rights are subject to a basket (see Drafting Notes, Baskets and Materiality Scrape).
- Knowledge qualifiers (except in representations relating to threatened actions which are typically qualified by knowledge).

END DRAFTING NOTE

(a) Section 4.14(a) of the Disclosure Schedules contains a list of each material benefit, retirement, employment, consulting, compensation, incentive, bonus, stock option, restricted stock, stock appreciation right, phantom equity, change in control, severance, vacation, paid time off, welfare and fringe-benefit agreement, plan, policy and program in effect and covering one or more Employees, former employees of the Business, current or former directors of the Business or the beneficiaries or dependents of any such Persons, and is maintained, sponsored, contributed to, or required to be contributed to by Seller, or under which Seller has any material liability for premiums or benefits (as listed on Section 4.14(a) of the Disclosure Schedules, each, a "**Benefit Plan**").

Drafting Note: List of Benefit Plans

While the asset purchase agreement limits the buyer's assumption of liabilities to those expressly set out in the agreement (see Section 2.03 and Section 2.04), certain federal and state laws may supersede the limitations set out in the agreement and impose liability on the buyer. This can be the case with certain employee benefit liabilities. For this reason, sellers often include a representation listing all material employee benefit plans and programs to provide the buyer with information about its employee benefit plans.

If the seller wants to be more aggressive, it should consider deleting all references to former employees and directors in the definition of "Benefit Plan." However, most buyers will want the definition of "Benefit Plan" to include plans that cover former employees and directors and they usually end up being included in the definition after negotiations are completed.

Also, as a practical matter, because Section 6.04(b) requires the buyer to offer the transferred employees compensation and benefits that are comparable to what they received from the seller, the buyer needs all information on the type of compensation and benefits currently provided to all transferred employees.

Buyer

The buyer may attempt to require the seller to separately identify employee benefit plans that contain change in control provisions or that are maintained primarily for target business employees outside of the United States by adding the following to Section 4.14(a):

"Seller has separately identified in Section 4.14(a) of the Disclosure Schedules (i) each Benefit Plan that contains a change in control provision and (ii) each Benefit Plan that is maintained, sponsored, contributed to, or required to be contributed to by Seller primarily for the benefit of Employees outside of the United States (a "**Non-U.S. Benefit Plan**")."

END DRAFTING NOTE

(b) Except [as set forth in Section 4.14(b) of the Disclosure Schedules, or] as would not have a Material Adverse Effect, to Seller's Knowledge, each Benefit Plan and related trust complies with all applicable Laws (including ERISA [and/,] the Code [and applicable local Laws]). Each Benefit Plan that is intended to be qualified under Section 401(a) of the Code (a "**Qualified Benefit Plan**") has received a favorable determination letter from the Internal Revenue Service, or with respect to a prototype plan, can rely on an opinion letter from the Internal Revenue Service to the prototype plan sponsor, to the effect that such Qualified Benefit Plan is so qualified and that the plan and the trust related thereto are exempt from federal income Taxes under Sections 401(a) and 501(a), respectively, of the Code, and, to Seller's Knowledge, nothing has occurred that could reasonably be expected to cause the revocation of such determination letter from the Internal Revenue Service or the unavailability of reliance on such opinion letter from the Internal Revenue Service, as applicable. With respect to any Benefit Plan, to Seller's Knowledge, no event has occurred or is reasonably expected to occur that has resulted in or would subject Seller to a Tax under Section 4971 of the Code or the Purchased Assets to a lien under Section 430(k) of the Code.

(c) [Except as set forth in Section 4.14(c) of the Disclosure Schedules,] no Benefit Plan: (i) is subject to the minimum funding standards of Section 302 of ERISA or Section 412 of the Code; or (ii) is a "multi-employer plan" (as defined in Section 3(37) of ERISA). Except as would not have a Material Adverse Effect, Seller has not: (A) withdrawn from any pension plan under circumstances resulting (or expected to result) in liability; or (B) engaged in any transaction which would give rise to a liability under Section 4069 or Section 4212(c) of ERISA.

Drafting Note: Plan Liabilities

The representation in Section 4.14(c) provides information regarding whether any plan is a **defined benefit plan**, which subjects an employer to certain funding obligations under ERISA and the Code. The representation in Section 4.14(c) also provides information regarding whether any plans are **multi-employer plans**. When employers completely or partially withdraw from a multi-employer pension plan, the plan will immediately assess the employer with a proportionate share of the plan's unfunded vested benefits. This is relevant for the buyer because it may inherit this liability as a result of the transaction.

Buyer

Under ERISA, liabilities for certain types of plans may not only be imposed on the employer sponsoring or contributing to the plan, but also on certain of the employer's affiliates (as outlined in ERISA). To address this affiliate liability, the buyer should try to expand these

representations to include employee benefit plans that are sponsored, maintained, contributed or required to be contributed to by any entity that, together with the seller, would be treated as a single employer under Sections 414(b), (c), (m) or (o) of the Code.
END DRAFTING NOTE

(d) [Except as set forth in Section 4.14(d) of the Disclosure Schedules and] other than as required under Section 4980B of the Code or other applicable Law, no Benefit Plan provides benefits or coverage in the nature of health, life or disability insurance following retirement or other termination of employment (other than death benefits when termination occurs upon death).

Drafting Note: Post-Employment Obligations

Retiree health obligations and other post-employment obligations may be quite costly to employers as medical costs continue to escalate. These costs will likely increase further because of certain provisions of the **Patient Protection and Affordable Care Act**. The representation in Section 4.14(d) assures the buyer that it will be aware of the costs of these benefits.
END DRAFTING NOTE

(e) Except [as set forth in Section 4.14(e) of the Disclosure Schedules, or] as would not have a Material Adverse Effect, no Benefit Plan exists that could: (i) result in the payment to any Employee, director or consultant of the Business of any money or other property; or (ii) accelerate the vesting of or provide any additional rights or benefits (including funding of compensation or benefits through a trust or otherwise) to any Employee, director or consultant of the Business, in each case, as a result of the execution of this Agreement. Neither the execution of this Agreement nor the consummation of the transactions contemplated hereby will result in "excess parachute payments" within the meaning of Section 280G(b) of the Code.

Drafting Note: Section 280G of the Code

Section 280G of the Code deals with payments made to certain individuals in connection with a change of control (which may include a sale of all or substantially all assets). If these payments exceed a specified amount, they are not deductible and the individual receiving the payment incurs a 20% excise tax.
END DRAFTING NOTE

(f) The representations and warranties set forth in this Section 4.14 are the Seller's sole and exclusive representations and warranties regarding employee benefit matters.

Drafting Note: Exclusivity of Employee Benefit Matters Representations

This section ensures that the representations in Section 4.14 are the only representations covering employee benefit matters (see Drafting Note, Specialized Regulatory Representations). For this reason, the buyer should attempt to expand the scope of Section 4.14 to be as comprehensive as possible.
END DRAFTING NOTE

Section 4.15 Employment Matters.

Drafting Note: Employment Matters

Section 4.15 is a fairly limited representation that covers employment matters regarding:

- Compliance with employment laws.
- Collective bargaining or other labor agreements.
- Unfair labor practices.

- Labor strikes, slowdowns or stoppages.

Various federal, state and local laws govern employment and labor practices. Both parties should engage employment and labor law specialists when preparing or reviewing this representation.

Buyers

The buyer should try to expand the scope of this representation by adding a representation:

- Requiring a list of all current employees which includes information about their compensation and stating that this compensation has been paid in full.
- Requiring a list of all employment contracts or at least stating that all employment contracts have been delivered or made available to the buyer.
- Covering compliance with the WARN Act.

For a more comprehensive representation regarding employment matters, see Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Section 4.20.
END DRAFTING NOTE

(a) [Except as set forth in Section 4.15(a) of the Disclosure Schedules,] Seller is not a party to, bound by, any collective bargaining or other agreement with a labor organization representing any of the Employees. [Except as set forth in Section 4.15(a) of the Disclosure Schedules,] since [DATE], there has not been, nor, to Seller's Knowledge, has there been any threat of, any strike, slowdown, work stoppage, lockout, concerted refusal to work overtime or other similar labor activity or dispute affecting Seller or any of the Employees.

Drafting Note: Labor Organizations

The buyer should try to expand this representation by:

- Adding a representation that the seller is not obligated to bargain with a labor organization representing any of the employees of the target business.
- Adding a representation regarding the absence of union organizing activity directed at the employees of the target business (typically going back about five to six years).

- Deleting the time limitation in the representation about labor strikes and work stoppages.

END DRAFTING NOTE

(b) Seller is in compliance with all applicable Laws pertaining to employment and employment practices to the extent they relate to the Employees, except to the extent non-compliance would not result in a Material Adverse Effect.

Drafting Note: Compliance with Employment Laws

Buyer

The buyer may want to include an illustrative list of applicable laws pertaining to employment and employment practices in the compliance representation. For example, it may suggest adding the following to the first sentence of Section 4.15(b), immediately after the phrase "employment and employment practices" and before the phrase "to the extent they relate to employees of the Business":

", including all Laws relating to labor relations, equal employment opportunities, fair employment practices, employment discrimination, harassment, retaliation, reasonable accommodation, disability rights or benefits, immigration, wages, hours, overtime compensation, employee and independent contractor classification, child labor, health and safety, workers' compensation, leaves of absence and unemployment insurance,"

The buyer should also consider expanding the scope of this representation by:

- Deleting the materiality and MAE qualifiers, especially if the buyer's indemnification rights are subject to a basket (see Drafting Notes, Baskets and Materiality Scrape).
- Covering past compliance. It can try to compromise by only asking the seller to provide a representation on past compliance for a limited time period.
- Covering claims by prospective employees to encompass challenges to or investigations of discriminatory hiring practices.

In addition, the buyer may want to add a representation relating to any pending or threatened legal proceeding against the seller in connection with employment related matters. For example, it can consider adding the following:

"[Except as set forth in Section 4.15(b) of the Disclosure Schedules,] there are no actions, suits, claims, investigations or other legal proceedings against Seller pending, or to the Seller's Knowledge, threatened to be brought or filed, by or with any Governmental Authority or arbitral tribunal in connection with the employment or termination of employment of any current or former applicant, employee, consultant[, volunteer, intern] or independent contractor of the Business, including, without limitation, any claim relating to unfair labor practices, employment discrimination, harassment, retaliation, equal pay or any other employment related matter arising under applicable Laws."

#MeToo Representations

Although Section 4.15(b) covers the seller's compliance with harassment laws in a broad general manner, some buyers seeking to limit their exposure to unforeseen litigation (in response to the #MeToo movement) have also begun negotiating for specific, stand-alone representations regarding the target business' exposure to allegations of sexual harassment and similar claims. For a sample #MeToo representation, see Standard Clause, #MeToo Representations and Warranties.

END DRAFTING NOTE

(c) The representations and warranties set forth in this Section 4.15 are the Seller's sole and exclusive representations and warranties regarding employment matters.

Drafting Note: Exclusivity of Employment Matters Representations

This section ensures that the representations in Section 4.15 are the only representations covering employment matters (see Drafting Note, Specialized Regulatory Representations). For this reason, the buyer should try to expand the scope of Section 4.15 to be as comprehensive as possible.

END DRAFTING NOTE

Section 4.16 Taxes.

Drafting Note: Taxes

The tax representations in an asset purchase agreement are typically more limited than the tax representations included in a stock purchase agreement. This is because the buyer does not generally inherit the tax liabilities of the seller in an asset purchase agreement.

The tax representations in Section 4.16 assume that the seller:

- Is a **C-corporation**.
- Does not file a consolidated income tax return with any affiliates.
- Does not have any subsidiaries (and therefore is not transferring any stock in the asset purchase).

The tax representations must be modified if any of these assumptions are not correct.

The tax representations cover US federal, state, local and foreign tax matters, so the parties should engage tax counsel who can advise them in all these areas.
END DRAFTING NOTE

(a) Except [as set forth in Section 4.16 of the Disclosure Schedules, or] as would not have a Material Adverse Effect, Seller has filed (taking into account any valid extensions) all material Tax Returns with respect to the Business required to be filed by Seller and has paid all Taxes shown thereon as owing. Seller is not currently the beneficiary of any extension of time within which to file any material Tax Return other than extensions of time to file Tax Returns obtained in the ordinary course of business.

(b) Seller is not a "foreign person" as that term is used in Treasury Regulations Section 1.1445-2.

Drafting Note: FIRPTA

If a US real property interest is acquired from a foreign person, the buyer must withhold a Foreign Investment in Real Property Tax Act (FIRPTA) tax. FIRPTA withholding is required by the buyer only if the seller is a foreign person and the buyer is acquiring a US real property interest. Section 4.16(b) assures the buyer that it does not need to withhold a FIRPTA tax.

However, the representation alone is not enough to relieve the buyer of liability for FIRPTA withholding. For this reason, buyers often also require a nonforeign affidavit from the seller at or before closing (see Section 7.02(g)).
END DRAFTING NOTE

(c) Except for certain representations related to Taxes in Section 4.14, the representations and warranties set forth in this Section 4.16 are Seller's sole and exclusive representations and warranties regarding Tax matters.

Drafting Note: Exclusivity of Tax Matters Representations

This section ensures that, except for certain tax-related representations in Section 4.14 (employee benefit matters), the representations in Section 4.16 are the only representations covering tax matters (see Drafting Note, Specialized Regulatory Representations). For this reason, the buyer should attempt to expand the scope of Section 4.16 to be as comprehensive as possible.
END DRAFTING NOTE

Section 4.17 Brokers. [Except for [NAME OF BROKER, FINDER OR INVESTMENT BANKER],] no broker, finder or investment banker is entitled to any brokerage, finder's or other fee or commission in connection with the transactions contemplated by this Agreement or any other Transaction Document based upon arrangements made by or on behalf of Seller.

Drafting Note: Brokers

If there are several brokers, finders, or investment bankers to name in this representation, list their names on a disclosure schedule to the purchase agreement and revise the bracketed language accordingly.
END DRAFTING NOTE

Section 4.18 No Other Representations and Warranties. Except for the representations and warranties contained in this Article IV (including the related portions of the Disclosure Schedules), neither Seller nor any other Person has made or makes any other express or implied representation or warranty, either written or oral, on behalf of Seller, including any representation or warranty as to the accuracy or completeness of any information regarding the Business and the Purchased Assets furnished or made available to Buyer and its Representatives (including [the Confidential Information Memorandum prepared by [NAME OF FINANCIAL ADVISOR] dated [DATE] and] any information, documents or material [delivered to Buyer/made available to Buyer in the Data Room], management presentations or in any other form in expectation of the transactions contemplated hereby) or as to the future revenue, profitability or success of the Business, or any representation or warranty arising from statute or otherwise in law.

Drafting Note: No Other Representations and Warranties

Seller

The seller wants to preclude any non-contractual claims against it by the buyer (such as claims based on Rule 10b-5 of the Exchange Act and tort-based fraud and misrepresentation claims). It can do this by including:

- Section 4.18 which states the seller is not making any representations to the buyer other than those contained in the asset purchase agreement.
- Section 5.08 which states that the buyer has conducted its own investigation and is relying solely on its own investigation and the seller's express representations and warranties contained in the asset purchase agreement.

For further discussion, see Drafting Note, Independent Investigation.

Buyer

If the seller has stronger negotiating leverage, the buyer will likely have to agree to some form of the above language, but it can scale back the representation by deleting the second half of the sentence that contains references to specific examples such as the confidential information memorandum, information in the data room or otherwise delivered to the buyer, forecast information and representations arising from applicable laws. If the buyer agrees to keep this representation for the seller, it should include a reciprocal representation in Article V that the buyer is not making any representations to the seller other than those contained in the asset purchase agreement (this is often combined with buyer's independent investigation representation in Section 5.08).

However, if the buyer has more negotiating leverage, it should replace the disclaimer of other representations and warranties with a full disclosure representation, such as:

"**Full Disclosure.** No representation or warranty by Seller in this Agreement and no statement contained in the Disclosure Schedules to this Agreement or any certificate or other document furnished or to be furnished to Buyer pursuant to this Agreement contains any untrue statement of a material fact, or omits to state a material fact necessary to make the statements contained therein, in light of the circumstances in which they are made, not misleading. "

This formulation of the full disclosure representation seeks to assure the buyer that the disclosures made in the asset purchase agreement, the disclosure schedules and any other document delivered to the buyer under the asset purchase agreement do not contain any misstatements or omissions of a material fact that would make the disclosures misleading. This representation is often referred to as a 10b-5 representation because it tracks the language in Rule 10b-5 of the Exchange Act.

For a more aggressive approach, the buyer can consider adding the following to the above full disclosure representation:

"To the Knowledge of Seller, there is no event or circumstance which Seller has not disclosed to Buyer which would reasonably be expected to have a Material Adverse Effect."

Sellers rarely agree to the preceding language. It is unusual and would normally be proposed in circumstances where the buyer was only able to conduct limited due diligence. A very aggressive buyer may want to remove the knowledge qualifier, but most buyers understand that they may have to accept the qualifier to get the additional representation.

END DRAFTING NOTE

ARTICLE V

REPRESENTATIONS AND WARRANTIES OF BUYER

Drafting Note: Representations and Warranties of Buyer

Representations provided by the buyer serve a different purpose than the ones provided by the seller. The seller does not need to know about the buyer's business (except if part of the purchase price is being paid with the buyer's stock or promissory notes). The seller is mainly concerned about whether the buyer has approval to do the transaction and its ability (financial or otherwise) to close it.

Some of the buyer's representations (such as Section 5.01, Section 5.02, Section 5.03 and Section 5.04) are reciprocal to some of the seller's representations in Article IV. These representations usually mirror the seller's representations, so the buyer should be prepared to give the seller whatever it requests from the seller for those representations. Whenever changes are made to those seller representations, conforming changes should be made to the corresponding buyer representations. In addition, if the buyer successfully revises the introduction to the seller's representations so that the representations are made as of the closing date (as well as the signing date), it should make conforming changes to the introduction to the buyer's representations (see Drafting Note, Introduction to Representations).

Additional Representations

If part of the purchase price is being paid with the buyer's stock or promissory notes, the seller should require some additional representations from the buyer. These additional representations vary from deal to deal, but the following are typically provided in relation to the buyer:

- Capitalization.
- Financial statements.
- Compliance with laws.
- No undisclosed liabilities.
- No MAE.
- No legal proceedings.
- Tax returns.

END DRAFTING NOTE

[Except as set forth in the Disclosure Schedules,] Buyer represents and warrants to Seller that the statements contained in this Article V are true and correct as of the date hereof.

Section 5.01 Organization and Authority of Buyer. Buyer is a corporation duly organized, validly existing and in good standing under the Laws of the state of [STATE OF ORGANIZATION].

Section 5.02 Authority of Buyer Buyer has all necessary corporate power and authority to enter into this Agreement and the other Transaction Documents to which Buyer is a party, to carry out its obligations hereunder and thereunder and to consummate the transactions contemplated hereby and thereby. The execution and delivery by Buyer of this Agreement and any other Transaction Document to which Buyer is a party, the performance by Buyer of its obligations hereunder and thereunder and the consummation by Buyer of the transactions contemplated hereby and thereby have been duly authorized by all requisite corporate action on the part of Buyer. This Agreement has been duly executed and delivered by Buyer, and (assuming due authorization, execution and delivery by Seller) this Agreement constitutes a legal, valid and binding obligation of Buyer enforceable against Buyer in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or similar Laws affecting creditors' rights generally and by general principles of equity (regardless of whether enforcement is sought in a proceeding at law or in equity). When each other Transaction Document to which Buyer is or will be a party has been duly executed and delivered by Buyer (assuming due authorization, execution and delivery by each other party thereto), such Transaction Document will constitute a legal and binding obligation of Buyer enforceable against it in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or similar Laws affecting creditors' rights generally and by general principles of equity (regardless of whether enforcement is sought in a proceeding at law or in equity).

Section 5.03 No Conflicts; Consents. The execution, delivery and performance by Buyer of this Agreement and the other Transaction Documents to which it is a party, and the consummation of the transactions contemplated hereby and thereby, do not and will not: (a) result in a violation or breach of any provision of the certificate of incorporation or by-laws of Buyer; (b) result in a violation or breach of any provision of any Law or Governmental Order applicable to Buyer; or (c) [except as set forth in Section 5.03 of the Disclosure Schedules,] require the consent, notice or other action by any Person under, conflict with, result in a violation or breach of, constitute a default under or result in the acceleration of any agreement to which Buyer is a party, except in the cases of clauses (b) and (c), where the violation, breach, conflict, default, acceleration or failure to give notice would not have a material adverse effect on Buyer's ability to consummate the transactions contemplated hereby. No consent, approval, Permit, Governmental Order, declaration or filing with, or notice to, any Governmental Authority is required by or with respect to Buyer in connection with the execution and delivery of this Agreement and the other Transaction Documents and the consummation of the transactions contemplated hereby and thereby, except for such filings as may be required under the HSR Act [and as set forth in Section 5.03 of the Disclosure Schedules] and such consents, approvals, Permits, Governmental Orders, declarations, filings or notices which would not have a material adverse effect on Buyer's ability to consummate the transactions contemplated hereby and thereby.

Drafting Note: No Conflicts; Consents

Section 5.03 is one of the buyer's reciprocal representations.

Buyer

The buyer may want to narrow the scope of the representation by limiting the representation in subsection (c) to only cover whether the transactions require the consent, notice or action by any person under one of buyer's agreements. The buyer can argue that it does not matter to the seller whether the transaction conflicts with or breaches any agreements to which it is a party. If the buyer cannot narrow the scope in this manner, it should try to limit the agreements covered by subsection (c) to only certain material agreements.
END DRAFTING NOTE

Section 5.04 Brokers. [Except for [NAME OF BROKER, FINDER OR INVESTMENT BANKER],] no broker, finder or investment banker is entitled to any brokerage, finder's or other fee or commission in connection with the transactions contemplated by this Agreement or any other Transaction Document based upon arrangements made by or on behalf of Buyer.

Drafting Note: Brokers

If there are several brokers, finders or investment bankers to name in this representation, list their names on a disclosure schedule to the purchase agreement and revise the bracketed language accordingly.
END DRAFTING NOTE

Section 5.05 Sufficiency of Funds. Buyer has sufficient cash on hand or other sources of immediately available funds to enable it to make payment of the Purchase Price and consummate the transactions contemplated by this Agreement.

Drafting Note: Sufficiency of Funds

The representation in Section 5.05 assumes the buyer is paying the purchase price with cash. If the buyer intends to pay the purchase price with its stock or promissory notes, this representation should be replaced with other representations (see Drafting Note, Additional Representations).

Acquisition Financing

Section 5.05 also assumes the buyer has the necessary funds to pay the purchase price from its available cash. If the buyer plans to finance the acquisition with debt or equity (or a combination of both), this representation must be revised accordingly and additional covenants and conditions may need to be added to the purchase agreement. For more information on acquisition financing, see Practice Note, Acquisition Finance: Overview.

Seller

Even if the buyer is financing the acquisition, the seller will want the buyer to provide the sufficiency of funds representation set out in Section 5.05 so that the buyer will be liable for any failure of financing. If the buyer plans to pledge the purchased assets as collateral for its financing, the seller should be mindful of **fraudulent conveyance** issues (see Drafting Note, Solvency).

Financing Representation

However, buyers generally insist on giving, and sellers usually accept, a representation reflecting the financing arrangement. If the seller agrees, however, to accept a financing representation, it should ensure that it is comprehensive and includes representations about the enforceability of the commitment letters and assurances that all conditions to the financing will be satisfied and the financing will be available at closing. For example:

"Buyer has delivered to Seller true and complete copies of the executed commitment letter [and related term sheet] of [BANK/INVESTOR], dated as of [DATE] (the "Commitment Letter"), pursuant to which such Person has agreed, subject to the terms and conditions set forth therein, to provide [DESCRIBE TERMS OF FINANCING] (the "**Financing**"). As of the date hereof, the Commitment Letter is in full force and effect and constitutes the legal, valid and binding obligation of Buyer and each of the other parties thereto. Prior to the date hereof, the commitment contained in the Commitment Letter has not been withdrawn or rescinded in any respect (and no party thereto has indicated an intent to so withdraw or rescind) or otherwise amended or modified in any respect. As of the date hereof, Buyer is not in breach of any of the terms or conditions set forth in the Commitment Letter and no event has occurred which, with or without notice, lapse of time or both, could reasonably be expected to constitute a breach by Buyer or failure by Buyer to satisfy a condition precedent set forth therein. As of the date hereof, Buyer has fully paid any and all commitment fees or other fees on the dates and to the extent required by the Commitment Letter. There are no conditions precedent or other contingencies relating to the funding of the full amount of the proceeds of the Financing except as stated in the Commitment Letter. The aggregate proceeds contemplated by the Commitment Letter[, together with available cash on hand of Buyer,] shall be sufficient to enable Buyer to pay the Purchase Price and consummate the transactions contemplated by this Agreement."

Financing Covenant

The seller should also include a covenant requiring the buyer to expend a certain minimum amount of effort to obtain the financing contemplated by the commitment letter. For example:

"Buyer shall use its reasonable best efforts to cause the financing contemplated by the Commitment Letter, subject to the terms and conditions set forth therein, to be available at the Closing; *provided, however*, that if funds in the amounts set forth in the Commitment Letter become unavailable to Buyer on the terms and conditions set forth therein, Buyer shall use its reasonable best efforts to obtain the funds necessary to consummate the transactions contemplated by this Agreement to the extent available on substantially similar terms and conditions as set forth in the Commitment Letter (the "**Alternative Financing**")."

Buyer

Financing Representation and Covenant

If the buyer is financing the acquisition, it should replace the sufficiency of funds representation in Section 5.05 with a representation reflecting its financing arrangement (see Drafting Note, Financing Representation). However, the buyer should try to limit what is covered by the representation. For example, it should resist any request by the seller to make statements regarding the enforceability of the commitment letters against the other parties, as well as any statements about the other parties not being in default under the commitment letters.

If the seller includes a covenant requiring the buyer to use its reasonable best efforts to obtain the financing (see Drafting Note, Financing Covenant), the buyer should try to lower the standard required to "commercially reasonable" efforts.

Financing Cooperation Covenant

The seller's cooperation is usually needed to satisfy certain closing conditions for the buyer's financing commitment. Therefore, the buyer should try to add a covenant requiring the seller to cooperate with it to obtain the financing. For example:

"Seller agrees to use all [reasonable best/commercially reasonable] efforts to cause its officers, employees and advisors to provide reasonable cooperation in connection with the arrangement of the Financing or the Alternative Financing with respect to the transactions contemplated by this Agreement, including without limitation, participation in meetings, due diligence sessions, road shows, the preparation of offering memoranda, private placement memoranda, prospectuses and similar documents, the execution and delivery of any commitment letters, underwriting or placement agreements, pledge and security documents, other definitive financing documents, or other requested certificates of documents, including a customary certificate of the chief financial officer with respect to solvency matters, comfort letters of accountants, legal opinions and real estate title documentation as may be reasonably requested by Buyer."

Financing Failure

The buyer should also consider including provisions protecting it in case the financing fails. For example, it could try to add a:

- **Financing out**. This closing condition allows the buyer to walk away from the deal if its financing becomes unavailable (see Standard Clause, Purchase Agreement: Financing Condition). However, sellers rarely agree to this condition because they don't want to take on the risk of the buyer being unable to finance the deal.

- **Reverse break-up fee**. This is a fee, in lieu of unspecified damages, paid by the buyer in the event it is unable to obtain its financing and proceed with closing the acquisition (see Practice Notes, Reverse Break-up Fees and Specific Performance and Drafting and Negotiating Reverse Break-up Fee and Specific Performance Provisions).

END DRAFTING NOTE

Section 5.06 Solvency Immediately after giving effect to the transactions contemplated hereby, Buyer shall be solvent and shall: (a) be able to pay its debts as they become due; (b) own property that has a fair saleable value greater than the amounts required to pay its debts (including a reasonable estimate of the amount of all contingent liabilities); and (c) have adequate capital to carry on its business. No transfer of property is being made and no obligation is being incurred in connection with the transactions contemplated hereby with the intent to hinder, delay or defraud either present or future creditors of Buyer or Seller. In connection with the transactions contemplated hereby, Buyer has not incurred, nor plans to incur, debts beyond its ability to pay as they become absolute and matured.

Drafting Note: Solvency

Fraudulent conveyance issues can arise if the buyer pledges the purchased assets as collateral for its financing and later becomes insolvent or undercapitalized and enters bankruptcy. In those cases, there may be a question of whether the buyer received reasonably equivalent value in exchange for granting a security interest in the purchased assets as the loan proceeds were used to pay the seller. If a court finds there was a fraudulent conveyance, the transaction can be avoided and the seller must return the sale proceeds to the buyer for the benefit of its creditors (for further information about fraudulent conveyances in the context of leveraged buyouts, see Practice Notes, Fraudulent Conveyances in Bankruptcy: Overview: Leveraged Buyouts and Fraudulent Conveyances: Issues and Strategies for Lenders and Private Equity Sponsors: Facilitating Fraudulent Transfers: LBOs). This discussion focuses on fraudulent conveyance issues under the **Bankruptcy Code**, but similar issues can arise under state law (which follow either the **Uniform Fraudulent Conveyance Act** or the **Uniform Fraudulent Transfer Act**) even if the buyer does not enter bankruptcy.

Section 5.06 assures the seller that the buyer will remain solvent after the deal closes. It also ensures that the seller has an indemnification claim against the buyer for breach of the buyer's solvency representation if the transaction is ultimately avoided in a bankruptcy proceeding.

Buyer

The buyer should try to minimize its potential liability for breach of Section 5.06 by adding certain assumptions, such as an assumption that:

- The seller's representations and warranties about the target business and the purchased assets are true and correct.
- All conditions to the buyer's obligations to close have been satisfied or waived.
- The target business and the purchased assets have not suffered an MAE.
- Any financial projections provided to the buyer about the target business remain reasonable projections about the future performance of the target business after the closing.

END DRAFTING NOTE

Section 5.07 Legal Proceedings. [Except as set forth in Section 5.07 of the Disclosure Schedules,] there are no actions, suits, claims, investigations or other legal proceedings pending or, to Buyer's knowledge, threatened against or by Buyer or any Affiliate of Buyer that challenge or seek to prevent, enjoin or otherwise delay the transactions contemplated by this Agreement.

Drafting Note: Legal Proceedings of Buyer

The representation in Section 5.07 is similar to the seller's representation in Section 4.11(a), except it does not include a statement regarding claims or actions affecting the buyer's properties or assets. Unless part of the purchase price is being paid with the buyer's stock or promissory notes, the seller should only be concerned about claims or actions that may affect the deal.

END DRAFTING NOTE

Section 5.08 Independent Investigation. Buyer has conducted its own independent investigation, review and analysis of the Business and the Purchased Assets, and acknowledges that it has been provided adequate access to the personnel, properties, assets, premises, books and records, and other documents and data of Seller for such purpose. Buyer acknowledges and agrees that: (a) in making its decision to enter into this Agreement and to consummate the transactions contemplated hereby, Buyer has relied solely upon its own investigation and the express representations and warranties of Seller set forth in Article IV of this Agreement (including related portions of the Disclosure Schedules); and (b) neither Seller nor any other Person has made any representation or warranty as to Seller, the Business, the Purchased Assets or this Agreement, except as expressly set forth in Article IV of this Agreement (including the related portions of the Disclosure Schedules).

Drafting Note: Independent Investigation

This representation works with the disclaimer in Section 4.18 to preclude the buyer from bringing a 10b-5 or tort-based fraud or misrepresentation claim based on representations and warranties made outside of the agreement. By including this representation, the buyer is unable to prove (or will have a hard time proving) reliance, an essential element of both types of claims.

A contractual right to bar fraud claims is not available in all jurisdictions (for example, in California (*Danzig v. Jack Grynberg & Assoc.*, 208 Cal. Rptr. 336, 342 (Ct. App. 1984)), Massachusetts (*Sweeney v. DeLuca*, 2006 WL 936688, at *5–6 (Mass. Super. Ct. Mar. 16, 2006)), and Nevada (*Blanchard v. Blanchard*, 839 P.2d 1320, 1322–23 (Nev. 1992))). Jurisdictions that do allow contractual disclaimers have different requirements for the language of the disclaimer and the surrounding circumstances that must be present to give the disclaimer effect. For example, to find that the buyer has waived its right to bring fraud claims, Delaware courts require statements by the buyer that it explicitly disclaims any representations and warranties not in the purchase agreement and has not relied on these representations and warranties (*Great Lakes Chem. Corp. v. Pharmacia Corp.*, 788 A.2d 544 (Del. Ch. 2001); *ABRY P'rs V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032 (Del. Ch. 2006)). Seller should review the applicable laws of the jurisdiction chosen to govern the purchase agreement.

The seller needs to make sure the disclaimer provisions do not conflict with or get nullified by the exclusive remedies provision in the indemnification section which often includes a fraud carve-out (see Section 8.07).

For a discussion of disclaimers of reliance, see Disclaimers of Reliance in Private M&A Deals Chart, which contains sample disclaimers of reliance typically seen in acquisition agreements and discussions of their adequacy under Delaware, Texas and New York law.

Buyer

If the seller has stronger negotiating leverage, the buyer will likely have to agree to some form of this representation. It should try to add a disclaimer similar to the one in Section 4.18 for its representations. If the buyer has significant leverage, it can try to delete this representation and replace the disclaimer

in Section 4.18 with a full disclosure representation (for further discussion, see Drafting Note, No Other Representations and Warranties).
END DRAFTING NOTE

ARTICLE VI

COVENANTS

Drafting Note: Covenants

Article VI includes all pre-closing and post-closing covenants that apply to the seller, the target business and the buyer.

Pre-closing covenants generally deal with how the target business will be operated between the signing and closing of the transaction and what each party must do to ensure the transaction is completed. If the buyer will be financing the transaction, the seller will want to add a covenant requiring the buyer to expend a certain minimum amount of effort to obtain the financing (see Drafting Note, Acquisition Financing).

Post-closing covenants can cover:

- Obligations that relate to completing the deal (such as further assurances to carry out the transaction).
- Ongoing arrangements between the parties, such as retaining books and records.

If the parties prefer to do so, they can also separate the seller's covenants from the buyer's covenants, or the pre-closing covenants from the post-closing covenants, in separate Articles.

Article VI contains a fairly limited set of covenants because most covenants in the asset purchase agreement tend to restrict or obligate the seller, and the seller will want to limit its restrictions and obligations. The seller generally wants to only include those covenants that are considered standard and given in almost all purchase agreements by sellers and those covenants that ensure the buyer can consummate the transaction.

In some cases, a seller may include a general release of the seller by the buyer from any claims the buyer may have against the seller for matters relating to the target business before the closing date, other than matters covered by the asset purchase agreement. This is often included if the seller is a private equity fund that plans to distribute the proceeds of the sale to its investors and wants to limit any potential liabilities it may have from the sale after the closing date to those set forth in the purchase agreement. Often, if the buyer agrees to include a release of the seller, it will request a reciprocal release of the buyer.

Efforts Standard

Many of the covenants require an action by a third party, such as obtaining governmental and third-party approvals, or are otherwise outside the parties' control. These types of covenants are not usually worded as unqualified obligations because a party would be in breach of the asset purchase agreement and liable for damages based on factors outside of its control. Rather, they are typically qualified by some degree of an "efforts" standard.

In this asset purchase agreement, the type of "efforts" standard used depends on which party is under an obligation to perform and the subject matter of the covenant. Many of the covenants requiring actions by the seller are subject to a "commercially reasonable efforts" standard while most of the covenants requiring actions by the buyer are subject to a "reasonable best efforts" standard, which is an arguably higher standard. In addition, the covenant requiring the parties to obtain regulatory consents is subject to a "reasonable best efforts" standard and defines the parameters of the standard by specifying certain required actions. In general, the best efforts standard is considered higher than other standards frequently used in purchase agreements, such as reasonable efforts or commercially reasonable efforts. However, courts do not always recognize the hierarchy that attorneys and some commentators tend to believe exists between best efforts and reasonable efforts. Instead, many courts interpret the two terms as creating substantially similar obligations (see Practice Note, Efforts Provisions in Commercial Contracts: Best Efforts, Reasonable Efforts and Commercially Reasonable Efforts).

Buyer

The buyer should consider including additional covenants, such as:

- A no-shop covenant to ensure the seller does not continue to solicit other buyers for the target business between the signing and closing date (for example, see Standard Clause, Purchase Agreement: No-shop Provision). If the seller agrees to add a no-shop covenant, it should try to include a **fiduciary out** exception.

- A non-compete and non-solicit covenant to ensure the seller does not compete with the target business or solicit any of its employees or customers after the closing (for example, see Standard Clause, Purchase Agreement: Non-compete and Non-solicit Provision).

- If the buyer is financing the acquisition, a covenant requiring the seller to cooperate with the buyer to obtain its financing (see Drafting Note, Financing Cooperation Covenant).

If any of the buyer's covenants that depend on third-party actions require a "reasonable best efforts" standard, the buyer should try to lower the standard to a "commercially reasonable efforts standard" so that it is subject to the same standard as the seller.
END DRAFTING NOTE

Section 6.01 Conduct of Business Prior to the Closing. From the date hereof until the Closing, except as otherwise provided in this Agreement or consented to in writing by Buyer (which consent shall not be unreasonably withheld, conditioned or delayed), Seller shall (a) conduct the Business in the ordinary course of business; and (b)

use commercially reasonable efforts to maintain and preserve intact its current Business organization, operations and franchise and to preserve the rights, franchises, goodwill and relationships of its Employees, customers, lenders, suppliers, regulators and others having relationships with the Business. From the date hereof until the Closing Date, except as consented to in writing by Buyer (which consent shall not be unreasonably withheld, conditioned or delayed), Seller shall not take any action that would cause any of the changes, events or conditions described in Section 4.05 to occur.

Drafting Note: Conduct of Business Prior to the Closing

Seller

Section 6.01 assures the buyer that the target business will be operated in the ordinary course of business and will be in the same condition at closing as it was when the buyer conducted its due diligence and determined the value of the target business. This covenant includes actions the seller is prohibited from taking before the closing by referring to the representation in Section 4.05 regarding absence of certain changes, events and conditions (for a discussion of these changes, events and conditions, see Drafting Note, Changes, Events and Conditions). If there are any actions that the seller plans to take regarding the target business between the signing and closing, they should be listed as an exception to this covenant in the seller's disclosure schedules.

COVID-19 and Other Extraordinary Events

During the occurrence of an extraordinary or unexpected event a seller may need to take actions outside of the ordinary course of business but may not have the time to obtain the buyer's consent. This issue became apparent in 2020 following the COVID-19 pandemic outbreak.

In *AB Stable VIII LLC v. Maps Hotels and Resorts One LLC*, the first Delaware court decision to interpret COVID-19 related issues in an M&A transaction, the Delaware Court of Chancery held that although the effects of the COVID-19 pandemic did not constitute an MAE under the merger agreement, the buyer was nonetheless permitted to terminate the agreement because the target's responses to the COVID-19 pandemic violated the agreement's interim operating covenant. In arriving at that conclusion, the court relied on the use of the words "only" and "consistent with past practice" in the interim operating covenant which required the target company to conduct its business between signing and closing "only in the ordinary course of business consistent with past practices in all material respects." The court interpreted this language to mean that it must look to the company's operations "'before and after entering into' the transaction agreement to determine whether those operations are 'consistent'." Therefore, any deviations from the target's past practice, even deviations that were consistent with other companies' responses to the COVID-19 pandemic or a "reasonable response" to an extraordinary or unexpected event, may nonetheless constitute a breach if it "significantly alter[s] the total mix of information available to the buyer when viewed in the context of the parties' contract." (2020 WL 7024929, at *69-71 (Del. Ch. Nov. 30, 2020)). In this case, the court held that the target company's cost-cutting measures in response to the COVID-19 outbreak, which included the complete closure of two

hotels and the unprecedented limiting of operations at its other 13 hotels (where the hotel shut down or limited all of its amenities) constituted a radical departure from its normal and routine operations resulting in a breach of the interim operating covenant.

This does not mean that all deviations from past practice will result in a breach as is evidenced by the Delaware Chancery Court's subsequent decision in *Snow Phipps Group, LLC v. KCake Acquisition, Inc.* where the court reached the opposite result interpreting an interim operating covenant that required the target company to operate "in a manner consistent with the past custom and practice . . . in all material respects," and found that the target had not breached the covenant because the company's cost-cutting deviations from past practice included only spending variations that "varied only in *expected and de minimis* ways." The court also considered whether the target's largest credit revolver draw in recent history violated the interim operating covenant, and likewise held that it had not under the circumstances. In arriving at this conclusion the court also focused on the fact that the target company had disclosed its partial revolver draw within one day of borrowing the funds, offered to repay it within two days of the buyer raising the issue, and never used the funds. (2021 WL 1714202, at *37-40 (Del. Ch. Apr. 30, 2021).)

Following the COVID-19 pandemic outbreak, many sellers negotiated COVID-19 specific modifications to the interim operating covenant to provide the target business with more flexibility in its responses to the pandemic, a practice which became common although subject to extensive negotiation and wording variations (see COVID-19 Issues in Private M&A Transactions Checklist: Interim Operating Covenant). Although this Standard Document does not generally discuss COVID-19 specific drafting modifications (see Drafting Note, COVID-19 Considerations), a seller should consider whether to request and negotiate drafting modifications to the interim operating covenant for any future generic extraordinary or unexpected event to provide the target business with flexibility in the event a future extraordinary or unexpected event were to occur between signing and closing.

Buyer

The buyer should try to include a comprehensive list of what it wants the seller to do and not to do before the closing. The list needs to be customized to the target business and should address any specific concerns the buyer may have about the target business or the purchased assets. If the buyer is financing the transaction, it should also include items that its lender requires (see Practice Note, Acquisition Finance: Overview).

For example, the buyer may want to specify that the seller shall:

- Preserve and maintain all permits required for the target business and the use of the purchased assets.
- Pay the debts, taxes and other obligations of the target business when due.
- Maintain the properties and assets included in purchased assets in the same condition as they were on the date of the asset purchase agreement, subject to reasonable wear and tear.
- Continue in full force and effect without modification all insurance policies, except as required by applicable law.

- Defend and protect the properties and assets included in the purchased assets from infringement and usurpation.
- Perform all of its obligations under all assigned contracts.
- Maintain its books and records in accordance with past practice.
- Comply in all material respects with all applicable laws.
- Consult the buyer about any material operational matters.
- Report to the buyer periodically on the status of its business, operations and finances.

In addition, if the buyer cannot expand the list of changes, events and conditions in Section 4.05 (see Drafting Note, Changes, Events and Conditions), it should include those additional actions the seller is prohibited from taking in this Section 6.01. For example, it may want to specify that the seller cannot:

- Make any material changes to any method of accounting or accounting practice for the target business.
- Make capital investments above a certain dollar threshold.
- Enter into an agreement that would constitute a material contract.
- Make any loan to (or forgive any loan to) any directors, officers or employees of the target business.
- Accelerate, terminate, modify or cancel an assigned contract.
- Adopt, modify or terminate any collective bargaining or other agreement with a union.

However, if the seller is a competitor, the buyer must be careful that none of the additional covenants effectively give the buyer control of the target business and inadvertently violate applicable antitrust laws. For example, a buyer should not have so much control over the target business operations that it constitutes an integration of the target business with the buyer before the applicable waiting period under the HSR Act has expired. If this is a particular concern, the parties should consider including the following provision in this Article VI:

"Section 5.XX. No Control of Other Party's Business. Nothing contained in this Agreement shall give Buyer, directly or indirectly, the right to control or direct the operations of the Business prior to the Effective Time. Prior to the Effective Time, Seller shall exercise, consistent with the terms and conditions of this Agreement, complete control and supervision over the Business and its assets and operations."

Although the provision above (No Control of Other Party's Business) may be included in the purchase agreement, competing parties can still face potential liability and penalties for violating the HSR Act if a buyer's actions control or affect the decisions of the target business regarding price, output or

other competitive variables (see Practice Note, Information Exchange and Integration Planning in M&A: Antitrust).
END DRAFTING NOTE

Section 6.02 Access to Information. From the date hereof until the Closing, Seller shall (a) afford Buyer and its Representatives reasonable access to and the right to inspect all of the Real Property, properties, assets, premises, Books and Records, Assigned Contracts and other documents and data related to the Business; (b) furnish Buyer and its Representatives with such financial, operating and other data and information related to the Business as Buyer or any of its Representatives may reasonably request; and (c) instruct the Representatives of Seller to cooperate with Buyer in its investigation of the Business; *provided, however,* that any such investigation shall be conducted during normal business hours upon reasonable advance notice to Seller, under the supervision of Seller's personnel and in such a manner as not to interfere with the conduct of the Business or any other businesses of Seller. All requests by Buyer for access pursuant to this Section 6.02 shall be submitted or directed exclusively to [NAME OF SELLER DESIGNEE] or such other individuals as Seller may designate in writing from time to time. Notwithstanding anything to the contrary in this Agreement, Seller shall not be required to disclose any information to Buyer if such disclosure would, in Seller's sole discretion: (w) cause significant competitive harm to Seller and its businesses, including the Business, if the transactions contemplated by this Agreement are not consummated; (x) jeopardize any attorney-client or other privilege; [or] (y) contravene any applicable Law, fiduciary duty or binding agreement entered into prior to the date of this Agreement[; or (z) reveal bids received from third parties in connection with transactions similar to those contemplated by this Agreement and any information and analysis (including financial analysis) relating to such bids]. Prior to the Closing, without the prior written consent of Seller, which may be withheld for any reason, Buyer shall not contact any suppliers to, or customers of, the Business and Buyer shall have no right to perform invasive or subsurface investigations of the Real Property. Buyer shall, and shall cause its Representatives to, abide by the terms of the Confidentiality Agreement with respect to any access or information provided pursuant to this Section 6.02.

Drafting Note: Access to Information

Seller

It is typical for a seller to include a covenant that allows the buyer to continue its due diligence throughout the period between signing and closing. However, Section 6.02 contains comprehensive protections to ensure:

- The buyer's due diligence investigation does not interfere with the seller's businesses, including the target business. It does this by:
    - only permitting access during business hours;

- requiring advance notice of any visits;
- requiring supervision by the seller's personnel; and
- requiring all requests for access or information to be submitted to a designated individual.

- Non-disclosure of information that could:
  - cause competitive harm to the seller or the target business if the transaction does not close;
  - result in a violation of law;
  - jeopardize any attorney-client or other privilege afforded such information; or
  - reveal sensitive and confidential information from other bids (the seller should include the optional language in Section 6.02 if it is soliciting bids in an auction process).

- The buyer cannot contact the suppliers or customers of the target business without the seller's prior written consent.
- The buyer cannot perform invasive or subsurface investigation of the real property being acquired.

Buyer

The buyer should confirm that the covenant provides the buyer with access to whatever it needs to conduct a full due diligence review, to facilitate financing arrangements (if any) and to prepare for closing. To further these objectives, the buyer should try to delete some of the restrictions set forth in Section 6.02. For example, if the buyer is concerned about potential environmental issues, it may want to engage an environmental consultant to perform some level of environmental investigation of the properties being acquired (for example, **Phase I environmental site assessment report** or **Phase II environmental site assessment report**). To do this, the buyer should delete the prohibition against performing invasive or subsurface investigations of the acquired properties and add a specific right to conduct environmental investigations, such as:

"Without limiting the foregoing, Seller shall permit Buyer and its Representatives to conduct environmental due diligence of the Real Property, including the collecting and analysis of samples of indoor or outdoor air, surface water, groundwater or surface or subsurface land on, at, in, under or from the Real Property."

However, unless the buyer has significant negotiating leverage, it may not be successful in deleting the prohibition and including this provision because the seller is likely to resist this change.

Similarly, if the buyer is concerned about the customers or suppliers of the target business, it should try to delete the restriction against contacting the suppliers or customers and replace it with a specific right to contact these customers or suppliers (assuming there are no confidentiality or antitrust issues). If the buyer cannot do this, the buyer should try to limit the restriction by not allowing the seller to withhold consent for any reason and stating the seller cannot unreasonably withhold or delay its consent.

The buyer should also ensure the covenant and the definition of "Representatives" are broad enough to address its needs. If the buyer is financing the transaction, it should ensure the lender and its representatives are also provided access.
END DRAFTING NOTE

Section 6.03 Supplement to Disclosure Schedules. From time to time prior to the Closing, Seller shall have the right (but not the obligation) to supplement or amend the Disclosure Schedules hereto with respect to any matter hereafter arising or of which it becomes aware after the date hereof (each a "**Schedule Supplement**"). Any disclosure in any such Schedule Supplement shall not be deemed to have cured any inaccuracy in or breach of any representation or warranty contained in this Agreement, including for purposes of the indemnification or termination rights contained in this Agreement or of determining whether or not the conditions set forth in Section 7.02(a) have been satisfied; *provided, however,* that if Buyer has the right to, but does not elect to, terminate this Agreement within [NUMBER] Business Days of its receipt of such Schedule Supplement, then Buyer shall be deemed to have irrevocably waived any right to terminate this Agreement with respect to such matter and, further, shall have irrevocably waived its right to indemnification under Section 8.02 with respect to such matter.

Drafting Note: Supplement to Disclosure Schedules

Seller

Section 6.03 permits the seller to update the disclosure schedules after the asset purchase agreement is signed. However, the update cannot be used to cure any inaccuracies or breaches of the seller's representations unless the update provides the buyer with a right to terminate the purchase agreement and the buyer fails to do so, in which case the buyer loses its right to indemnification for breach of any representation that is cured by the update.

Section 6.03 is typically heavily negotiated and there are many different ways the parties can ultimately deal with updates to the disclosure schedules and the recourse available to the buyer as a result of an update. Sellers will want the updates to cure any inaccuracies in or breaches of its representations, including for purposes of determining whether the closing conditions have been fulfilled and for

purposes of indemnification. On the other hand, buyers will resist losing their ability to terminate the agreement or bring indemnification claims as a result of any schedule supplement. After negotiations, parties usually end up somewhere in between these extremes.

Section 6.03 provides a reasonable compromise by allowing the buyer to maintain its right to terminate the purchase agreement. However, if the buyer has a right to terminate the asset purchase agreement (for example, if the schedule supplement was material enough to cause the failure of a closing condition) but does not exercise its right to terminate within a certain number of days after receiving the schedule supplement, it is deemed to have irrevocably waived its right to terminate and loses its right to indemnification for breach of any representation that is cured by the update. If the schedule supplement does not allow the buyer to terminate the asset purchase agreement (for example, if the schedule supplement was not material enough to cause the failure of a closing condition), then the buyer is still permitted to bring a post-closing indemnity claim based on the updated information.

Buyer

The buyer should try to revise Section 6.03 so that the seller is required to deliver updates to the schedules if there are any events or discoveries that result in an inaccuracy in or breach of the seller's representations and to ensure that those updates cannot be used by the seller to cure any such inaccuracy or breach for any purposes, regardless of whether the buyer does not exercise its right to terminate the purchase agreement. For example, it can revise this provision as follows:

"From time to time prior to the Closing, Seller shall promptly supplement or amend the Disclosure Schedules hereto with respect to any matter hereafter arising or of which it becomes aware after the date hereof, which, if existing, occurring or known at the date of this Agreement, would have been required to be set forth or described in the Disclosure Schedules (each a "**Schedule Supplement**"). Any disclosure in any such supplement or amendment shall not be deemed to have cured any inaccuracy in or breach of any representation or warranty contained in this Agreement, including for purposes of the indemnification or termination rights contained in this Agreement or of determining whether or not the conditions set forth in Section 7.02 have been satisfied."

This language prevents the buyer from losing its right to terminate the asset purchase agreement or bring an indemnification claim based on the new information. In many jurisdictions (including New York), a buyer must explicitly reserve its right to bring indemnification claims based on information it knew before the closing or risk being deemed to have waived its right to rely on the representation in question.

If the buyer does not have much negotiating leverage, it may need to accept the compromise offered by the seller. However, the buyer can try to:

- Limit the seller's right to update the disclosure schedules to matters arising after the signing date by deleting the seller's right to update the disclosure schedules for matters that existed on the signing date but were discovered afterwards.

- Limit its indemnification rights rather than deleting them altogether. For example, it can limit its indemnification right to only allow indemnification if the amount of losses resulting from the new information exceeds a specified amount.

If the buyer can make any changes to Section 6.03, it should delete or revise the **anti-sandbagging provision** in Section 8.04(g) to conform with those changes (see Drafting Note, Anti-sandbagging).

END DRAFTING NOTE

Section 6.04 Employees and Employee Benefits.

Drafting Note: Employees and Employee Benefits

The covenants in Section 6.04 address the buyer's obligation to hire employees of the target business and to provide them with a certain level of compensation and benefits. These covenants vary depending on the particular transaction and the types of benefit plans maintained by the buyer.

There are various federal, state and local laws governing employment and labor practices and employee benefits. Some state and local laws also require that successor employers preserve certain employee benefits, such as paid sick leave, that were accrued but unused during employment with the predecessor seller employer. Both parties should engage employment, labor and employee benefits specialists when preparing or reviewing these covenants.

Buyer

Section 6.04 only addresses the buyer's obligations concerning the transferred employees after the closing. It does not address the seller's pre-closing employee and employee benefit liabilities. The buyer may want to add covenants requiring the seller to remain liable and pay for these liabilities. For examples of these types of covenants, see Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Section 6.05.

END DRAFTING NOTE

(a) Buyer shall, or shall cause an Affiliate of Buyer to, offer employment effective on the Closing Date, to all Employees, including Employees who are absent due to vacation, family leave, short-term disability or other approved leave of absence (the Employees who accept such employment and commence employment on the Closing Date, the "**Transferred Employees**").

Drafting Note: Transferred Employees

Seller

Section 6.04(a) requires the buyer to hire all of the seller's employees who work for the target business as of the closing. If the buyer refuses to agree to hire all of these employees, the seller should at least require the buyer to:

- Hire and retain "enough" employees of the seller so it can avoid or minimize WARN Act or other similar obligations.
- Agree to assume the seller's WARN Act or other similar obligations, if any, that flow from the transaction.

Depending on the jurisdiction, federal WARN Act notice requirements and liability in the context of an asset sale may depend on whether:

- The sale is of a business as a going concern or simply a sale of assets (see, for example, *Smullin v. Mity Enterprises, Inc.,* 420 F.3d 836 (8th Cir. 2005) and *Burnsides v. MJ Optical, Inc.,* 128 F.3d 700 (8th Cir. 1997)).
- The seller still employs its employees on the effective date of the sale or there is a lag between the termination of employees by the seller before the closing date and the hiring of employees by the buyer (see, for example, *Phason v. Meridian Rail Corp.,* 479 F.3d 527 (7th Cir. 2007) and *Wilson v. Airtherm Products, Inc.,* 436 F.3d 906 (8th Cir. 2006)).
- The seller has assurances from the buyer that it will hire a sufficient number of employees so that notice requirements under the WARN Act will not be triggered (see, for example, *Wilson*).

In addition, state mini-WARN Acts may impose additional or different obligations on the parties.

For more information on the WARN Act, see Practice Note, Worker Adjustment and Retraining Notification (WARN) Act: Overview. For information on mini-WARN Act statutes in certain states, see Mini-WARN Acts: State Q&A Tool.

If the seller has to allow the buyer to hire less than all of its employees, it should revise Section 6.04(a) as follows:

"Effective as of the [Closing Date/the day immediately following the Closing Date], Buyer shall hire at least the minimum number of Employees necessary to avoid creating any obligation under the WARN Act on the part of Seller, and Buyer shall continue to employ at least the minimum number of Employees for the minimum duration necessary to avoid creating any obligation under the WARN Act on the part of Seller. Buyer shall bear any and all obligations and liability under the WARN Act resulting from employment losses relating to the sale of the Business."

Buyer

The buyer should try to revise Section 6.04 so that it is not required to hire a minimum number of employees. For example, it should try to revise this provision as follows:

"Commencing on the Closing Date, Seller shall terminate all Employees, and, at Buyer's sole discretion, Buyer may offer employment, on an "at will" basis, to any or all of the Employees. [Seller shall bear any and all obligations and liability under the WARN Act resulting from employment losses relating to the sale of the Business.]"

If the seller is subject to the WARN Act or any similar state or local laws, the buyer should include the bracketed language to ensure it is not responsible for any WARN Act liabilities that may result from the termination of employees on or before the closing date.

In addition, if any employees of the target business are represented by a union, the buyer should be aware of and address any successor liability issues. Specifically a buyer may become a successor to the collective bargaining obligations of the target business if:

- There is substantial continuity in business operations.
- A majority of the buyer's employees in an appropriate unit for collective bargaining comprises holdover unionized employees.

(See *Fall River Dyeing and Fishing Corp. v. N.L.R.B.,* 482 U.S. 27 (1987) and *N.L.R.B. v. Burns Int'l Sec. Servs.,* 406 U.S. 272 (1972).)

If a buyer is a successor employer under the **National Labor Relations Act** (NLRA), it is not bound to the terms of the collective bargaining agreements of the target business and has the right to set initial terms and conditions of employment for the new workforce. However, if a buyer is a perfectly clear successor under the NLRA, it may forfeit its right to set initial terms and conditions of employment. For example, a buyer may become a perfectly clear successor if it agrees in the purchase agreement to retain a majority of the employees of the target business and to keep the same terms and conditions of employment (*Burns Int'l Sec., Servs,* 406 U.S. 272 *and Spruce Up Corp.,* 209 NLRB 194 (1974), enforced, 529 F.2d 516 (4th Cir. 1974)).

END DRAFTING NOTE

(b) During the period commencing on the Closing Date and ending on the date which is [12/[NUMBER]] months from the Closing (or if earlier, the date of the Transferred Employee's termination of employment with Buyer or an Affiliate of Buyer), Buyer shall, or shall cause an Affiliate of Buyer to, provide each Transferred Employee with: (i) base salary or hourly wages which are no less than the base salary or hourly wages provided by Seller immediately prior to the Closing; (ii) target bonus opportunities (excluding equity-based compensation), if any, which are no less than the target bonus opportunities (excluding equity-based compensation) provided by Seller

immediately prior to the Closing; (iii) retirement and welfare benefits that are no less favorable in the aggregate than those provided by Seller immediately prior to the Closing; and (iv) severance benefits that are no less favorable than the practice, plan or policy in effect for such Transferred Employee immediately prior to the Closing.

Drafting Note: Comparable Salary and Benefits

The covenant in Section 6.04(b) requires that the transferred employees receive base salary, target bonus opportunities, retirement and welfare benefits, and severance that are each no less favorable than what they were receiving prior to the transaction. Equity awards are generally carved out of this provision because the buyer generally wants to maintain discretion to determine whether to grant equity awards and the type and structure of the awards.

Seller

The seller generally wants to ensure there will be some continuity with respect to employment conditions for a limited period of time (for example, one to two years) following the closing. This alleviates employee concerns through the negotiation and closing of the transaction and creates an incentive for employees to remain with the target business following the transaction.

The seller will also usually want some assurance that if its employees are terminated during a certain period of time following the closing (for example, one year), they will receive certain severance benefits. The success of this proposition depends on:

- The seller's leverage.
- Whether the buyer anticipates keeping all of those employees.
- Whether the buyer or the seller is responsible for paying the severance benefits.

Buyer

The buyer may object to matching each individual aspect of the transferred employees' compensation and prefer to provide each transferred employee with benefits and compensation that are in the aggregate no less than the compensation and benefits that each transferred employee received immediately before the closing.

Alternatively, the buyer may want compensation and benefits to be in its discretion or no less favorable than compensation and benefits provided to similarly situated employees of the buyer because:

- These approaches give the buyer greater flexibility and make it easier for the buyer to integrate the transferred employees into its existing business.
- The buyer may have different benefit plans and programs than those maintained by the seller.

For example, the buyer may want to replace Section 6.04(b) with the following:

"Each Transferred Employee shall be eligible to receive the salary and benefits maintained for employees of Buyer on substantially similar terms and conditions as are provided to similarly situated employees of Buyer."

END DRAFTING NOTE

(c) With respect to any employee benefit plan maintained by Buyer or an Affiliate of Buyer (collectively, "**Buyer Benefit Plans**") for the benefit of any Transferred Employee, effective as of the Closing, Buyer shall, or shall cause its Affiliate to, recognize all service of the Transferred Employees with Seller, as if such service were with Buyer, for vesting, eligibility and accrual purposes; *provided, however,* such service shall not be recognized to the extent that (x) such recognition would result in a duplication of benefits or (y) such service was not recognized under the corresponding Benefit Plan.

Drafting Note: Crediting Service

Seller

The seller generally wants to ensure that its employees receive service credit under the buyer's employee benefit plans for the time that employees were employed by the seller. For most employee benefit plans, service credit is provided for purposes of benefit eligibility and vesting. However, if the seller provides certain plans (for example, a vacation policy or severance plan) in which benefit accrual is based on years of service, the seller wants to include a provision requiring employees to receive service credit for that plan.

The seller may also want to include a provision requiring that for any **employee welfare benefit plan**, the buyer will:

- Cause pre-existing conditions, exclusions, actively-at-work requirements or waiting periods to be waived.

- Give effect to claims incurred, amounts paid by and amounts reimbursed to employees of the seller before the closing when determining any deductible and maximum out-of-pocket limits under the buyer's post-closing benefit plans.

Buyer

While a provision crediting prior service for purposes of benefit vesting and eligibility is fairly typical, the buyer should confirm that its employee benefit plans do not need to be amended in order to effect this provision. Whether prior service credit is provided for purposes of benefit accrual depends on the relevant benefit. For example, benefit accrual under a defined benefit plan is generally carved out.

Whether a buyer will agree to credit pre-closing claims for purposes of deductible and maximum out-of-pocket limits depends on the terms of the insurance policies related to the benefit plans, if any, and the way in which the buyer's plans are administered.
END DRAFTING NOTE

(d) [Effective as soon as practicable following the Closing Date, Seller, or any applicable Affiliate, shall effect a transfer of assets and liabilities [(including outstanding loans)] from the defined contribution retirement plan that it maintains to the defined contribution retirement plan maintained by Buyer, with respect to the Transferred Employees, in connection with the transactions contemplated by this Agreement. Any such transfer shall be in an amount sufficient to satisfy Section 414(l) of the Code. [Upon the transfer of assets and liabilities into Buyer's plan, all transferred account balances from Seller's plan shall become fully vested].]

Drafting Note: Transfers of Plan Account Balances

While a buyer is not required to accept a transfer of defined contribution plan assets, it is not uncommon in an asset sale for defined contribution plan account balances of the target business employees hired by the buyer to be transferred from the seller's benefit plan to the buyer's plan. Employees generally favor account balances being transferred into their new employer's plan as opposed to the maintenance of two separate plan accounts. The transfer is a simple mechanism as the amount in each participant's accounts is known. If the affected employees have outstanding loan balances, the outstanding loans are frequently included in the transfer.

The buyer and seller must coordinate the loan transfer with their retirement plan service providers and the process can require significant negotiation. The seller may also insist that

the buyer fully vest these employees with respect to any unvested portion of their account balances. The buyer, however, may not wish to provide these employees with an advantage over its existing employees and therefore may wish to just provide service credit for the employees' service with the seller in lieu of full vesting.

The language in Section 6.04(d) applies only to defined contribution plans. Transfers of defined benefit plan assets are much less common. These transfers are more difficult, as the transfer amount is not simply the sum of all account balances but rather is a pool out of which to pay benefits. In this regard, the transfer can only take place if there is an actuarial determination as to the amount of the accrued benefits which should be transferred to the buyer's plan. Actuarial determinations can vary widely as they contain many assumptions, such as wage growth, attrition and prevailing interest rates. The buyer and seller may disagree on the appropriate transfer amount. Additional actuaries or a court decision may be needed to settle the claims of the parties.

END DRAFTING NOTE

(e) Effective as of the Closing, the Transferred Employees shall cease active participation in the Benefit Plans. Seller shall remain liable for all eligible claims for benefits under the Benefit Plans that are incurred by the Employees prior to the Closing Date. For purposes of this Agreement, the following claims shall be deemed to be incurred as follows: (i) life, accidental death and dismemberment, short-term disability, and workers' compensation insurance benefits, on the event giving rise to such benefits; (ii) medical, vision, dental, and prescription drug benefits, on the date the applicable services, materials or supplies were provided; and (iii) long-term disability benefits, on the eligibility date determined by the long-term disability insurance carrier for the plan in which the applicable Employee participates.

Drafting Note: Timing of Claims under Benefit Plans

Because the buyer is not assuming any of the employee benefit plans in which the transferred employees participate, there could be ambiguity regarding whether the employee benefit plans of the seller or the buyer cover certain claims incurred by the transferred employees and their dependents and beneficiaries around the time of the closing. The language in Section 6.04(e) clarifies when each type of claim under a welfare benefit plan is incurred. The seller should confirm that each type of welfare benefit that it provides to the transferred employees before the closing is addressed in this provision. The seller should also confirm that the date specified for each type of claim is consistent with the seller's employee benefit plan documents and any insurance policies providing benefits coverage.

END DRAFTING NOTE

(f) Buyer and Seller intend that the transactions contemplated by this Agreement should not constitute a separation, termination or severance of employment of any Employee who accepts an employment offer by Buyer that is consistent with the requirements of Section 6.04(b), including for purposes of any Benefit Plan that provides for separation, termination or severance benefits, and that each such Employee will have continuous employment immediately before and immediately after the Closing. Buyer shall be liable and hold the Seller harmless for: (i) any statutory, common law, contractual or other severance with respect to any Employee, other than an Employee who has received an offer of employment by Buyer on terms and conditions consistent with Section 6.04(b) hereof and declines such offer; and (ii) any claims relating to the employment of any Transferred Employee arising in connection with or following the Closing.

Drafting Note: Termination Payments and Benefits

Section 6.04(f) addresses termination payments and benefits that may become payable to employees who do not continue employment with the buyer. If the buyer agrees to offer comparable employment to each of the seller's employees who works for the target business as of the closing, then the seller generally requires the buyer to be responsible for any termination payments and benefits that become due because of the buyer's failure to provide those employment offers.

Section 6.04(f) is drafted so that if the buyer does not provide an employee with a comparable employment offer, then the buyer is liable for any resulting termination payments and benefits. However, it provides an exception for an employee who rejects the buyer's employment offer because the buyer is typically not willing to assume liability for any termination payments and benefits that are triggered under the seller's severance arrangements when the buyer has complied with all of its obligations. The buyer generally requires the seller to be liable for termination payments and benefits for employees who reject the buyer's comparable employment offers.

If the buyer does not agree to offer employment to each of the seller's employees who works for the target business as of the closing, then the parties must consider who should bear the liability for any termination payments and benefits. This depends on:

- Each party's negotiating leverage.
- The number of employees that the buyer intends to hire.
- The costs of providing the termination payments and benefits.

END DRAFTING NOTE

(g) This Section 6.04 shall be binding upon and inure solely to the benefit of each of the parties to this Agreement, and nothing in this Section 6.04, express or implied, shall confer upon any other Person any rights or remedies of any nature whatsoever under or by reason of this Section 6.04. Nothing contained herein, express or implied, shall be construed to establish, amend or modify any benefit plan, program, agreement or arrangement. The parties hereto acknowledge and agree that the terms set forth in this Section 6.04 shall not create any right in any Transferred Employee or any other Person to any continued employment with Buyer or any of its Affiliates or compensation or benefits of any nature or kind whatsoever.

Section 6.05 Confidentiality. Buyer acknowledges and agrees that the Confidentiality Agreement remains in full force and effect and, in addition, covenants and agrees to keep confidential, in accordance with the provisions of the Confidentiality Agreement, information provided to Buyer pursuant to this Agreement. If this Agreement is, for any reason, terminated prior to the Closing, the Confidentiality Agreement and the provisions of this Section 6.05 shall nonetheless continue in full force and effect.

Drafting Note: Confidentiality

In most asset purchases, the buyer enters into a confidentiality agreement with the seller before beginning its due diligence review (for information on confidentiality agreements in asset purchases and other M&A transactions, see Practice Note, Confidentiality Agreements: Mergers and Acquisitions, Standard Document, Confidentiality Agreement: Mergers and Acquisitions and Confidentiality Agreements for M&A Transactions: A Checklist for Buyers and Sellers. Section 6.05 assures the seller of the continued effectiveness of the confidentiality agreement signed by the buyer by having it acknowledge and agree that the confidentiality agreement continues in full force and effect.

Buyer

Most buyers do not have an issue including this covenant. However, the buyer may have concerns about the seller disclosing information it has about the target business after the closing. To address this, the buyer should consider adding a corresponding covenant requiring the seller to keep information confidential after the closing. For example:

"From and after the Closing, Seller shall, and shall cause its Affiliates to, hold, and shall use its commercially reasonable efforts to cause its or their respective Representatives to hold, in confidence any and all information, whether written or oral, concerning the Business, except to the extent that Seller can show that such information (a) is generally available to and known by the public through no fault of Seller, any of its Affiliates or their respective Representatives; or (b) is lawfully acquired by Seller, any of its Affiliates or their respective Representatives from and after the Closing from sources which are not prohibited from disclosing such information by a legal, contractual or fiduciary

obligation. If Seller or any of its Affiliates or their respective Representatives are compelled to disclose any information by judicial or administrative process or by other requirements of Law, Seller shall promptly notify Buyer in writing and shall disclose only that portion of such information which Seller is advised by its counsel in writing is legally required to be disclosed; *provided, however*, that Seller shall use commercially reasonable efforts to obtain an appropriate protective order or other reasonable assurance that confidential treatment will be accorded such information."

If the sale was initially conducted using an auction, the buyer should ask the seller to assign the confidentiality agreements signed by the other bidders to the buyer so that the buyer can enforce them.
END DRAFTING NOTE

Section 6.06 Governmental Approvals and Consents.

Drafting Note: Governmental Approvals and Consents

Section 6.06 works in conjunction with:

- The representations in Section 4.03 and Section 5.03, which sets out the governmental and third-party consents required for the transaction.
- The closing condition in Section 7.01, which sets out the governmental approvals required for closing.

This covenant applies to both parties and requires them to make all filings and use their reasonable best efforts to obtain all governmental approvals and their commercially reasonable efforts to obtain all third-party consents (see discussion of the best efforts and other standards in Drafting Note, Covenants). It also specifies certain actions the buyer must take to ensure the necessary antitrust approvals are received.
END DRAFTING NOTE

(a) Each party hereto shall, as promptly as possible, use its reasonable best efforts to obtain, or cause to be obtained, all consents, authorizations, orders and approvals from all Governmental Authorities that may be or become necessary for its execution and delivery of this Agreement and the performance of its obligations pursuant to this Agreement and the other Transaction Documents. Each party shall cooperate fully with the other party and its Affiliates in promptly seeking to obtain all such consents, authorizations, orders and approvals. The parties

hereto shall not willfully take any action that will have the effect of delaying, impairing or impeding the receipt of any required consents, authorizations, orders and approvals. If required by the HSR Act and if the appropriate filing pursuant to the HSR Act has not been filed prior to the date hereof, each party hereto agrees to make an appropriate filing pursuant to the HSR Act with respect to the transactions contemplated by this Agreement within [NUMBER] Business Days after the date hereof and to supply as promptly as practicable to the appropriate Governmental Authority any additional information and documentary material that may be requested pursuant to the HSR Act.

(b) [Without limiting the generality of the Buyer's undertakings pursuant to this Section 6.06, Buyer agrees to use its reasonable best efforts and to take any and all steps necessary to avoid or eliminate each and every impediment under any antitrust, competition or trade regulation Law that may be asserted by any Governmental Authority or any other party so as to enable the parties hereto to close the transactions contemplated by this Agreement as promptly as possible, including proposing, negotiating, committing to and effecting, by consent decree, hold separate orders, or otherwise, the sale, divestiture or disposition of any of its assets, properties or businesses or of the assets, properties or businesses to be acquired by it pursuant to this Agreement as are required to be divested in order to avoid the entry of, or to effect the dissolution of, any injunction, temporary restraining order or other order in any suit or proceeding, which would otherwise have the effect of materially delaying or preventing the consummation of the transactions contemplated by this Agreement. In addition, Buyer shall use its reasonable best efforts to defend through litigation on the merits any claim asserted in court by any party in order to avoid entry of, or to have vacated or terminated, any Governmental Order (whether temporary, preliminary or permanent) that would prevent the consummation of the Closing.]

Drafting Note: Parameters of "Reasonable Best Efforts" for Buyer

Include Section 6.06(b) if the seller has any concerns about obtaining antitrust approval and wants to place the risk of obtaining such approval on the buyer. This covenant ensures that the buyer does everything possible to receive antitrust approval, including:

- Divesting or disposing of assets if required by the antitrust authorities.
- Defending against or terminating any governmental order that would prevent the closing through litigation.

Buyer

Most buyers are not willing to sell or dispose of their assets to obtain the necessary governmental consents. Rather, most buyers prefer to specify that they are not required to sell or dispose of their assets, as well as take any other actions that would affect the value and the terms of the transaction. The buyer should consider replacing this Section 6.06(b) with:

"Notwithstanding the foregoing, nothing in this Section 6.06 shall require, or be construed to require, Buyer or any of its Affiliates to agree to: (i) sell, hold, divest, discontinue or limit, before or after the Closing Date, any assets, businesses or interests of Buyer or any of its Affiliates or any of the Purchased Assets; (ii) any conditions relating to, or changes or restrictions in, the operations of any such assets, businesses or interests which, in either case, could reasonably be expected to result in a Material Adverse Effect or materially and adversely impact the economic or business benefits to Buyer of the transactions contemplated by the Agreement; or (iii) any material modification or waiver of the terms and conditions of this Agreement."

If the buyer cannot delete or replace this covenant, it can try to limit its obligations by:

- Only requiring divestiture of non-material assets or assets less than a certain amount.
- Placing a cap on the amount it is required to divest.
- Specifying certain assets it is required to divest.

END DRAFTING NOTE

(c) All analyses, appearances, meetings, discussions, presentations, memoranda, briefs, filings, arguments, and proposals made by or on behalf of either party before any Governmental Authority or the staff or regulators of any Governmental Authority, in connection with the transactions contemplated hereunder (but, for the avoidance of doubt, not including any interactions between Seller [or Buyer] with Governmental Authorities in the ordinary course of business, any disclosure which is not permitted by Law or any disclosure containing confidential information) shall be disclosed to the other party hereunder in advance of any filing, submission or attendance, it being the intent that the parties will consult and cooperate with one another, and consider in good faith the views of one another, in connection with any such analyses, appearances, meetings, discussions, presentations, memoranda, briefs, filings, arguments, and proposals. Each party shall give notice to the other party with respect to any meeting, discussion, appearance or contact with any Governmental Authority or the staff or regulators of any Governmental Authority, with such notice being sufficient to provide the other party with the opportunity to attend and participate in such meeting, discussion, appearance or contact.

(d) Seller and Buyer shall use commercially reasonable efforts to give all notices to, and obtain all consents from, all third parties that are described in Section 4.03 [and Section 5.03] of the Disclosure Schedules; *provided, however*, that Seller shall not be obligated to pay any consideration therefor to any third party from whom consent or approval is requested.

Drafting Note: Third-Party Consents

Section 6.06(d) requires both parties to use their commercially reasonable efforts to obtain third-party consents required for the transaction and makes sure the seller is not required to pay any third parties who require a payment for their consent.

Seller

If the seller wants to be more aggressive, it should consider specifying certain actions the buyer must take in its exercise of "commercially reasonable efforts," such as:

- Providing financial statements and other financial information as third parties may reasonably request.
- Agreeing to commercially reasonable adjustments to the terms of the agreements with such third parties.
- Executing agreements to affect the assumption of such agreements on or before the closing.

END DRAFTING NOTE

Section 6.07 Books and Records.

(a) In order to facilitate the resolution of any claims made against or incurred by Seller prior to the Closing, or for any other reasonable purpose, for a period of [NUMBER] years after the Closing, Buyer shall:

(i) retain the Books and Records (including personnel files) relating to periods prior to the Closing in a manner reasonably consistent with the prior practices of Seller; and

(ii) upon reasonable notice, afford the Seller's Representatives reasonable access (including the right to make, at Seller's expense, photocopies), during normal business hours, to such Books and Records.

(b) In order to facilitate the resolution of any claims made by or against or incurred by Buyer after the Closing, or for any other reasonable purpose, for a period of [NUMBER] years after the Closing, Seller shall:

(i) retain the books and records (including personnel files) of Seller which relate to the Business and its operations for periods prior to the Closing; and

(ii) upon reasonable notice, afford the Buyer's Representatives reasonable access (including the right to make, at Buyer's expense, photocopies), during normal business hours, to such books and records.

(c) Neither Buyer nor Seller shall be obligated to provide the other party with access to any books or records (including personnel files) pursuant to this Section 6.07 where such access would violate any Law.

Section 6.08 Closing Conditions. From the date hereof until the Closing, each party hereto shall use commercially reasonable efforts to take such actions as are necessary to expeditiously satisfy the closing conditions set forth in Article VII hereof.

Drafting Note: Closing Conditions

While many of the closing conditions are covered by other covenants in Article VI, the seller should include Section 6.08 as a catchall. For more about the "commercially reasonable efforts" standard used in this covenant, see Drafting Note, Covenants.
END DRAFTING NOTE

Section 6.09 Public Announcements. Unless otherwise required by applicable Law [or stock exchange requirements] (based upon the reasonable advice of counsel), no party to this Agreement shall make any public announcements in respect of this Agreement or the transactions contemplated hereby or otherwise communicate with any news media without the prior written consent of the other party (which consent shall not be unreasonably withheld, conditioned or delayed), and the parties shall cooperate as to the timing and contents of any such announcement.

Section 6.10 Bulk Sales Laws. The parties hereby waive compliance with the provisions of any bulk sales, bulk transfer or similar Laws of any jurisdiction that may otherwise be applicable with respect to the sale of any or all of the Purchased Assets to Buyer.

Drafting Note: Bulk Sales Laws

Bulk sales or bulk transfer laws apply in some states whenever a seller transfers a significant amount of its assets in a transaction that is not in the ordinary course of business. The scope of bulk sales laws and the penalties associated with them vary from jurisdiction to jurisdiction. It is important for the parties to identify the jurisdictions in which the seller and the purchased assets are located, especially because bulk sales laws no longer apply in many jurisdictions.

Seller

Compliance with bulk sales laws can be burdensome and may delay the closing of the deal in some cases. As a practical matter, parties typically waive compliance with bulk sales laws. The seller generally limits this provision to just a waiver of compliance with bulk sales or bulk transfer laws, but a buyer may try to add additional obligations on the seller.

Buyer

While buyers typically waive compliance with bulk sales laws, they generally prefer to have the seller remain responsible for any liabilities that may arise from noncompliance. For example, the buyer could add the following at the end of Section 6.10:

"; it being understood that any liabilities or obligations arising out of the failure of Seller to comply with the requirements and provisions of any bulk sales, bulk transfer or similar Laws of any jurisdiction which would not otherwise constitute Assumed Liabilities shall be treated as Excluded Liabilities."

By making liabilities for noncompliance an excluded liability, the buyer is also creating an indemnification obligation for the seller (see Section 8.02(c)). An aggressive buyer may also require the seller to litigate all claims of creditors that may be asserted against the buyer.

Alternatively, although it is not common, a buyer can require the seller to comply with applicable bulk sales if it has any strong concerns.

END DRAFTING NOTE

Section 6.11 Transfer Taxes. All transfer, documentary, sales, use, stamp, registration, value added and other such Taxes and fees (including any penalties and interest) incurred in connection with this Agreement and the other Transaction Documents (including any real property transfer Tax and any other similar Tax) shall be borne and paid by Buyer when due. Buyer shall, at its own expense, timely file any Tax Return or other document with respect to such Taxes or fees (and Seller shall cooperate with respect thereto as necessary).

Drafting Note: Transfer Taxes

Under Section 6.11, transfer taxes are borne by the buyer. While it is common for the seller to pay all transfer taxes, the seller may have the buyer responsible for the taxes when it prepares the initial draft. If the buyer resists paying the taxes, the seller may want to consider proposing the taxes be shared equally.

Buyer

Although buyers often rely on the tax indemnification provisions set out in the purchase agreement (see Section 2.04(c) and Section 8.02(c)) for protection against transferee liability for delinquent state and local tax obligations of the seller, a buyer may want the additional protections offered by requiring the delivery of tax clearance certificates by the seller. For example, it may want to add:

Tax Clearance Certificates. If requested by Buyer, Seller shall notify all of the taxing authorities in the jurisdictions that impose Taxes on Seller or where Seller has a duty to file Tax Returns of the transactions contemplated by this Agreement in the form and manner required by such taxing authorities, if the failure to make such notifications or receive any available tax clearance certificate (a "**Tax Clearance Certificate**") could subject the Buyer to any Taxes of Seller. If any taxing authority asserts that Seller is liable for any Tax, Seller shall promptly pay any and all such amounts and shall provide evidence to the Buyer that such liabilities have been paid in full or otherwise satisfied.

END DRAFTING NOTE

Section 6.12 Further Assurances. Following the Closing, each of the parties hereto shall, and shall cause their respective Affiliates to, execute and deliver such additional documents, instruments, conveyances and assurances and take such further actions as may be reasonably required to carry out the provisions hereof and give effect to the transactions contemplated by this Agreement and the other Transaction Documents.

Drafting Note: Further Assurances

Section 6.12 is a common provision that ensures each party takes any actions reasonably necessary to carry out the asset purchase agreement. It is useful for dealing with miscellaneous issues that may

arise after the closing. However, if the parties are aware of any specific actions that must be taken, they should provide for them specifically in a separate covenant.
END DRAFTING NOTE

ARTICLE VII

CONDITIONS TO CLOSING

Drafting Note: Conditions to Closing

Conditions to closing are only included in asset purchase agreements when there is a period of time between the signing and closing. A failure by either party to satisfy its closing conditions gives the other party a right to refuse to close the transaction or terminate the asset purchase agreement (if provided for in the termination section (see Section 9.01(b)(ii) and Section 9.01(c)(ii)), but does not make the failing party liable to the other unless the failure causes a separate breach of a representation or covenant.

The closing conditions contained in Article VII are those commonly found in seller-friendly asset purchase agreements. It is not as comprehensive a list as you would find in a buyer-friendly form (see Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Section 7.02). Because the seller wants to ensure the acquisition closes, it tries to limit the number of closing conditions to minimize the buyer's ability to walk away from the deal without consequences. The buyer will typically try to add additional closing conditions and the scope of the closing conditions is typically heavily negotiated.

Each party should consider whether there are any additional conditions to closing that each may want due to the nature of the transaction or the parties. For further discussion, see Drafting Notes, Conditions to Obligations of All Parties, Drafting Note, Conditions to Obligations of Buyer and Conditions to Obligations of Seller.
END DRAFTING NOTE

Section 7.01 Conditions to Obligations of All Parties. The obligations of each party to consummate the transactions contemplated by this Agreement shall be subject to the fulfillment, at or prior to the Closing, of each of the following conditions:

(a) The filings of Buyer and Seller pursuant to the HSR Act, if any, shall have been made and the applicable waiting period and any extensions thereof shall have expired or been terminated.

(b) No Governmental Authority shall have enacted, issued, promulgated, enforced or entered any Governmental Order which is in effect and has the effect of making the transactions contemplated by this Agreement illegal, otherwise restraining or prohibiting consummation of such transactions or causing any of the transactions contemplated hereunder to be rescinded following completion thereof.

(c) [Seller shall have received all consents, authorizations, orders and approvals from the Governmental Authorities referred to in Section 4.03 and Buyer shall have received all consents, authorizations, orders and approvals from the Governmental Authorities referred to in Section 5.03, in each case, in form and substance reasonably satisfactory to Buyer and Seller, and no such consent, authorization, order and approval shall have been revoked.]

Drafting Note: Conditions to Obligations of All Parties

Section 7.01 lists the conditions that both parties must satisfy before the closing. These are usually limited to:

- Making the HSR Act filings and the expiration or termination of the applicable waiting period (for information on the reporting requirements under the HSR Act, see Practice Note, Hart-Scott-Rodino Act: Overview).
- There not being any governmental orders that make the transaction illegal.
- Obtaining other governmental approvals.

Include Section 7.01(c) if there are any governmental approvals required for the transactions contemplated by the asset purchase agreement (other than those under the HSR Act). For example, if the target business operates in a regulated industry, the transaction may need approval from the relevant authority for the sale of the target business. If governmental approvals are required, they should have been disclosed in Section 4.03 and Section 5.03 (or in the relevant section of the disclosure schedules).
END DRAFTING NOTE

Section 7.02 Conditions to Obligations of Buyer. The obligations of Buyer to consummate the transactions contemplated by this Agreement shall be subject to the fulfillment or Buyer's waiver, at or prior to the Closing, of each of the following conditions:

Drafting Note: Conditions to Obligations of Buyer

Section 7.02 includes the conditions that must be satisfied before the buyer is obligated to close the transaction. The buyer can waive any of these conditions, but the waiver must be in writing (see Section 10.10).

Seller

Section 7.02 is limited to the:

- Bring down of the seller's representations and warranties.
- Compliance with pre-closing covenants in the asset purchase agreement.
- Delivery of closing documents, such as the ancillary agreements, FIRPTA certificate, officer's certificates and secretary's certificates.

By limiting the closing conditions to just these few items, the seller expects to have an easier time satisfying the conditions so that the buyer must complete the transaction.

Buyer

The buyer should try to add some other closing conditions that are often included as conditions to a buyer's obligations under an asset purchase agreement. For example:

- **Third-party consent condition.** This condition requires the seller to obtain all third-party consents listed on Section 4.03 of the Disclosure Schedules. The buyer should add this because the failure to obtain these consents are not covered by the bring down because these consents are listed as an exception to the no conflicts representation (see Section 4.03). The failure to obtain them is also not covered by the condition to comply with pre-closing covenants because the covenant only requires the seller to use its commercially reasonable efforts to obtain the consent. The seller could argue it complied with that covenant even if it did not obtain all the consents if it can show it used commercially reasonable efforts. Depending on the level of materiality qualifiers in Section 4.03 and the negotiating leverage of the parties, the buyer may need to limit the list of required consents in the closing condition to only the most important consents listed by the seller in the disclosure schedule to Section 4.03. Adding this condition also provides the buyer a right to waive a required consent that the seller may not

be able to obtain before it is required to close (see Drafting Note, Obtaining Consents After Closing).

- **MAE condition.** While the MAE condition is somewhat covered by Section 7.02(a) and the bring down of the no MAE representation in Section 4.05(a), buyers often prefer a separate condition because it provides an additional right not to close. However, as evidenced in MAC-related cases such as *Hexion*, it is difficult for buyers to prove that an MAE has occurred. In fact, until the recent Delaware Court of Chancery's decision in *Akorn*, commentators believed that no Delaware court had ever previously found that an MAE had occurred. That *Akorn* did not signal a change in the difficulty of proving an MAE is evidenced by the Delaware Court of Chancery's subsequent decision in *Channel Medsystems*. The standard of proof for an MAE is high, and the burden of proof falls on the buyer (for further discussion, see Drafting Note, Definition: Material Adverse Effect). Although the buyer can try to contractually shift the burden to the seller, it is advisable for the buyer to identify objective closing conditions (such as financial or operational targets) and include them in the agreement instead of relying on the MAE condition to terminate a deal. Alternatively, the buyer can consider adding additional termination rights for the occurrence of certain objective events (see Drafting Note, Termination). For further discussion on using financial or operational targets as closing conditions, see Practice Note, Material Adverse Change Provisions: Mergers and Acquisitions: Additional Financial Milestone Closing Conditions and Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Drafting Note, MAE Condition.

- **Litigation condition.** This condition would permit the buyer to refuse to close if any litigation has been commenced that would restrain or prohibit the transaction. This is a common condition, but some sellers may prefer to leave it out because it requires speculation about whether the litigation would be successful and a frivolous claim may potentially block the deal. To increase its chances of getting the seller to include this condition, the buyer can try to limit the litigation covered by this closing condition to only that which is reasonably likely to succeed on its merits.

- **Deal-specific conditions.** If the buyer has any special concerns about a deal, it should try to address these with deal specific conditions. For example, if the buyer is concerned about a particular litigation claim, it may want to include a closing condition that requires that particular litigation claim to be finally adjudicated or settled.

- **Additional closing deliverables.** The buyer should consider requiring additional closing deliverables to get more comfort, such as:
  - a legal opinion from seller's counsel, including any local or regulatory counsel;
  - in a leveraged buyout transaction, payment in full of all indebtedness and proof of removal of all recorded liens or mortgages on real and personal property included in the purchased assets;
  - real property related deliverables (in addition to those listed in Section 3.02) that the buyer would want to have for itself or any lender financing the transaction, including title insurance policies, **ALTA/NSPS land title surveys**, seller affidavits and indemnity

agreements required by the title insurance company, **tenant estoppel certificates** for owned real property and landlord estoppel certificates for leased real property; and

- any other documents or instruments as it may reasonably request or as are reasonably necessary to complete the acquisition.

If the buyer has strong negotiating leverage, it may want to add other conditions, such as:

- **Due diligence out.** The buyer's obligation to close is subject to the satisfactory completion of its due diligence investigation of the target business. This is a rare closing condition, and most sellers do not agree to this closing condition because it essentially gives the buyer an option on the target business.

- **Financing out.** The buyer's obligation to close is subject to it obtaining financing to pay the purchase price (this condition is particularly important in leveraged buyout transactions) (see Practice Note, Buyouts: Overview and Standard Clause, Purchase Agreement: Financing Condition). This is also an uncommon closing condition. If a buyer cannot negotiate a financing condition, it often tries to negotiate for a reverse break-up fee payable on a financing failure (see Practice Notes, Reverse Break-up Fees and Specific Performance: Reverse Break-up Fee as Buyer Option and Drafting and Negotiating Reverse Break-up Fee and Specific Performance Provisions.

- **Financial or operating targets.** The buyer's obligation to close is subject to the target business achieving specified financial or operating targets (such as EBITDA or sales targets). Buyers may prefer to include these targets as conditions in lieu of relying on an MAE condition because of the difficulty in proving the occurrence of an MAE (for further discussion, see Drafting Note, Definition: Material Adverse Effect, Practice Note, Material Adverse Change Provisions: Mergers and Acquisitions: Additional Financial Milestone Closing Conditions and Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Drafting Note, MAE Condition).

If the buyer is financing the transaction, it should try to include any additional closing conditions that its lender requires for the financing transaction.
END DRAFTING NOTE

(a) The representations and warranties of Seller contained in Article IV shall be true and correct in all respects as of the Closing Date with the same effect as though made at and as of such date (except those representations and warranties that address matters only as of a specified date, which shall be true and correct in all respects as of that specified date), except where the failure of such representations and warranties to be true and correct would not have a Material Adverse Effect.

Drafting Note: Bring Down of Representations and Warranties

Section 7.02(a) provides the buyer with the right to walk away from the deal if any of the seller's representations fail to be true and correct on the closing date unless that failure would not have an MAE. The wording of this condition raises several issues.

Scope of Condition

Section 7.02(a) only covers the seller's representations and warranties contained in Article IV of this purchase agreement. The buyer may try to expand the scope to include representations and warranties contained in:

- The entire agreement.
- The other transaction documents.
- Any other certificate or document delivered under the purchase agreement.

The seller should resist expanding Section 7.02(a) in this manner so that it has an easier time satisfying the conditions and requiring the buyer to complete the transaction.

Materiality

Seller

Section 7.02(a) subjects the bring down of representations to an MAE standard. This favors the seller since it does not permit the buyer to walk away from the deal because of an inaccurate representation unless the inaccuracy would have a material adverse effect on the target business as a whole or the seller's ability to consummate the acquisition.

Buyer

If the buyer accepts the MAE standard, it should modify it by:

- Including inaccuracies that could not reasonably be expected to have an MAE.
- Requiring inaccuracies to be viewed individually or in the aggregate when judging the MAE.

For example, it could revise the last clause of Section 7.02(a) as follows:

"except where the failure of such representations and warranties to be true and correct, individually or in the aggregate, could not reasonably be expected to have a Material Adverse Effect."

Another approach that is commonly taken is to require the representations to be true and correct in "all material respects." For example:

"The representations and warranties of Seller contained in Article IV shall be true and correct in all material respects as of the Closing Date with the same effect as though made at and as of such date (except those representations and warranties that address matters only as of a specified date, which shall be true and correct in all respects as of that specified date)."

This approach is not as favorable to the seller as the MAE formulation (see above). If the bring down of representations were only subject to the materiality standard, though a buyer would be unable to walk away for an immaterial breach of a representation, it could still walk away if there were a material breach of an immaterial representation. The MAE formulation would prevent this from happening.

Buyers will generally accept having the bring down of representations subject to a materiality or MAE standard. In most cases, buyers will prefer having the bring down of representations subject to the materiality standard rather than the MAE standard. In either case, the buyer needs to address the issue of a "double materiality" standard being applied to representations that are already qualified by materiality or MAE.

If the bring down of representations is subject to MAE, the buyer should add the following parenthetical after the phrase "in all respects" in Section 7.02(a):

"(without giving effect to any limitation indicated by the words "Material Adverse Effect," "in all material respects," "material" or "materially")"

If the bring down of representations is subject to materiality, the buyer should revise Section 7.02(a) as follows:

"The representations and warranties of Seller contained in Article IV shall be true and correct in all respects (in the case of any representation or warranty qualified by materiality or Material Adverse Effect) or in all material respects (in the case of any representation or warranty not qualified by materiality or Material Adverse Effect) as of the Closing Date with the same effect as though made at and as of such date (except those representations and warranties that address matters only as of a specified date, which shall be true and correct as of that specified date)."

In addition, the buyer should consider requiring some fundamental representations to be true and correct in all respects even if they do not have a materiality qualifier. These are usually limited to representations relating to:

- The organization and authority of the seller.
- Monetary obligations, such as debt or broker's fees.
- Financial statements (GAAP contains a materiality standard).

Timing of Bring Down

Seller

Section 7.02(a) requires the representations to be true and correct on and as of the closing date only. This provides the seller the opportunity to cure any inaccuracies that may have existed on the signing date, so that the buyer cannot walk away from the deal based on a representation being inaccurate on the date of signing. The seller can point out that the buyer is somewhat protected by Section 6.03, which allows the buyer to terminate the agreement if the seller delivers a supplement to the disclosure schedules after the signing date and the underlying event or circumstance results in an MAE.

Buyer

The buyer should revise the bring down to require representations to be true and correct on the signing date as well. The buyer can argue that its agreement to buy the assets of the target business was based on inaccurate information, and it would never have signed the asset purchase agreement if it had known of the inaccuracy.
END DRAFTING NOTE

(b) Seller shall have duly performed and complied in all material respects with all agreements, covenants and conditions required by this Agreement and each of the other Transaction Documents to be performed or complied with by it prior to or on the Closing Date.

Drafting Note: Compliance with Agreement

Section 7.02(b) provides the buyer with the right to walk away from the deal if the seller fails to perform or comply with any pre-closing agreements, covenants and conditions. As with the bring down of the representations, this condition is subject to materiality.

Buyers may want to remove the materiality qualifier for agreements, covenants and conditions that are already subject to materiality. If so, they should add the following proviso to Section 7.02(b):

"*; provided, however*, that, with respect to agreements, covenants and conditions that are qualified by materiality, Seller shall have performed such agreements, covenants and conditions, as so qualified, in all respects."

END DRAFTING NOTE

(c) Seller shall have delivered to Buyer duly executed counterparts to the Transaction Documents (other than this Agreement) and such other documents and deliveries set forth in Section 3.02(a).

(d) Buyer shall have received a certificate, dated the Closing Date and signed by a duly authorized officer of Seller, that each of the conditions set forth in Section 7.02(a) and Section 7.02(b) have been satisfied (the "**Seller Closing Certificate**").

Drafting Note: Closing Certificate

Section 7.02(d) requires the seller to deliver a closing certificate to the buyer, certifying its satisfaction of Section 7.02(a) and Section 7.02(b). For an example of an officer's certificate, see Standard Document, Officer's Certificate: Mergers & Acquisitions.
END DRAFTING NOTE

(e) Buyer shall have received a certificate of the Secretary or an Assistant Secretary (or equivalent officer) of Seller certifying that attached thereto are true and complete copies of all resolutions adopted by the board of directors of Seller authorizing the execution, delivery and performance of this Agreement and the other Transaction Documents and the consummation of the transactions contemplated hereby and thereby, and that all such resolutions are in full force and effect and are all the resolutions adopted in connection with the transactions contemplated hereby and thereby.

Drafting Note: Secretary's Certificate

In asset purchases, the certificate required by Section 7.02(e) (known as the secretary's certificate) is typically combined with the certificate required by Section 7.02(f). For an example of a secretary's certificate, see Standard Document, Secretary's Certificate: Mergers & Acquisitions.

END DRAFTING NOTE

(f) Buyer shall have received a certificate of the Secretary or an Assistant Secretary (or equivalent officer) of Seller certifying the names and signatures of the officers of Seller authorized to sign this Agreement, the Transaction Documents and the other documents to be delivered hereunder and thereunder.

(g) Buyer shall have received a certificate pursuant to Treasury Regulations Section 1.1445-2(b) (the "**FIRPTA Certificate**") that Seller is not a foreign person within the meaning of Section 1445 of the Code duly executed by Seller.

Drafting Note: FIRPTA Certificate

Sellers often provide for the delivery of a FIRPTA certificate because buyers may otherwise be liable for FIRPTA withholding. For more information, see Section 4.16(b) and Drafting Note, FIRPTA.
END DRAFTING NOTE

Section 7.03 Conditions to Obligations of Seller. The obligations of Seller to consummate the transactions contemplated by this Agreement shall be subject to the fulfillment or Seller's waiver, at or prior to the Closing, of each of the following conditions:

Drafting Note: Conditions to Obligations of Seller

Section 7.03 includes the closing conditions that must be satisfied before the seller is obligated to close the transaction. The seller can waive any of these conditions, but the waiver must be in writing (see Section 10.10).

The seller's list of closing conditions is similar to the buyer's list of closing conditions, except that it requires delivery of the purchase price.

END DRAFTING NOTE

(a) The representations and warranties of Buyer contained in Article V shall be true and correct in all respects as of the Closing Date with the same effect as though made at and as of such date (except those representations and warranties that address matters only as of a specified date, which shall be true and correct in all respects as of that specified date), except where the failure of such representations and warranties to be true and correct would not have a material adverse effect on Buyer's ability to consummate the transactions contemplated hereby.

(b) Buyer shall have duly performed and complied in all material respects with all agreements, covenants and conditions required by this Agreement and each of the other Transaction Documents to be performed or complied with by it prior to or on the Closing Date.

(c) Buyer shall have delivered to Seller the Purchase Price, duly executed counterparts to the Transaction Documents (other than this Agreement) and such other documents and deliveries set forth in Section 3.02(b).

(d) Seller shall have received a certificate, dated the Closing Date and signed by a duly authorized officer of Buyer, that each of the conditions set forth in Section 7.03(a) and Section 7.03(b) have been satisfied (the "**Buyer Closing Certificate**").

(e) Seller shall have received a certificate of the Secretary or an Assistant Secretary (or equivalent officer) of Buyer certifying that attached thereto are true and complete copies of all resolutions adopted by the board of directors of Buyer authorizing the execution, delivery and performance of this Agreement and the other Transaction Documents and the consummation of the transactions contemplated hereby and thereby, and that all such resolutions are in full force and effect and are all the resolutions adopted in connection with the transactions contemplated hereby and thereby.

(f) Seller shall have received a certificate of the Secretary or an Assistant Secretary (or equivalent officer) of Buyer certifying the names and signatures of the officers of Buyer authorized to sign this Agreement, the Transaction Documents and the other documents to be delivered hereunder and thereunder.

ARTICLE VIII

INDEMNIFICATION

Drafting Note: Indemnification

The indemnification provision provides a post-closing remedy for losses incurred under the purchase agreement. These losses can occur as a result of:

- Failure to perform a covenant.
- Breach of, or inaccuracy in, a representation or warranty.
- Excluded or assumed liabilities.

The indemnification provisions should be read in conjunction with the representations, warranties, and covenants (including the disclosure schedules) to determine the full scope of what is covered. For further discussion, see Practice Note, Indemnification Clauses in Private M&A Agreements.

Since most indemnification claims are brought by the buyer against the seller, most sellers prefer to minimize or eliminate indemnification obligations in the asset purchase agreement. If the seller has strong negotiating leverage, it may choose to delete the indemnification section and specify that the representations and warranties do not survive the closing (see Drafting Note, Survival). However, in private acquisitions, most buyers require either:

- Indemnification in some form.
- R&W insurance (see Representation and Warranty Insurance).
- A combination of indemnification and R&W insurance.

Unless the buyer is solely relying on R&W insurance, leaving out indemnification rights altogether allows the buyer to add its own version of an indemnification provision in the draft, which it usually drafts in its favor. The seller is usually better off including a limited indemnification provision so that it can control the initial draft of the provision.

Escrow

Buyers often worry that the seller may not have the funds necessary to meet indemnification obligations if and when they arise. In many cases, the seller will most likely have used the proceeds of the purchase price before an indemnification claim is raised. If the buyer has any concerns about the seller's ability to pay its indemnification obligations when they become due, it should:

- Request a portion of the purchase price be held in escrow to satisfy those obligations.

- Incorporate the terms of the escrow into the appropriate provisions of the asset purchase agreement.

For an example of escrow provisions, see Standard Clause, Purchase Agreement: Escrow Provisions. For an example of an escrow agreement used in M&A transactions, see Standard Document, Escrow Agreement.

Representation and Warranty Insurance

Acquisitions have increasingly been incorporating R&W insurance, which provides coverage for indemnification claims a buyer may have for losses resulting from breaches of a seller's representations and warranties. This shifts some of the business risks of an acquisition to an insurer in exchange for payment of the policy premium.

R&W insurance can be obtained by either the buyer or the seller and may be written with either the buyer or the seller as the insured under the policy. R&W insurance is most suitable for deals with transaction values between $20 million and $1 billion. Premium costs, together with professional fees and expenses, may be too prohibitive for deals valued less than $20 million. Deals valued over $1 billion may require coverage that exceeds most insurance companies' appetite for risk (although insurer pools and excess coverage may be available to cover these larger transactions).

For more information on R&W insurance, see Practice Notes, Representation and Warranty Insurance for M&A Transactions and Incorporating Representation and Warranty Insurance into M&A Transactions and Standard Clause, Purchase Agreement: Representation and Warranty Insurance Provisions. For an example of a purchase agreement that incorporates R&W insurance, see Standard Document, Stock Purchase Agreement (Representation & Warranty Insurance, Pro-Buyer).

END DRAFTING NOTE

Section 8.01 Survival. Subject to the limitations and other provisions of this Agreement, the representations and warranties contained herein shall survive the Closing and shall remain in full force and effect until the date that is [NUMBER] [months/years] from the Closing Date. None of the covenants or other agreements contained in this Agreement shall survive the Closing Date other than those which by their terms contemplate performance after the Closing Date, and each such surviving covenant and agreement shall survive the Closing for the period contemplated by its terms. Notwithstanding the foregoing, any claims asserted in good faith with reasonable specificity (to the extent known at such time) and in writing by notice from the non-breaching party to the breaching party prior to the expiration date of the applicable survival period shall not thereafter be barred by the expiration of such survival period and such claims shall survive until finally resolved.

Drafting Note: Survival

Seller

The representations and warranties of the seller and the buyer must survive the closing to form a basis for post-closing liability. If the seller includes an indemnification section in the asset purchase agreement and provides for the survival of the representations and warranties, it should try to keep the survival period as short as possible, usually one year or less.

This provision provides for pre-closing covenants to expire at the closing and post-closing covenants to survive the closing according to their terms. For a more moderate approach, the seller may choose to have the pre-closing covenants survive for a short time after the closing (usually the same survival period as the representations and warranties). Alternatively the seller may choose to be silent regarding the survival of all covenants. However, if the asset purchase agreement is silent about their survival, the buyer will typically provide for the pre-closing and post-closing covenants to survive the closing indefinitely. It may be better for the seller to address the survival of covenants in its initial draft so it can limit their survival period.

Although Delaware prohibits parties from contractually extending the statute of limitations, it views the contractual shortening of the statute of limitations more favorably. Delaware courts have generally interpreted survival clauses as a contractual statute of limitations, even when there was no clear and explicit language to that effect (see *ENI Holdings, LLC v KBR Group Holdings, LLC*, No. 8075-VCG, 2013 WL 6186326 (Del. Ch. Nov. 27, 2013) and *GRT, Inc. v. Marathon GTF Tech., LTD*, No. 5571-CS, 2011 WL 2682898 (Del. Ch. July 11, 2011)).

However, in some other jurisdictions (like California and New York), simply stating that the representations only survive for a certain period after the closing is not enough to limit the time in which the buyer may bring claims for breaches of those representations and warranties (for example, see *Western Filter Corp. v. Argan, Inc.,* 540 F.3d 947 (9th Cir. 2008) and *Hurlbut v. Christiano,* 63 A.D.2d 1116 (N.Y. App. Div 1978)). Courts in these jurisdictions do not favor provisions that limit the statute of limitations and have held that limiting survival only limits the period in which a breach of the representation can occur and not when a claim for such breach can be brought. In these jurisdictions, to ensure the buyer cannot bring a claim for breach of a representation after expiration of the applicable survival period, the seller must include clear and explicit language limiting the period during which the buyer can bring a claim. For example, it would need to add the following to this Section 8.01 or to the limitations set forth in Section 8.04:

"For the avoidance of doubt, the Parties hereby agree and acknowledge that the survival period set forth in this Section 7.01 is a contractual statute of limitations and any claim brought by any Party pursuant to this Article VII must be brought or filed prior to the expiration of the survival period."

If the seller has chosen not to offer indemnification, the seller should revise this section so the representations, warranties and pre-closing covenants do not survive the closing. For example, it can replace Section 8.01 with the following:

"None of the representations, warranties and covenants (to the extent such covenants relate to the performance of obligations prior to the Closing) contained in this Agreement or in any instrument delivered under this Agreement shall survive the Closing Date. This Section 8.01 does not limit any covenant of the parties to this Agreement which, by its terms, contemplates performance after the Closing Date."

Buyer

The buyer should try to extend the survival period, typically between 12 and 18 months for most representations and warranties, to ensure the survival period lasts through the completion of one financial statement audit cycle after the closing. The representations most commonly carved out of the general survival period include those covering:

- Due organization.
- Due authority.
- Title to the purchased assets.
- Brokers.
- Taxes.

These are usually classified as fundamental or special representations and their survival is generally extended:

- Indefinitely.
- For the applicable statute of limitations or the applicable statute of limitations plus 60 days.
- A greater number of years from the closing.

In some cases, the buyer may set different survival periods for different fundamental or special representations. The following is an example of a proviso that a buyer can add to the first sentence of Section 8.01 to extend the survival period for fundamental or special representations:

"; *provided, however*, that: (a) the representations and warranties in Section 4.01, Section 4.02, Section 4.07, Section 4.17, Section 5.01 and Section 5.04 shall survive [indefinitely/for a period of [NUMBER] years following the Closing]; and (b) the representations and warranties in Section 4.16 shall survive for the full period of all applicable statutes of limitations (giving effect to any waiver, mitigation or extension thereof) [plus 60 days]."

The buyer should also try to extend the survival period of all covenants so that they survive indefinitely.

When negotiating for longer or indefinite survival periods, the buyer should note that some jurisdictions may consider such survival provisions to be a contractual extension of the statute of limitations (especially as they relate to direct claims made by the buyer, rather than third-party claims, which arguably accrue when payments are made to the third party and not at closing). Because these states generally do not permit parties to contractually extend the statute of limitations, the portions of the survival clause providing longer or indefinite survival periods may be unenforceable to the extent they have the survival period extend beyond the statute of limitations for breach of contract claims. If it is important for the buyer to have a longer period in which to bring a claim, it can consider:

- Choosing the statute of limitations of a state with a longer period to govern the merger agreement. For example, New York has a six-year statute of limitations and Illinois has a ten-

year statute of limitations. In addition, although Delaware has a three-year statute of limitations for contract claims, it allows an action based on a written contract involving at least $100,000 to be brought within the period specified in such written contract, provided it is brought within 20 years from when the action accrues (see 10 Del.C. § 8106).

- Stating that a claim does not accrue until a wrongful act has been discovered or should have been discovered. This delays when the statute of limitations starts to run. Although courts in a few other states have permitted this type of provision, it has not been tested in all jurisdictions, so there is a risk that this type of provision may be unenforceable as against public policy.

END DRAFTING NOTE

Section 8.02 Indemnification By Seller. Subject to the other terms and conditions of this Article VIII, Seller shall indemnify Buyer against, and shall hold Buyer harmless from and against, any and all Losses incurred or sustained by, or imposed upon, Buyer based upon, arising out of, with respect to or by reason of:

(a) any inaccuracy in or breach of any of the representations or warranties of Seller contained in this Agreement;

(b) any breach or non-fulfillment of any covenant, agreement or obligation to be performed by Seller pursuant to this Agreement; or

(c) any Excluded Asset or any Excluded Liability.

Drafting Note: Indemnification by Seller

If an indemnification section is included, it generally provides for the seller to indemnify the buyer for inaccuracies in or breaches of representations and warranties, breaches of covenants, agreements or obligations and losses arising from excluded assets or excluded liabilities. This asset purchase agreement limits the scope of seller's indemnification for breaches of representations and warranties to only cover inaccuracies and breaches of those representations, warranties and covenants in the asset purchase agreement and not any exhibits, certificates or other transaction documents.

Buyer

The buyer should try to make the seller's indemnification obligation more comprehensive by:

- Adding a requirement to defend, pay and reimburse the buyer for losses. For example, see the lead-in paragraph to Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Section 8.02.

- Including its affiliates and representatives (such as directors, officers, employees, consultants, and advisors) as indemnitees so that they can also bring claims to enforce the indemnification provisions in the asset purchase agreement. Typically, a defined term such as "Buyer Indemnitees" is used when there are multiple indemnitees. The buyer should ensure the term is defined broadly enough to include all persons who need to be able to bring an indemnification claim against the seller.

- Expanding the indemnity obligation for breaches of representations to include inaccuracies or breaches of representations in any exhibit, certificate or other transaction document.

- Expanding the indemnity obligation for breaches of representations to include inaccuracies or breaches of representations as if such representations were made as of the closing date. This ensures an indemnification claim can be made if a representation is true and correct on the signing date, but something happens between the signing and closing that causes the representation to be untrue as of the closing date. This issue can also be addressed in the introduction to the representations (see Drafting Note, Introduction to Representations).

In addition, while they may already be included in the excluded liabilities, the buyer may want to add additional indemnification items if it has concerns about any specific liabilities for which it wants the seller to be liable, such as losses arising out of:

- Retained employee liabilities.

- Product liability claims.

- Litigation and other liabilities disclosed by the seller in the disclosure schedules.

- Environmental conditions involving the purchased assets or currently or formerly owned, operated or leased real property that exists as of the closing.

- Noncompliance with bulk sales or bulk transfer laws.

END DRAFTING NOTE

Section 8.03 Indemnification By Buyer. Subject to the other terms and conditions of this Article VIII, Buyer shall indemnify Seller against, and shall hold Seller harmless from and against, any and all Losses incurred or sustained by, or imposed upon, Seller based upon, arising out of, with respect to or by reason of:

(a) any inaccuracy in or breach of any of the representations or warranties of Buyer contained in this Agreement;

(b) any breach or non-fulfillment of any covenant, agreement or obligation to be performed by Buyer pursuant to this Agreement; or

(c) [subject to Seller's obligations in Section 8.02,] any Assumed Liability.

Drafting Note: Indemnification by Buyer

Most asset purchase agreements provide for the buyer to indemnify the seller for inaccuracies in or breaches of representations and warranties, breaches of covenants, agreements or obligations and losses arising from assumed liabilities. The provision should mirror the corresponding provision relating to indemnification by the seller and any changes to one section require conforming changes in the other section. The buyer's provision rarely includes any additional indemnification items.

Buyer

The buyer should include the bracketed language in Section 8.03(c) to clarify that it is not responsible for any losses from an Assumed Liability if the Assumed Liability results from a breach of the seller's representations. In this case, the seller has the indemnity obligation. This situation is more likely to occur when pre-closing liabilities are included as Assumed Liabilities (see Section 2.03).

END DRAFTING NOTE

Section 8.04 Certain Limitations. The party making a claim under this Article VIII is referred to as the "**Indemnified Party**", and the party against whom such claims are asserted under this Article VIII is referred to as the "**Indemnifying Party**". The indemnification provided for in Section 8.02 and Section 8.03 shall be subject to the following limitations:

Drafting Note: Certain Limitations

The seller usually wants to limit the indemnification obligations in Article VIII because most indemnification claims are made by the buyer against the seller. Some of the ways indemnification can be limited include:

- Baskets and **mini-baskets**.
- Caps.
- Indemnity payment adjustments for insurance proceeds received by the buyer on account of an indemnifiable loss.
- Indemnity payment adjustments for tax benefits received by the buyer on account of an indemnifiable loss.
- Exclusion of punitive, incidental, consequential and other special damages.
- Duty to mitigate.
- Anti-sandbagging provisions.

If the seller includes a purchase price adjustment in the initial draft, it should also include a provision that ensures it is not liable for a loss that it has already paid for with a purchase price reduction (see Drafting Note, Purchase Price Adjustment).

If the seller agrees to an escrow to ensure payment of indemnifiable losses, it should include a provision that requires indemnity payments to be paid from the escrow account before any payments are required from the seller (see Drafting Note, Escrows).

Most of the limitations in this asset purchase agreement apply to both parties, but the seller can consider having them only apply to seller's obligations in the initial draft.
END DRAFTING NOTE

(a) The Indemnifying Party shall not be liable to the Indemnified Party for indemnification under Section 8.02(a) or Section 8.03(a), as the case may be, until the aggregate amount of all Losses in respect of indemnification under Section 8.02(a) or Section 8.03(a) exceeds [$[NUMBER]/[PERCENTAGE]% of the Purchase Price] (the "**Deductible**"), in which event the Indemnifying Party shall only be required to pay or be liable for Losses in excess of the Deductible. With respect to any claim as to which the Indemnified Party may be entitled to indemnification under Section 8.02(a) or Section 8.03(a), as the case may be, the Indemnifying Party shall not be liable for any individual or series of related Losses which do not exceed $[NUMBER] (which Losses shall not be counted toward the Deductible).

Drafting Note: Baskets

Section 8.04(a) contains:

- A basket that requires the aggregate amount of losses for inaccuracies in or breaches of representations and warranties to exceed a specified minimum amount before an indemnifying party is liable under Section 8.02(a) or Section 8.03(a).
- A mini-basket that requires the losses from any particular claim for an inaccuracy in or breach of a representation or warranty to exceed a certain amount (typically small) before the claim gets counted toward the basket or is indemnifiable once the basket amount is exceeded.

Buyers often accept baskets (subject to some of the issues discussed in Scope of Indemnification Obligations Subject to Basket). Although buyers accept mini-baskets (set out in the second sentence of Section 8.04(a)) less often, mini-baskets are increasingly common, especially where the seller has strong negotiating leverage or the buyer has a materiality scrape.

Scope of Indemnification Obligations Subject to Basket

The basket in Section 8.04(a) only applies to indemnification obligations for inaccuracies in or breaches of representations and warranties, and not to breaches of covenants or other types of liabilities (such as excluded liabilities).

Seller

If the seller wants to be more aggressive, it can try to have the basket apply to all indemnification obligations, including claims for breaches of covenants and excluded assets and liabilities. However, standard practice is to allow the buyer to recover on those claims from dollar one with no limit.

Buyer

The buyer can try to limit the basket by excluding certain representations from being subject to the basket, such as representations covering:

- Corporate organization and authority.
- Title to the purchased assets.
- Taxes.
- Broker fees.

If the seller agrees to assume a certain liability through a specific indemnity listed in Section 8.02 (such as liability for pending litigation), the buyer should also ensure the basket does not apply to that liability. If the buyer can negotiate these carve-outs from the basket, it should clarify that all losses from a breach of those representations or from any of those specific liabilities get counted toward the basket.
The buyer should also ensure the basket does not apply to claims based on fraud and intentional misrepresentations.

Deductible versus Threshold

The basket in these provisions is structured as a **deductible**, which provides that the indemnifying party is only liable for losses over the minimum amount (also known as an "excess liability" basket). The buyer should try to structure the basket as a **threshold**, which provides that the indemnifying party is liable for the total amount of losses once the minimum amount is exceeded (also known as a "dollar one" or "tipping" basket). For example, it should try to replace the limiting language in Section 8.04(a) with the following:

"until the aggregate amount of all Losses in respect of indemnification under Section 8.02(a) or Section 8.03(a) exceeds [$[NUMBER]/[PERCENTAGE]% of the Purchase Price], in which event the Indemnifying Party shall be required to pay or be liable for all such Losses from the first dollar."

Sometimes the parties may agree to a hybrid approach where the indemnifying party is only liable for losses once a threshold amount is exceeded, but once the threshold amount is reached, the indemnifying party is liable for losses that exceed an amount that is less than the threshold amount but greater than zero.

Materiality Scrape

Since some of the representations and warranties contain materiality or MAE qualifiers, if the buyer accepts a basket limitation, it should try to provide for a "materiality scrape" or "read out" of these qualifiers for the purposes of Article VIII. For example:

"For purposes of determining the existence of any inaccuracy in or breach of any representation or warranty and calculating the amount of any Loss with respect thereto, any materiality, Material Adverse Effect or other similar qualifications in the representations and warranties shall be disregarded."

This particular formulation of a materiality scrape is sometimes referred to as a double materiality scrape because it reads out materiality for purposes of both:

- Determining the existence of a breach.
- Calculating the amount of the loss.

This provides the indemnified party with the right to exclude materiality, MAE, or other similar qualifications contained in the representations for indemnification purposes. The buyer can argue that because the basket already provides one level of materiality, it would be subject to "double materiality" if the materiality qualifications in the representations were included.

If the buyer can include a materiality scrape, it will not be as concerned about removing materiality or MAE qualifiers from the seller's representations in Article IV, because the qualifiers do not affect the buyer's indemnification rights. With a materiality scrape, materiality or MAE qualifiers contained in the representations only affect what the seller must disclose under the asset purchase agreement.

Seller

If the seller agrees to include a materiality scrape, it should try to limit it to the calculation of the amount of losses and not to determine whether there has been an inaccuracy in or breach of a representation. This is sometimes referred to as a single materiality scrape. It can also try to limit the scope or effect of the materiality scrape by:

- **Increasing the basket amount.** If immaterial inaccuracies and breaches are counted toward the basket, the minimum amount will be reached sooner. In addition, a materiality scrape makes it more important to the seller to have the basket structured as a deductible rather than a threshold, though the buyer will argue that the deductible is essentially an increase in the purchase price.
- **Excluding certain representations.** For example:
  - **No MAE representation.** The seller can argue that the essence of this representation would be lost if there were a materiality scrape.
  - **Lists.** Certain representations require the seller to provide lists in the disclosure schedules. These are usually limited to material items (such as material contracts, material intellectual property, and material licenses). The seller can

argue that the materiality scrape is not intended to require the seller to include immaterial items on these lists.

- **Representations not subject to basket.** The seller can argue that representations carved out from the basket are not subject to double materiality and should not be subject to the materiality scrape.

- **Full disclosure representation (if one is included).** Since this representation tracks the language of Rule 10b-5 of the Exchange Act, the seller can argue that the term "material" is part of the essence of the representation, rather than just a qualifier.

END DRAFTING NOTE

(b) The aggregate amount of all Losses for which an Indemnifying Party shall be liable pursuant to Section 8.02(a) or Section 8.03(a), as the case may be, shall not exceed [$[NUMBER]/[PERCENTAGE]% of the Purchase Price].

Drafting Note: Indemnification Caps

Indemnification under Section 8.02(a) and Section 8.03(a) is also limited by a cap, which limits the indemnifying party's obligation to a specified amount.

Seller

The seller will likely want to set the cap at a small percentage (around 5% to 10%) of the purchase price.

If the seller wants to be more aggressive, it can try to have the cap apply to all indemnification obligations, including claims for breaches of covenants. As a compromise, the seller may set a lower cap for breaches of representations and a higher cap for other indemnification obligations.

Buyer

While a buyer may expect to incur a small amount of losses as a cost of doing business before being indemnified, it should resist including a cap because it can potentially incur an unlimited amount of losses. If it does agree to a cap, it should try to:

- Negotiate a high amount.
- Exclude certain representations (see Drafting Note, Scope of Indemnification Obligations Subject to Basket).
- Exclude certain liabilities that the seller has agreed to assume.
- Exclude certain liabilities that have the potential to be quite significant (such as environmental liabilities (whether they be through an inaccuracy or breach of a representation or a specific indemnity listed in Section 8.02)).
- Exclude claims based on fraud and intentional misrepresentations.

END DRAFTING NOTE

(c) Payments by an Indemnifying Party pursuant to Section 8.02 or Section 8.03 in respect of any Loss shall be limited to the amount of any liability or damage that remains after deducting therefrom any insurance proceeds and any indemnity, contribution or other similar payment received or reasonably expected to be received by the Indemnified Party in respect of any such claim. The Indemnified Party shall use its commercially reasonable efforts to recover under insurance policies or indemnity, contribution or other similar agreements for any Losses prior to seeking indemnification under this Agreement.

Drafting Note: Payment Adjustments for Insurance Proceeds

Another way for the seller to limit its indemnification obligations (and avoid double recovery) is to deduct insurance proceeds received or expected to be received by the buyer from any payments the seller is required to make.

Buyer

The buyer can try to minimize this limitation by:

- Only requiring deduction of proceeds actually received.

- Netting out all costs and expenses incurred in recovering the proceeds, and possibly any increased premiums related thereto.
- Removing the obligation to recover insurance and other proceeds before seeking indemnification for a claim.

END DRAFTING NOTE

(d) Payments by an Indemnifying Party pursuant to Section 8.02 or Section 8.03 in respect of any Loss shall be reduced by an amount equal to any Tax benefit realized or reasonably expected to be realized as a result of such Loss by the Indemnified Party.

Drafting Note: Payment Adjustments for Taxes

The seller can also limit its indemnity obligations by reducing the amount of any indemnity payment by the amount of any tax benefit to the buyer that is attributable to the loss.

Buyer

The buyer may resist including this limitation because determining whether an indemnity payment results in a tax benefit to the buyer may be difficult, and could result in litigation. If the buyer agrees to include a tax benefit limitation, it may want to negotiate limits to the tax benefit clause, including:

- Limiting it to tax benefits that are actually realized.
- Limiting it to tax benefits realized within a specific time period from the date of loss (typically two years).
- Clarifying that the limitation shall not limit or delay the indemnified party's ability to recover on an indemnifiable loss.

In addition, the buyer may require that any loss be increased by the amount of any taxes attributable to the receipt of an indemnity payment by adding the following to Section 8.04(d):

"and increased by an amount equal to any Tax imposed on the receipt of such indemnity payment."

END DRAFTING NOTE

(e) In no event shall any Indemnifying Party be liable to any Indemnified Party for any punitive, incidental, consequential, special or indirect damages, including loss of future revenue or income, loss of business reputation or opportunity relating to the breach or alleged breach of this Agreement, or diminution of value or any damages based on any type of multiple.

Drafting Note: Punitive, Incidental and Other Special or Indirect Damages

This provision reinforces the narrow definition of Losses set out in Article I by specifically excluding certain types of damages, such as punitive, incidental, consequential, special or indirect damages (including loss of revenue, diminution in value and any damages based on any type of multiple) (see Drafting Note, Definition: Losses).

Buyer

The buyer should try to delete this limitation and, if it has negotiating leverage, specifically include these types of damages. If it does not have sufficient leverage to request these changes, it should try to include the damages to the extent they are actually awarded to a third party by adding the following to the end of Section 8.04(e):

"(other than indemnification for amounts paid or payable to third parties in respect of any third-party claim for which indemnification hereunder is otherwise required)."

END DRAFTING NOTE

(f) Each Indemnified Party shall take, and cause its Affiliates to take, all reasonable steps to mitigate any Loss upon becoming aware of any event or circumstance that would be reasonably expected to, or does, give rise thereto, including incurring costs only to the minimum extent necessary to remedy the breach that gives rise to such Loss.

Drafting Note: Duty to Mitigate

Seller

The seller will want the indemnified party to do what it can to minimize the losses for which it is seeking indemnification because the seller will most likely be the indemnifying party. Section 8.04(f) protects the indemnifying party from an indemnified party who may allow damages to accumulate and incur unreasonable costs and expenses because it knows those damages and costs will be paid by the other party.

Buyer

If the buyer has some negotiating leverage, it should try to delete this provision because it provides the indemnifying party with an additional argument to try to reduce the amount of losses the indemnified party can recover. If the indemnified party had to pay losses to a third party, this provision could potentially reduce its recovery to less than what it paid out for a third-party claim if the indemnifying party argues that it did not try to mitigate its losses.
END DRAFTING NOTE

(g) Seller shall not be liable under this Article VIII for any Losses based upon or arising out of any inaccuracy in or breach of any of the representations or warranties of Seller contained in this Agreement if Buyer had knowledge of such inaccuracy or breach prior to the Closing.

Drafting Note: Anti-sandbagging

Seller

Section 8.04(g) is commonly referred to as an anti-sandbagging provision. Its purpose is to ensure the buyer cannot bring an indemnification claim based on an inaccuracy or breach of a representation that the buyer knew about before the closing if it chooses to proceed and close the transaction despite the inaccuracy or breach of the representation. The seller would argue that, because the buyer had knowledge of the specific inaccuracy or breach of the representation, it did not rely on the accuracy of the representation when closing the transaction and so waived its right to indemnification based on that breach by proceeding with

the closing. The seller would claim that it would be prejudiced if the buyer is then able to bring an indemnification claim afterwards.

This provision is silent on whether the buyer's knowledge includes constructive knowledge and whether there is an investigation requirement. The seller may choose to do this so it does not prompt the buyer to try to limit its knowledge to actual knowledge. If the seller believes it has enough negotiating leverage, it should explicitly include constructive knowledge (any matters the buyer should have known about) with an investigation requirement in what constitutes the buyer's knowledge for purposes of Section 8.04(g).

Buyer

The buyer should oppose an anti-sandbagging provision because it provides the seller with an affirmative defense against an indemnification claim, limiting the buyer's indemnification rights further and requiring the buyer to prove the breach and prove it did not know about the breach to collect on an indemnification claim. If the buyer does agree to include an anti-sandbagging provision, it should try to include a narrow definition of what constitutes its knowledge (similar to the seller's actual knowledge standard (see definition of Knowledge of Seller or Seller's Knowledge)).

If the buyer has enough negotiating leverage, it should try to replace Section 8.04(g) with a **sandbagging or pro-sandbagging provision**, such as:

"The representations, warranties and covenants of the Indemnifying Party, and the Indemnified Party's right to indemnification with respect thereto, shall not be affected or deemed waived by reason of any investigation made by or on behalf of the Indemnified Party (including by any of its Representatives) or by reason of the fact that the Indemnified Party or any of its Representatives knew or should have known at any time that any such representation or warranty is, was or might be inaccurate or by reason of the Indemnified Party's waiver of any condition set forth in Section 7.02 or Section 7.03, as the case may be."

This reserves the buyer's right to bring an indemnification claim against the seller for breach of a representation, warranty or covenant, even if the buyer knew about the breach before the closing and proceeded to close the transaction. The buyer should include this type of provision if it wants to ensure preservation of its indemnification rights.

Although the seller typically argues that it is unfair for the buyer to have an indemnification right based on information it knew before the closing, consider the following situations:

- The buyer receives information from the seller before the closing, but its effect on the seller's representations does not become evident until after the closing.

- The buyer receives information that affects the seller's representations immediately before the closing, but it either lacks the time or negotiating leverage to renegotiate the deal to account for such knowledge or it is so committed to the deal it cannot walk away at that point.

If the buyer can replace the anti-sandbagging provision of Section 8.04(g) with a pro-sandbagging provision, it needs to revise Section 6.03 so that it does not undermine the pro-

sandbagging provision and limit the buyer's ability to bring an indemnification claim based on an inaccuracy in or breach of a representation that is cured by an update to the disclosure schedules (see Drafting Note, Supplement to Disclosure Schedules).

Silent on Sandbagging

If the agreement is silent, the state law governing the purchase agreement determines whether sandbagging is permitted. While most states (including Delaware and New York) permit some form of sandbagging, there are some (such as California) that will protect sellers from sandbagging if there is no express provision in the agreement.

In addition, even if applicable state law permits sandbagging, a buyer's ability to prevail may still depend on other factors. For example, in New York, the courts will only allow sandbagging if the buyer can prove it believed it was purchasing the seller's promise as to the truth of the representation. As such, if the buyer receives its knowledge of the breach from the seller (rather than discovering breach on its own), it generally will not be able to recover for breach if it goes ahead and closes the deal. Even if the purchase agreement is governed by the law of a state that permits sandbagging, it is advisable to include an express pro-sandbagging provision.

END DRAFTING NOTE

Section 8.05 Indemnification Procedures.

(a) If any Indemnified Party receives notice of the assertion or commencement of any action, suit, claim or other legal proceeding made or brought by any Person who is not a party to this Agreement or an Affiliate of a party to this Agreement or a Representative of the foregoing (a "**Third-Party Claim**") against such Indemnified Party with respect to which the Indemnifying Party is obligated to provide indemnification under this Agreement, the Indemnified Party shall give the Indemnifying Party prompt written notice thereof. The failure to give such prompt written notice shall not, however, relieve the Indemnifying Party of its indemnification obligations, except and only to the extent that the Indemnifying Party forfeits rights or defenses by reason of such failure. Such notice by the Indemnified Party shall describe the Third-Party Claim in reasonable detail, shall include copies of all material written evidence thereof and shall indicate the estimated amount, if reasonably practicable, of the Loss that has been or may be sustained by the Indemnified Party. The Indemnifying Party shall have the right to participate in, or by giving written notice to the Indemnified Party, to assume the defense of any Third-Party Claim at the Indemnifying Party's expense and by the Indemnifying Party's own counsel, and the Indemnified Party shall cooperate in good faith in such defense. In the event that the Indemnifying Party assumes the defense of any Third-Party Claim, subject to Section 8.05(b), it shall have the right to take such action as it deems necessary to avoid, dispute, defend, appeal or make counterclaims pertaining to any such Third-Party Claim in the name and on behalf of the Indemnified Party. The Indemnified Party shall have the right, at its own cost and expense, to participate in the defense of any Third-Party Claim with counsel selected by it subject to the Indemnifying Party's right to control the defense thereof. If the Indemnifying Party elects not to compromise or defend such Third-Party Claim or fails to promptly notify the

Indemnified Party in writing of its election to defend as provided in this Agreement, the Indemnified Party may, subject to Section 8.05(b), pay, compromise, defend such Third-Party Claim and seek indemnification for any and all Losses based upon, arising from or relating to such Third-Party Claim. Seller and Buyer shall cooperate with each other in all reasonable respects in connection with the defense of any Third-Party Claim, including making available (subject to the provisions of Section 6.05) records relating to such Third-Party Claim and furnishing, without expense (other than reimbursement of actual out-of-pocket expenses) to the defending party, management employees of the non-defending party as may be reasonably necessary for the preparation of the defense of such Third-Party Claim.

Drafting Note: Indemnification Procedures for Third-Party Claims

Section 8.05(a) provides various procedures the parties must follow concerning third-party claims. It deals primarily with notice requirements and the control of legal proceedings. The buyer is more concerned with the indemnified party's rights under this provision because the buyer is the indemnified party in most circumstances. The seller is mainly concerned with the indemnifying party's rights.

Buyer

Notice

Section 8.05(a) requires the indemnified party to provide the indemnifying party with prompt written notice of a third-party claim. The buyer should try to revise the provision to only require "reasonably prompt" written notice and define "reasonably prompt" to be within a certain number of days (usually 30 days) after the indemnifying party receives notice.

Right to Assume Defense

Most indemnification procedures for third-party claims provide the indemnifying party with the right to assume the defense of such third-party claim. However, the buyer should try to exclude certain types of claims from that right, such as:

- Claims by customers and suppliers or other claims involving potential reputational risks.
- Claims for equitable relief.
- If there is a cap, claims that arise after the cap is met.

In addition, the buyer should try to further limit the indemnifying party's right to assume the defense of a third-party claim by requiring the indemnifying party to acknowledge in writing that it is obligated to indemnify the indemnified party against any losses that may result from such third-party claim before it is allowed to assume its defense.

Selection of Counsel

Section 8.05(a) also permits an indemnifying party to use any counsel it wishes. The buyer may want the indemnified party to have more control over the counsel that the indemnifying party uses to defend the third-party claim. In this case, the buyer should specify that the indemnifying party can assume the defense of that claim with counsel "reasonably satisfactory to the Indemnified Party."

Right to Participate in the Defense

This provision also permits the indemnified party to participate in the defense of a third-party claim at its own cost and expense. The buyer may want to require the indemnifying party to pay the indemnified party's legal fees under certain circumstances, such as if the indemnified party's counsel believes there:

- Are legal defenses available to an indemnified party that are different from or additional to those available to the indemnifying party.
- Exists a conflict of interest between the indemnifying party and the indemnified party that cannot be waived.

Right of Indemnified Party to Assume Defense

Subject to the indemnifying party's settlement consent rights in Section 8.05(b), this provision also permits an indemnified party to pay, compromise or defend a third-party claim if the indemnifying party does not elect (or fails to elect) to assume the defense of a third-party claim. The buyer should try to add additional circumstances under which an indemnified party can take over the defense of a third-party claim. For example, it may want the indemnified party to be able to take over the defense if:

- The indemnifying party fails to diligently defend a third-party claim.
- The indemnified party determines that the indemnifying party's defense or proposed settlement of a claim would adversely affect the indemnified party's tax liability or its ability to conduct its business (including the target business).
- The indemnified party has additional defenses available to it that are inconsistent with those available to the indemnifying party (this asset purchase agreement only

provides a participation right, subject to the indemnifying party's right to control the defense).

END DRAFTING NOTE

(b) Notwithstanding any other provision of this Agreement, the Indemnifying Party shall not enter into settlement of any Third-Party Claim without the prior written consent of the Indemnified Party (which consent shall not be unreasonably withheld, conditioned or delayed), except as provided in this Section 8.05(b). If a firm offer is made to settle a Third-Party Claim without leading to liability or the creation of a financial or other obligation on the part of the Indemnified Party and provides, in customary form, for the unconditional release of each Indemnified Party from all liabilities and obligations in connection with such Third-Party Claim and the Indemnifying Party desires to accept and agree to such offer, the Indemnifying Party shall give written notice to that effect to the Indemnified Party. If the Indemnified Party fails to consent to such firm offer within [ten/[NUMBER]] days after its receipt of such notice, the Indemnified Party may continue to contest or defend such Third-Party Claim and in such event, the maximum liability of the Indemnifying Party as to such Third-Party Claim shall not exceed the amount of such settlement offer. If the Indemnified Party fails to consent to such firm offer and also fails to assume defense of such Third-Party Claim, the Indemnifying Party may settle the Third-Party Claim upon the terms set forth in such firm offer to settle such Third-Party Claim. If the Indemnified Party has assumed the defense pursuant to Section 8.05(a), it shall not agree to any settlement without the written consent of the Indemnifying Party (which consent shall not be unreasonably withheld, conditioned or delayed).

Drafting Note: Settlement of Third-Party Claims

The buyer should try to delete the indemnifying party's right to consent to a settlement proposed to be accepted by the indemnified party if the indemnifying party elects not to (or fails to elect to) assume the defense of a third-party claim. It should try to revise the last sentence of Section 8.05(b) so that the indemnified party can agree to a settlement without the written consent of the indemnifying party.

END DRAFTING NOTE

(c) Any claim by an Indemnified Party on account of a Loss which does not result from a Third-Party Claim (a "**Direct Claim**") shall be asserted by the Indemnified Party giving the Indemnifying Party prompt written notice thereof. The failure to give such prompt written notice shall not, however, relieve the Indemnifying Party of its indemnification obligations, except and only to the extent that the Indemnifying Party forfeits rights or defenses by reason of such failure. Such notice by the Indemnified Party shall describe the Direct Claim in reasonable detail,

shall include copies of all material written evidence thereof and shall indicate the estimated amount, if reasonably practicable, of the Loss that has been or may be sustained by the Indemnified Party. The Indemnifying Party shall have [30/[NUMBER]] days after its receipt of such notice to respond in writing to such Direct Claim. During such [30/[NUMBER]]-day period, the Indemnified Party shall allow the Indemnifying Party and its professional advisors to investigate the matter or circumstance alleged to give rise to the Direct Claim, and whether and to what extent any amount is payable in respect of the Direct Claim and the Indemnified Party shall assist the Indemnifying Party's investigation by giving such information and assistance (including access to the Indemnified Party's premises and personnel and the right to examine and copy any accounts, documents or records) as the Indemnifying Party or any of its professional advisors may reasonably request. If the Indemnifying Party does not so respond within such [30/[NUMBER]]-day period, the Indemnifying Party shall be deemed to have rejected such claim, in which case the Indemnified Party shall be free to pursue such remedies as may be available to the Indemnified Party on the terms and subject to the provisions of this Agreement.

Drafting Note: Direct Claims

Some asset purchase agreements do not contain a provision outlining the procedures for claims not involving third parties. Section 8.05(c) provides the notice requirements and a time period for investigation and negotiation before the parties can pursue outside remedies. If the parties do not want to resort to suing each other in court, they may consider adding in dispute resolution procedures.

Buyer

The buyer should attempt to ensure that the indemnifying party's (typically the seller's) investigation does not interfere with the indemnified party's (typically the buyer's) businesses by:

- Only permitting access during business hours.
- Requiring advance notice of any visits.
- Requiring supervision by the indemnified party's personnel.
- Requiring the indemnifying party to sign a confidentiality agreement before providing copies of any accounts, documents or records.

END DRAFTING NOTE

Section 8.06 Tax Treatment of Indemnification Payments. All indemnification payments made under this Agreement shall be treated by the parties as an adjustment to the Purchase Price for Tax purposes, unless otherwise required by Law.

Drafting Note: Tax Treatment of Indemnification Payments

Section 8.06 provides that indemnity payments are treated as purchase price adjustments for tax purposes unless otherwise required by law.
END DRAFTING NOTE

Section 8.07 Exclusive Remedies. Subject to Section 10.12, the parties acknowledge and agree that their sole and exclusive remedy with respect to any and all claims [(other than claims arising from Fraud on the part of a party hereto in connection with the transactions contemplated by this Agreement)] for any breach of any representation, warranty, covenant, agreement or obligation set forth herein or otherwise relating to the subject matter of this Agreement, shall be pursuant to the indemnification provisions set forth in this Article VIII. In furtherance of the foregoing, except with respect to Section 10.12, each party hereby waives, to the fullest extent permitted under Law, any and all rights, claims and causes of action for any breach of any representation, warranty, covenant, agreement or obligation set forth herein or otherwise relating to the subject matter of this Agreement it may have against the other parties hereto and their Affiliates and each of their respective Representatives arising under or based upon any Law, except pursuant to the indemnification provisions set forth in this Article VIII. Nothing in this Section 8.07 shall limit any Person's right to seek and obtain any equitable relief to which any Person shall be entitled pursuant to Section 10.12 [or to seek any remedy on account of any Fraud by any party hereto].

Drafting Note: Exclusive Remedies

This exclusive remedy provision provides that the right to indemnification under the asset purchase agreement is the only remedy available to the parties for any breach of the representations, warranties, covenants, agreements or obligations in the agreement, other than:

- The right to specific performance (Section 10.12).
- If included, fraud (see Fraud).

Seller

While the seller would prefer not to have any exceptions to the exclusive remedy provision, it often excludes claims for equitable relief (such as specific performance) and, unless it has strong negotiating leverage, claims based on fraud.

In addition, if the asset purchase agreement provides indemnification for specific matters (such as environmental matters or ERISA) in a separate section, the seller should ensure those other sections are included in the exclusive remedies provision.

Fraud

When excluding fraud, the seller should try to ensure it is limited to intentional fraud because in some jurisdictions fraud is not always limited to intentional lies and can be broader than what the parties may expect. For example, a seller may be found guilty of fraud for making reckless or negligent misrepresentations if it makes a representation in the purchase agreement that it does not know to be true (this could happen if the buyer insists on the risk of a certain representation being untrue be allocated to the seller). In some jurisdictions, the seller may be deemed to have committed reckless fraud if the seller knows it does not have the necessary information and has not made the necessary investigation to verify the truthfulness of a representation, and a claim that ordinarily would be an indemnification claim subject to the baskets, caps and other negotiated limitations set out in the purchase agreement could potentially become a tort-based fraud claim that is not subject to the negotiated limitations.
To prevent being surprised by an overly broad fraud exception and allowing the buyer to circumspect the negotiated limitations set out in Article VIII, the seller should, among other things, try to:

- Ensure fraud is defined (see the definition of Fraud); although in Delaware it may be sufficient to limit the fraud exception to only include intentional or deliberate fraud (see below).
- Ensure the fraud of others is not attributed to the seller.
- Clearly define whether claims for fraud must be made as a tort-based claim or be made within the indemnification framework of Article VIII without limitations.

Although this Standard Document defines fraud, it may not be as important to do so in Delaware. The Delaware Supreme Court recently confirmed that the parties to an acquisition agreement can allocate the risk of non-intentional fraud in *Express Scripts, Inc. v. Bracket Holdings Corp*. In that case, the Delaware Supreme Court, sitting en banc reversed a decision of the Delaware Superior Court, instead holding that the parties could limit the remedies for breaches to solely intentional fraud by using the undefined term "deliberate fraud." Specifically, the court noted that the term "deliberate" requires an intentional state of mind, which is different from a reckless state of mind, and therefore the term "deliberate fraud" excludes fraud claims based on reckless conduct. (2021 WL 752744 (Del. 2021); see also Legal Update, Express Scripts: DE Supreme Court Holds that Deliberate Fraud Does Not Include Reckless Conduct).

Buyer

Exclusive remedy provisions are fairly standard in asset purchase agreements so most buyers accept their inclusion. However, the buyer should try to add exceptions for certain types of claims. Section 8.07 already excludes claims for equitable relief and claims based on fraud. The buyer should consider also excluding claims for:

- Criminal activity.
- Willful breach or misconduct.
- Intentional misrepresentation by a party.

If the seller defines fraud, the buyer should try to expand the definition (see Drafting Note, Definition: Fraud) or to refer to undefined fraud. If the seller only provides for the exclusion of intentional fraud, the buyer should try to delete the term "intentional."

If the asset purchase agreement provides indemnification for specific matters (such as environmental or ERISA matters) in a separate section, the buyer should consider whether it wants to exclude that indemnification from this exclusive remedy provision.

END DRAFTING NOTE

ARTICLE IX

TERMINATION

Section 9.01 Termination. This Agreement may be terminated at any time prior to the Closing:

(a) by the mutual written consent of Seller and Buyer;

(b) by Buyer by written notice to Seller if:

(i) Buyer is not then in material breach of any provision of this Agreement and there has been a material breach, inaccuracy in or failure to perform any representation, warranty, covenant or agreement made by Seller pursuant to this Agreement that would give rise to the failure of any of the conditions specified in Article VII and such breach, inaccuracy or failure cannot be cured by Seller by [DATE] (the "**Drop Dead Date**"); or

(ii) any of the conditions set forth in Section 7.01 or Section 7.02 shall not have been fulfilled by the Drop Dead Date, unless such failure shall be due to the failure of Buyer to perform or comply with any of the covenants, agreements or conditions hereof to be performed or complied with by it prior to the Closing;

(c) by Seller by written notice to Buyer if:

(i) Seller is not then in material breach of any provision of this Agreement and there has been a material breach, inaccuracy in or failure to perform any representation, warranty, covenant or agreement made by Buyer pursuant to this Agreement that would give rise to the failure of any of the conditions specified in Article VII and such breach, inaccuracy or failure cannot be cured by Buyer by the Drop Dead Date; or

(ii) any of the conditions set forth in Section 7.01 or Section 7.03 shall not have been fulfilled by the Drop Dead Date, unless such failure shall be due to the failure of Seller to perform or comply with any of the covenants, agreements or conditions hereof to be performed or complied with by it prior to the Closing; or

(d) by Buyer or Seller in the event that:

(i) there shall be any Law that makes consummation of the transactions contemplated by this Agreement illegal or otherwise prohibited; or

(ii) any Governmental Authority shall have issued a Governmental Order restraining or enjoining the transactions contemplated by this Agreement, and such Governmental Order shall have become final and non-appealable.

Drafting Note: Termination

In most cases, the seller wants to make it more difficult to terminate the agreement, while the buyer wants to make it easier.

Buyer

The buyer should try to expand its termination rights by:

- Limiting the amount of time a party has to cure any breach, inaccuracy or failure in Section 9.01(b)(i) and Section 9.01(c)(i). As drafted, a party has until the drop dead date to cure any breach, inaccuracy or failure. The buyer may want to limit this right to a fixed number of days after a party receives notice of the breach, inaccuracy or failure from the other party.

- Adding a right to terminate if it becomes apparent that a closing condition will not be fulfilled by the drop dead date in Section 9.01(b)(ii) and Section 9.01(c)(ii) (this allows a party to terminate the deal prior to the drop dead date).

- Allowing a party to terminate once a governmental order restraining or enjoining the acquisition is issued, instead of waiting for the order to become final and non-appealable. The buyer will not want to close a transaction while an appeal is pending.

In addition, as evidenced in MAC-related cases such as *Hexion*, it is difficult for a buyer to prove that an MAE has occurred to terminate a deal; though the finding of an MAE is not unprecedented in light of *Akorn* (2018 WL 4719347, *aff'd* 2018 WL 6427137). If the buyer knows that it wants to terminate the purchase agreement if certain facts, events, or conditions occur, it would be advisable to set these objective matters out as additional termination rights. Alternatively, it can include these facts, events, or conditions as separate closing conditions (see Drafting Note, Conditions to Obligations of Buyer).

If the buyer is financing the acquisition with debt or equity from third parties and does not negotiate a financing out, it should consider offering a reverse break-up fee as a way to limit its liability (see Practice Notes, Reverse Break-up Fees and Specific Performance and Drafting and Negotiating Reverse Break-up Fee and Specific Performance Provisions).

END DRAFTING NOTE

Section 9.02 Effect of Termination. In the event of the termination of this Agreement in accordance with this Article, this Agreement shall forthwith become void and there shall be no liability on the part of any party hereto except:

(a) as set forth in this Article IX, Section 6.05 and Article X hereof; and

(b) that nothing herein shall relieve any party hereto from liability for any intentional breach of any provision hereof.

Drafting Note: Effect of Termination

Under general contract law, the parties have the right to terminate an agreement due to a material breach by the other party or a failure to satisfy a closing condition. However, most asset purchase agreements that have a separate signing and closing include a termination provision that serves two additional purposes:

- It provides an outside date by which all closing conditions must be satisfied (the drop dead date).
- It identifies which obligations and liabilities of the parties survive termination.

Add any obligations or other sections of the asset purchase agreement that the seller wants to survive termination to Section 9.02.

Buyer

The buyer should try to expand the exception in Section 9.02(b) to include:

- Any breaches, not just intentional breaches, of the purchase agreement.
- Fraud and intentional misrepresentations.

END DRAFTING NOTE

ARTICLE X

MISCELLANEOUS

Section 10.01 Expenses. Except as otherwise expressly provided herein (including Section 6.11 hereof), all costs and expenses, including, without limitation, fees and disbursements of counsel, financial advisors and accountants, incurred in connection with this Agreement and the transactions contemplated hereby shall be paid by the

party incurring such costs and expenses, whether or not the Closing shall have occurred[; *provided, however*, that Buyer shall be responsible for all filing and other similar fees payable in connection with any filings or submissions under the HSR Act [and Buyer/Seller shall pay all amounts payable to [NAME OF BROKER/FINDER/INVESTMENT BANKER]].

Drafting Note: Expenses

In general, the buyer and seller pay their own expenses. Section 10.01 ensures the buyer is responsible for paying all HSR Act filing fees. The statement relating to the payment of broker fees should conform to the representations in Section 4.17 and Section 5.04.

Buyer

The buyer should request the seller share the HSR Act filing fees equally because they can be significant.
END DRAFTING NOTE

Section 10.02 Notices. All notices, requests, consents, claims, demands, waivers and other communications hereunder shall be in writing and shall be deemed to have been given (a) when delivered by hand (with written confirmation of receipt); (b) when received by the addressee if sent by a nationally recognized overnight courier (receipt requested); (c) on the date sent by facsimile or e-mail of a PDF document (with confirmation of transmission) if sent during normal business hours of the recipient, and on the next Business Day if sent after normal business hours of the recipient or (d) on the [third/[NUMBER]] day after the date mailed, by certified or registered mail, return receipt requested, postage prepaid. Such communications must be sent to the respective parties at the following addresses (or at such other address for a party as shall be specified in a notice given in accordance with this Section 10.02):

If to Seller:	[SELLER ADDRESS]
	Facsimile:[FAX NUMBER]
	E-mail: [E-MAIL ADDRESS]
	Attention:[TITLE OF OFFICER TO RECEIVE NOTICES]
with a copy to:	[SELLER LAW FIRM]
	Facsimile:[FAX NUMBER]
	E-mail: [E-MAIL ADDRESS]

	Attention:[ATTORNEY NAME]
If to Buyer:	[BUYER ADDRESS]
	Facsimile:[FAX NUMBER]
	E-mail: [E-MAIL ADDRESS]
	Attention:[TITLE OF OFFICER TO RECEIVE NOTICES]
with a copy to:	[BUYER LAW FIRM]
	Facsimile:[FAX NUMBER]
	E-mail: [E-MAIL ADDRESS]
	Attention:[ATTORNEY NAME]

Drafting Note: Notices

This provision governs the manner in which any notice under the asset purchase agreement must be given, and the time at which the notice is deemed to be received.

Where there are multiple sellers, it may be administratively more convenient if they appoint a representative who can send and receive notices on their behalf. However, it may be important to preserve each individual seller's right to send and receive notices where notice is required to be sent or delivered by only some of the sellers.
END DRAFTING NOTE

Section 10.03 Interpretation. For purposes of this Agreement, (a) the words "include," "includes" and "including" shall be deemed to be followed by the words "without limitation"; (b) the word "or" is not exclusive; and (c) the words "herein," "hereof," "hereby," "hereto" and "hereunder" refer to this Agreement as a whole. Unless the context otherwise requires, references herein: (x) to Articles, Sections, Disclosure Schedules and Exhibits mean the Articles and Sections of, and Disclosure Schedules and Exhibits attached to, this Agreement; (y) to an agreement, instrument or other document means such agreement, instrument or other document as amended, supplemented and modified from time to time to the extent permitted by the provisions thereof and (z) to a statute means such statute as amended from time to time and includes any successor legislation thereto and any regulations promulgated thereunder. This Agreement shall be construed without regard to any presumption or rule requiring construction or interpretation against the party drafting an instrument or causing any instrument to be drafted. The Disclosure Schedules and Exhibits referred to herein shall be construed with, and as an integral part of, this Agreement to the same extent as if they were set forth verbatim herein.

Drafting Note: Interpretation

Section 10.03 deals with the general interpretation of the asset purchase agreement and certain terms and expressions used in it. Its main purpose is to reduce repetition within the body of the document.
END DRAFTING NOTE

Section 10.04 Disclosure Schedules. All section headings in the Disclosure Schedules correspond to the sections of this Agreement, but information provided in any section of the Disclosure Schedules shall constitute disclosure for purposes of each section of this Agreement where such information is relevant. Unless the context otherwise requires, all capitalized terms used in the Disclosure Schedules shall have the respective meanings assigned to such terms in this Agreement. Certain information set forth in the Disclosure Schedules is included solely for informational purposes, and may not be required to be disclosed pursuant to this Agreement. No reference to or disclosure of any item or other matter in the Disclosure Schedules shall be construed as an admission or indication that such item or other matter is required to be referred to or disclosed in the Disclosure Schedules. No disclosure in the Disclosure Schedules relating to any possible breach or violation of any agreement or Law shall be construed as an admission or indication that any such breach or violation exists or has actually occurred. The inclusion of any information in the Disclosure Schedules shall not be deemed to be an admission or acknowledgment by Seller that in and of itself, such information is material to or outside the ordinary course of the business or is required to be disclosed on the Disclosure Schedules. No disclosure in the Disclosure Schedules shall be deemed to create any rights in any third party.

Drafting Note: Disclosure Schedules

Seller

The first sentence of Section 9.04 benefits the seller because if a matter is disclosed somewhere in the disclosure schedules, it is considered disclosed in all other sections where the disclosure is relevant, even if the seller does not list the disclosure on that specific section of the disclosure schedule. The buyer cannot claim a breach of the representation if the exception is not included in the applicable section of the schedule. As a practical matter, when preparing the disclosure schedules, the seller should be as thorough as possible and not rely on this provision, but instead use it as a fallback.

For more information on disclosure schedules, see Practice Note, Disclosure Schedules: Mergers and Acquisitions and Standard Document, Disclosure Schedules for M&A Transactions.

Buyer

Buyers typically object to the language in the first sentence. Buyers are more likely to find this acceptable if the relevance of a particular disclosure as an exception to any other representation must be reasonably apparent. For example, the buyer should try to revise the first sentence of Section 9.04 to read:

"The Disclosure Schedules set forth items of disclosure with specific reference to the particular section or subsection of this Agreement to which the information in the Disclosure Schedules relates; *provided, however*, that any information set forth in one Section of the Disclosure Schedules will be deemed to apply to each other section or subsection thereof to which its relevance is reasonably apparent on its face."

END DRAFTING NOTE

Section 10.05 Headings. The headings in this Agreement are for reference only and shall not affect the interpretation of this Agreement.

Section 10.06 Severability. If any term or provision of this Agreement is invalid, illegal or unenforceable in any jurisdiction, such invalidity, illegality or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction. Upon such determination that any term or other provision is invalid, illegal or unenforceable, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.

Drafting Note: Severability

The purpose of the severability clause is to clarify that, if one or more terms or provisions are held to be invalid, illegal, or unenforceable, the parties intend the asset purchase agreement to survive by severing the invalid, illegal or unenforceable terms or provisions from the agreement.

The parties may want to consider adding a provision that allows the courts to amend the invalid, illegal or unenforceable provision as an alternative to the parties negotiating in good faith to modify the asset purchase agreement. However, this type of provision is unenforceable in some jurisdictions and the parties should consider the possibility that the court's decision may not be more favorable than what the parties can negotiate between themselves.

END DRAFTING NOTE

Section 10.07 Entire Agreement. This Agreement and the other Transaction Documents constitute the sole and entire agreement of the parties to this Agreement with respect to the subject matter contained herein and therein, and supersede all prior and contemporaneous representations, warranties, understandings and agreements, both written and oral, with respect to such subject matter. In the event of any inconsistency between the statements in the body of this Agreement and those in the other Transaction Documents, the Exhibits and Disclosure Schedules (other than an exception expressly set forth as such in the Disclosure Schedules), the statements in the body of this Agreement will control.

Drafting Note: Entire Agreement

This is a standard provision (also known as the merger or integration clause) used to prevent the parties from being liable for any representations, warranties, understandings, or agreements other than those expressly set out in the asset purchase agreement and any other transaction documents. The last part of Section 10.07 ensures that, if there are any inconsistencies between the asset purchase agreement and any other document (including the transaction documents, the exhibits, or disclosure schedules), the asset purchase agreement governs.

Section 10.07 specifically states that all previous representations and warranties are superseded by the asset purchase agreement. Sellers generally include representations and warranties in the integration clause because they do not want to be found liable for a representation or warranty they may have made that is not included in the asset purchase agreement or other transaction documents. The buyer should try to exclude any reference to representations and warranties in the integration clause to preserve its right to bring a claim based on alleged misrepresentations outside the asset purchase agreement.
END DRAFTING NOTE

Section 10.08 Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and permitted assigns. Neither party may assign its rights or obligations hereunder without the prior written consent of the other party, which consent shall not be unreasonably withheld, conditioned or delayed. No assignment shall relieve the assigning party of any of its obligations hereunder.

Drafting Note: Successors and Assigns

If the buyer intends to have one of its subsidiaries buy the assets and assume the liabilities of the target business from the seller for tax-planning or other commercial purposes, it should add the following proviso to the first sentence:

"; *provided, however*, that prior to the Closing Date, Buyer may, without the prior written consent of Seller, assign all or any portion of its rights under this Agreement to one or more of its direct or indirect wholly-owned subsidiaries."

The buyer should also consider whether there are any other assignments it wants to include as permitted assignments (for example, if it is financing the acquisition, it may need to assign the agreement to its lenders as collateral).
END DRAFTING NOTE

Section 10.09 No Third-Party Beneficiaries. This Agreement is for the sole benefit of the parties hereto and their respective successors and permitted assigns and nothing herein, express or implied, is intended to or shall confer upon any other Person or entity any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.

Drafting Note: No Third-Party Beneficiaries

If any other persons will be third-party beneficiaries of the asset purchase agreement, they should be added as exceptions. For example, if the buyer can include its affiliates and representatives as indemnitees under Article VIII, the buyer should make them exceptions to this Section 10.09, so that they can bring a claim to enforce the indemnification provisions in the asset purchase agreement.
END DRAFTING NOTE

Section 10.10 Amendment and Modification; Waiver. This Agreement may only be amended, modified or supplemented by an agreement in writing signed by each party hereto. No waiver by any party of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by the party so waiving. No waiver by any party shall operate or be construed as a waiver in respect of any failure, breach or default not expressly identified by such written waiver, whether of a similar or different character, and whether occurring before or after that waiver. No failure to exercise, or delay in exercising, any right, remedy, power or privilege arising from this Agreement shall operate or be

construed as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege.

Section 10.11 Governing Law; Submission to Jurisdiction; Waiver of Jury Trial.

(a) This Agreement shall be governed by and construed in accordance with the internal laws of the State of [RELEVANT STATE] without giving effect to any choice or conflict of law provision or rule (whether of the State of [RELEVANT STATE] or any other jurisdiction).

(b) ANY LEGAL SUIT, ACTION OR PROCEEDING ARISING OUT OF OR BASED UPON THIS AGREEMENT, THE OTHER TRANSACTION DOCUMENTS OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY MAY BE INSTITUTED IN THE FEDERAL COURTS OF THE UNITED STATES OF AMERICA OR THE COURTS OF THE STATE OF [RELEVANT STATE] IN EACH CASE LOCATED IN THE CITY OF [RELEVANT CITY] AND COUNTY OF [RELEVANT COUNTY], AND EACH PARTY IRREVOCABLY SUBMITS TO THE EXCLUSIVE JURISDICTION OF SUCH COURTS IN ANY SUCH SUIT, ACTION OR PROCEEDING. SERVICE OF PROCESS, SUMMONS, NOTICE OR OTHER DOCUMENT BY MAIL TO SUCH PARTY'S ADDRESS SET FORTH HEREIN SHALL BE EFFECTIVE SERVICE OF PROCESS FOR ANY SUIT, ACTION OR OTHER PROCEEDING BROUGHT IN ANY SUCH COURT. THE PARTIES IRREVOCABLY AND UNCONDITIONALLY WAIVE ANY OBJECTION TO THE LAYING OF VENUE OF ANY SUIT, ACTION OR ANY PROCEEDING IN SUCH COURTS AND IRREVOCABLY WAIVE AND AGREE NOT TO PLEAD OR CLAIM IN ANY SUCH COURT THAT ANY SUCH SUIT, ACTION OR PROCEEDING BROUGHT IN ANY SUCH COURT HAS BEEN BROUGHT IN AN INCONVENIENT FORUM.

(c) EACH PARTY ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY WHICH MAY ARISE UNDER THIS AGREEMENT OR THE OTHER TRANSACTION DOCUMENTS IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES AND, THEREFORE, EACH SUCH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LEGAL ACTION ARISING OUT OF OR RELATING TO THIS AGREEMENT, THE OTHER TRANSACTION DOCUMENTS OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY. EACH PARTY TO THIS AGREEMENT CERTIFIES AND ACKNOWLEDGES THAT (A) NO REPRESENTATIVE OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT SEEK TO ENFORCE THE FOREGOING WAIVER IN THE EVENT OF A LEGAL ACTION, (B) SUCH PARTY HAS CONSIDERED THE IMPLICATIONS OF THIS WAIVER, (C) SUCH PARTY MAKES THIS WAIVER VOLUNTARILY, AND (D) SUCH PARTY HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION 10.11(c).

Drafting Note: Governing Law; Submission to Jurisdiction; Waiver of Jury Trial

Section 10.11 permits the parties to select the law that governs the asset purchase agreement and the jurisdiction and venue in which a claim can be brought. Most agreements provide for both federal and state jurisdiction.

In general, parties should choose the law of a state that has a relationship to the parties or the transaction (or there should be some other reasonable basis for the choice). Many parties choose New York as the governing law because it has well-established contract law. Section 5-1401 of the New York General Obligations Law permits parties to choose New York as the governing law if the contract amount exceeds $250,000, regardless of whether the parties or the transaction have a relationship with the state. Parties may also consider other factors, such as which state has more favorable substantive laws applicable to the matters covered by the agreement.

If New York law is chosen as governing law, the second part of Section 10.11(a) regarding not giving effect to conflict of law rules can be deleted. In *IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A.,* No. 08669, 2012 WL 6571286 (N.Y. Dec. 18, 2012), the Court of Appeals held that language excluding New York's conflict of law rules is not necessary when there is an express choice of New York law in the contract pursuant to Section 5-1401.

If the parties want to expand the governing law provision to also apply to other claims (such as tort claims) arising out of related to the agreement, revise Section 10.11(a) to replace the phrase "This Agreement..." with the phrase "All matters arising out of or relating to this Agreement..."

Section 10.11(c) is frequently included in asset purchase agreements. Most sophisticated parties prefer that a judge hear and decide any dispute arising out of the asset purchase agreement, rather than a jury of people who may not appreciate and understand the potentially complex issues involved in the litigation. However, this provision is not enforceable in all jurisdictions. The parties should review all applicable laws and regulations to determine if it is enforceable.

For more information on choice of law clauses, see Standard Clause, General Contract Clauses: Choice of Law.
END DRAFTING NOTE

Section 10.12 Specific Performance. The parties agree that irreparable damage would occur if any provision of this Agreement were not performed in accordance with the terms hereof and that the parties shall be entitled to specific performance of the terms hereof, in addition to any other remedy to which they are entitled at law or in equity.

Drafting Note: Specific Performance

In certain agreements, it may be important to one party that another party actually performs its obligations, rather than simply being liable for damages on default. For example, the seller may prefer to have the buyer sell certain assets to obtain antitrust approval, rather than relying on damages for breach of the agreement after the event.

A party can also use Section 10.12 to force the other party to close the transaction. The buyer may want to specifically exclude the seller's right to force the buyer to close the transaction from this section.

The parties should also ensure that this provision does not conflict with any other section of the asset purchase agreement (for example, certain provisions may set out an exclusive remedy for a certain type of breach).
END DRAFTING NOTE

Section 10.13 Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall be deemed to be one and the same agreement. A signed copy of this Agreement delivered by facsimile, e-mail or other means of electronic transmission shall be deemed to have the same legal effect as delivery of an original signed copy of this Agreement.

Section 10.14 [Non-recourse. This Agreement may only be enforced against, and any claim, action, suit or other legal proceeding based upon, arising out of, or related to this Agreement, or the negotiation, execution or performance of this Agreement, may only be brought against the entities that are expressly named as parties hereto and then only with respect to the specific obligations set forth herein with respect to such party. No past, present or future director, officer, employee, incorporator, manager, member, partner, stockholder, Affiliate, agent, attorney or other Representative of any party hereto or of any Affiliate of any party hereto, or any of their successors or permitted assigns, shall have any liability for any obligations or liabilities of any party hereto under this Agreement or for any claim, action, suit or other legal proceeding based on, in respect of or by reason of the transactions contemplated hereby.]

Drafting Note: Non-recourse

While it is not standard in all purchase agreements (especially where the parties involved are corporations or other limited liability entities), the seller should consider including Section 10.14 to ensure any officer, director, stockholder, employee or other agent or representative of any of the parties to the asset purchase agreement does not have any personal liability for any actions taken on behalf of the applicable party during the negotiation, execution and performance of the agreement. This

provision applies to both parties but the seller may want to limit its application to its officers, directors, stockholders, employees or other agents or representatives.
END DRAFTING NOTE

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date first written above by their respective officers thereunto duly authorized.

[SELLER NAME]

By_____

Name:

Title:

[BUYER NAME]

By_____

Name:

Title:

