THE LEGAL ASPECTS OF A BUSINESS SALE

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"The Legal Aspects of a Business Sale"

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I. Time Line of the Transaction.

This is the timeline of most transactions involving the acquisition of an existing business:

A. Initial Stage

B. Formal Agreement Stage

C. Due Diligence Stage

D. Closing

E. Post-Closing

II. Initial Stage.

A. Deciding to Sell.

1. The Seller should prepare his business for sale by addressing issues that may create concern to a potential Buyer. These could include:

a. Locking in key employees

b. Potential or existing lawsuits

c. Labor issues

d. Dissident minority shareholders,

e. IRS and other tax issues,

f. Firming up necessary contracts and agreements.

2. If the Seller can improve the bottom line by trimming unnecessary expenses or increasing revenue that will have a positive impact on the purchase price.

3. The Seller should early on determine a realistic value of the company by appraisal or other means.

B. Deciding to Buy.

1. A Buyer will typically target the Seller.

2. Then proceed with a preliminary investigation.

3. Followed by a preliminary negotiation with the Seller.

C. What is the Deal?

1. Form of the Deal - Asset Purchase or Stock Purchase

a. Stock Sale v. Asset Sale

(1) Generally a Seller will prefer a Stock sale for several reasons:

(a) Seller receives capital gain, as opposed to the "double tax" potential which results when a corporation sells assets and subsequently liquidates.

(b) The Seller can select the assets to be sold.

(c) Seller's liabilities are generally assumed by the Buyer.

(2) A Buyer will prefer an Assets transaction because the Buyer will receive a step-up in basis in the assets acquired equal to the purchase price, and the Buyer is more insulated from the liabilities of the Seller. Also the Buyer may pick and choose the assets to be acquired.

b. Liability Aspects of Stock v. Asset Sale.

(1) In an Asset Sale it is generally assumed that the Buyer assumes none of the liabilities of the Seller, There are a number of exceptions to this rule, however. See discussion at Section VI, *Buyer's Liability Exposure.*

(2) Liability obligations of a selling corporation may be imposed on the Buyer in many situations. See Section II, *Buyer's Liability in Asset Transactions.*

2. What is the Price?

a. Is the price a fixed amount?

b. Is the price subject to adjustments?

c. Has the Seller considered the after tax price?

3. Is the any Consideration outside the Purchase Agreement?

a. Employment Agreements;

b. Lease or licensing agreements

4. How will the Buyer Pay?

a. All cash;

b. Stock;

c. Deferred Payment Arrangements

d. Assumption of Debt.

5. What are the Seller's Post Closing Obligations?

a. Consulting agreements;

b. Representations and Warranties;

c. Indemnities;

d. Lease or licensing agreements

6. What are the Buyer's Post Closing Obligations?

a. Deferred Payment;

b. Assumption of debt;

c. Representations and Warranties;

d. Indemnities;

e. Earn outs.

III. Investigation Stage – Buyer's Due Diligence.

The following is a review of the areas of concern for the Buyer in a business acquisition which should be addressed in its due diligence investigation of the Seller:

A. Organization and Good Standing.

1. The Seller's Articles of Incorporation and all amendments thereto. The Seller's Bylaws and all amendments thereto.

2. The Seller's minute book, including all minutes and resolutions of shareholders and directors, executive committees, and other governing groups.

3. The Seller's organizational chart.

4. The Seller's list of shareholders and number of shares held by each.

5. Copies of agreements relating to options, voting trusts, warrants, puts, calls, subscriptions, and convertible securities.

6. A Certificate of Good Standing from the Secretary of State of the state where the Seller is incorporated. Copies of active status reports in the state of incorporation for the last three years.

7. A list of all states where the Seller is authorized to do business and annual reports for the last three years.

8. A list of all states, provinces, or countries where the Seller owns or leases property, maintains employees, or conducts business. A list of all of the Seller's assumed names and copies of registrations thereof.

B. Financial Information.

1. Audited financial statements for three years, together with Auditor's Reports.

2. The most recent unaudited statements, with comparable statements to the prior year. Auditor's letters and replies for the past five years.

3. The Seller's credit report, if available.

4. Any projections, capital budgets and strategic plans.

5. Analyst reports, if available.

6. A schedule of all indebtedness and contingent liabilities.

7. A schedule of inventory.

8. A schedule of accounts receivable.

9. A schedule of accounts payable.

10. A description of depreciation and amortization methods and changes in accounting methods over the past five years.

11. Any analysis of fixed and variable expenses.

12. Any analysis of gross margins.

13. The Seller's general ledger.

14. A description of the Seller's internal control procedures.

C. Physical Assets.

1. A schedule of fixed assets and the locations thereof.

2. All U.C.C. filings.

3. All leases of equipment.

4. A schedule of sales and purchases of major capital equipment during last three years.

D. Real Estate.

1. A schedule of the Seller's business locations.

2. Copies of all real estate leases, deeds, mortgages, title policies, surveys, zoning approvals, variances or use permits.

E. Intellectual Property.

1. A schedule of domestic and foreign patents and patent applications. A schedule of trademark and trade names.

2. A schedule of copyrights.

3. A description of important technical know-how.

4. A description of methods used to protect trade secrets and know-how.

5. Any "work for hire" agreements.

6. A schedule and copies of all consulting agreements, agreements regarding inventions, and licenses or assignments of intellectual property to or from the Seller.

7. Any patent clearance documents.

8. A schedule and summary of any claims or threatened claims by or against the Seller regarding intellectual property.

F. Employees and Employee Benefits.

1. A list of employees including positions, current salaries, salaries and bonuses paid during last three years, and years of service.

2. All employment, consulting, nondisclosure, no solicitation or noncompetition agreements between the Seller and any of its employees.

3. Resumés of key employees.

4. The Seller's personnel handbook and a schedule of all employee benefits and holiday, vacation, and sick leave policies.

5. Summary plan descriptions of qualified and non-qualified retirement plans. Copies of collective bargaining agreements, if any.

6. A description of all employee problems within the last three years, including alleged wrongful termination, harassment, and discrimination.

7. A description of any labor disputes, requests for arbitration, or grievance procedures currently pending or settled within the last three years.

8. A list and description of benefits of all employee health and welfare insurance policies or self-funded arrangements.

9. A description of worker's compensation claim history.

10. A description of unemployment insurance claims history. Copies of all stock option and stock purchase plans and a schedule of grants thereunder.

G. Licenses and Permits.

1. Copies of any governmental licenses, permits or consents.

2. Any correspondence or documents relating to any proceedings of any regulatory agency.

H. Environmental Issues.

1. Environmental audits, if any, for each property leased by the Seller.

2. A listing of hazardous substances used in the Seller's operations.

3. A description of the Seller's disposal methods.

4. A list of environmental permits and licenses.

5. Copies of all correspondence, notices and files related to EPA, state, or local regulatory agencies.

6. A list identifying and describing any environmental litigation or investigations.

7. A list identifying and describing any known superfund exposure.

8. A list identifying and describing any contingent environmental liabilities or continuing indemnification obligations.

I. Taxes.

1. Federal, state, local, and foreign income tax returns for the last three years. States sales tax returns for the last three years.

2. Any audit and revenue agency reports.

3. Any tax settlement documents for the last three years.

4. Employment tax filings for three years.

5. Excise tax filings for three years.

6. Any tax liens.

J. Material Contracts.

1. A schedule of all subsidiary, partnership, or joint venture relationships and obligations, with copies of all related agreements.

2. Copies of all contracts between the Seller and any officers, directors, 5-percent shareholders or affiliates.

3. All loan agreements, bank financing arrangements, line of credit, or promissory notes to which the Seller is a party.

4. All security agreements, mortgages, indentures, collateral pledges, and similar agreements.

5. All guaranties to which the Seller is a party.

6. Any installment sale agreements.

7. Any distribution agreements, sales representative agreements, marketing agreements, and supply agreements.

8. Any letters of intent, contracts, and closing transcripts from any mergers, acquisitions, or divestitures within last five years.

9. Any options and stock purchase agreements involving interests in other companies.

10. The Seller's standard quote, purchase order, invoice and warranty forms.

11. All nondisclosure or noncompetition agreements to which the Seller is a party.

12. All other material contracts.

K. Product or Service Lines.

1. A list of all existing products or services and products or services under development.

2. Copies of all correspondence and reports related to any regulatory approvals or disapprovals of any Seller's products or services.

3. A summary of all complaints or warranty claims.

4. A summary of results of all tests, evaluations, studies, surveys, and other data regarding existing products or services and products or services under development.

L. Customer Information.

1. A schedule of the Seller's twelve largest customers in terms of sales thereto and a description of sales thereto over a period of two years.

2. Any supply or service agreements.

3. A description or copy of the Seller's purchasing policies.

4. A description or copy of the Seller's credit policy.

5. A schedule of unfilled orders.

6. A list and explanation for any major customers lost over the last two years.

7. All surveys and market research reports relevant to the Seller or its products or services.

8. The Seller's current advertising programs, marketing plans and budgets, and printed marketing materials.

9. A description of the Seller's major competitors.

M. Litigation.

1. A schedule of all pending litigation.

2. A description of any threatened litigation.

3. Copies of insurance policies possibly providing coverage as to pending or threatened litigation.

4. Documents relating to any injunctions, consent decrees, or settlements to which the Seller is a party.

5. A list of unsatisfied judgments.

N. Insurance Coverage.

1. A schedule and copies of the Seller's general liability, personal and real property, product liability, errors and omissions, key-man, directors and officers, worker's compensation, and other insurance.

2. A schedule of the Seller's insurance claims history for past three years.

O. Professionals.

1. A schedule of all law firms, accounting firms, consulting firms, and similar professionals engaged by the Seller during past five years.

P. Articles and Publicity.

1. Copies of all articles and press releases relating to the Seller within the past three years.

IV. The Letter of Intent -

A. The LOI should state the basic terms of the deal : (i) what is being sold; (ii) who is buying; (iii) what is the price, (iv) what is the form of the consideration and (4) the time line of the transaction.

B. Generally the LOI serves the Buyer purposes more than the Seller, since it will allow access to additional information and prevent negotiation with other parties. It may also the Seller to commit to sell and set the price.

C. The LO should work to narrow the issues before the process goes to far.

D. It should provide an escape clause; otherwise it may constitute a binding agreement of sale.

E. It is important also that the LOI also protects confidentiality of the Seller's information.

F. The LOI should also set a time line on acceptance of the letter and other important dates, such as investigation, closing, etc.

G. An alternative is to go right to a formal full agreement.

H. The signing of a LOI of intent will end the "Initial Stage".

V. Formal Agreement Stage.

A. Issues to be Resolved

1. Price

a. The determination of the Price is seldom a scientific process in the mind of the Seller.

b. A Buyer on the other hand tends to be more analytical in its approach.

c. In determining the price remember in both Asset deals and a Stock deals the price may be subject to adjustment at or close to the Closing Date (see discussion below)

d. In determining the price both parties should consider closely the "after tax" economic purchase price.

(1) Seller should be schooled not look at the number as much as the "after tax" number; also the time value of money in a deferred payment transaction should also be considered, as well as the inherent risk in becoming the Buyer's bank should also be considered.

(2) Buyer should also be concerned with the economic cost and method of payment.

e. Both parties should also calculate the cost of doing the deal (attorney's fees, acquisition audit, professional inventory, etc.), in determining the price.

f. Unfortunately in many transactions the price is agreed to by the parties before the professionals are involved.

2. Form of the Consideration.

a. All Cash

b. Deferred Payment Notes.

c. Assumption of Debt

d. Stock of the Purchaser –

e. Earn Outs

f. Rental Agreements

g. Employment Agreements

3. Collateral Issues.

a. Contingencies

b. Representations and Warranties

c. Indemnity Provisions

d. Covenants Not to Compete

VI. Buyer's Liability Exposure

A. Assets sale transactions are favored by Buyers because of the reduced exposure to the liabilities of the Seller. This is generally true. However; there are situations where the Buyer may be subject to liabilities created by the Seller, even in Asset sales.

B. The following may result in liability to the Buyer in Asset Transactions:

1. Express or Implied Assumption

a. Assumption of liability can either be express or implied.

b. Express assumption is generally based upon the provisions of the purchase agreement and the parties' intent.

c. Implied assumption is based upon the buyer's conduct or representations indicating an intention by the buyer to assume the seller's debts, coupled with reliance by the party asserting liability on that conduct or on those representations.

d. In some cases, assumption of liability may involve an unforeseen liability which, based on the facts of a particular case was implicitly assumed. An Asset agreement which provides that the buyer assumes and agrees "to pay, perform and discharge all debts, obligations, contracts and liabilities", could be interpreted broadly to mean that the Buyer implicitly assumed all of the Seller's unforeseen claims

2. De Facto Merger

a. If a court determines that the Asset transaction is in effect a merger of the Buyer and the Seller, the *de facto* merger doctrine may apply.

b. The doctrine could be applied for example in a case where the Seller's assets are acquired for the stock of the Buyer, and then liquidated.

c. The factors considered by the court will be the following:

(1) There a continuation of the enterprise evidenced by a continuity of management, personnel, physical location, assets and business operations.

(2) There is a continuity of shareholders, i.e., the shareholders of the acquired entity become shareholders in the acquiring entity;

(3) The seller ceases operation, liquidates and dissolves;

(4) The buyer assumes those obligations of the seller ordinarily required to continue uninterrupted operation of the seller's business operations.

3. "Mere Continuation" and "Continuity of Enterprise" Exceptions

a. The *de facto* merger doctrine has generally been limited to instances where there is a substantial identity between stockholders of seller and buyer a transaction which is essentially a merger of the buyer and the seller, with the selling corporation going out of existence, and its stockholders have receiving stock of the buyer.

b. Another exception which closely resembles de facto merger is the "mere continuation" exception.

c. In order for the "mere continuation" exception to apply there must generally be a continuation of the corporate identity as demonstrated by common identity of the officers, directors, or stockholders in the predecessor and successor corporations, and the existence of only one corporation at the completion of the transaction.

d. This concept has also be expanded in certain cases to create Buyer liability under the theory of "continuity of enterprise", looking to such factors as retention of seller's name, key personnel, location, production, facilities, clients, management, and business operations.

4. Fraud

a. In transactions where the consideration paid is not of equal value to the value of the assets acquired, or where there is a provable intent to defraud creditors' claims, a "fraud exception" may apply.

b. In addition to the case law, the Uniform Fraudulent Transfer Act ("UFTA"), enacted in many states, in one form or another limits a debtor's ability to transfer assets beyond the reach of creditors

c. The UFTA provides that a "transfer" is voidable by a creditor if (i) the transfer is made with actual intent to hinder, delay or defraud a creditor or (ii) the transfer leaves the debtor insolvent or undercapitalized, and (iii) it is not made in exchange for reasonably equivalent value.

d. If a transaction is determined by a court to constitute a fraudulent transfer under UFTA, the court can void or enjoin the transfer in whole or to the extent necessary to satisfy creditors' claims, or provide for attachment of the transferred assets.

5. Inadequate Consideration

a. Inadequate consideration is an element of common law fraud and the UFTA, but can also stand on its own as a separate exception.

b. This could occur where the consideration paid is determined to be inadequate and as a result the seller is rendered insolvent and unable to pay its debts.

6. The "Product Line" Exception

a. Under the "product line" exception, a buyer may be held strictly liable for defective products manufactured by its predecessor.

b. This exception has been applied, in cases, where the buyer acquires substantially all of the manufacturing assets of another corporation including plant, equipment, inventories, trade name, goodwill, etc. and had also employs its factory personnel, and continued to manufacture the same line of products under the seller's name and generally continued the seller's business as before.

c. In these cases the exception has imposed liability on the successor even if previously manufactured and distributed by the selling corporation or its predecessor.

7. Duty to Warn

If the Buyer fails to warn customers concerning defects in the predecessor's products, and Buyer knows about the defects, either before or after the transaction is completed, and there is some continuing relationship between the Buyer and the Seller's customers, the duty to warn exception may create Buyer liability.

8. Successor Liability for the Seller's Environmental Torts in Asset Acquisitions

a. Section 107(a)(2) of CERCLA extends liability for response costs to "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of."

b. Situations may arise, however, where a corporation, which previously had owned or operated a hazardous waste facility, now transfers corporate ownership to another corporation.

c. In such cases, it is important to determine whether the liability of the predecessor corporation's action regarding the disposal of hazardous waste is also transferred to the successor corporation.

d. Courts are demonstrating tendency to apply the "continuity of enterprise" exception in the environmental context. In asset transaction any environmental permits must be transferred and reissued to the Buyer.

9. Successor Liability Under the Labor Laws

a. The courts and the National Labor Relations Board (NLRB) have defined the duties of employers who acquire businesses that are organized by labor unions.

b. The form of the transaction is not alone determinative of the buyer's labor obligations.

c. Even in an asset purchase, the new employer may be a "successor" under labor law principles.

d. In certain cases an acquirer in an asset acquisition can have successor liability under the labor laws. In a stock purchase or statutory combinations, any collective bargaining agreements generally remain in effect.

e. In an asset purchase, the status of collective bargaining agreements will depend upon whether the buyer is a "successor," based on the continuity of the business and work force or provisions of the seller's collective bargaining agreement.

f. When a buyer uses substantially the same facilities and work force to produce the same basic products (or to provide the same basic services) for essentially the same customers in the same geographic area, the buyer may be regarded as a "successor."

g. The key factor in determining whether a buyer has a duty to bargain is whether a majority of the employees hired by the buyer were previously represented by the union. This rule applies as to each group of employees (bargaining unit) that was represented.

h. Thus, when a seller's employees are represented by more than one union, the buyer must recognize and bargain with the unions to the extent that a majority of the buyer's employees in each bargaining unit was previously represented by a union.

i. A successor must recognize the union that represented the predecessor's employees as its employees' bargaining representative and, upon demand, negotiate in good faith as to the terms and conditions of employment of its employees. If it is a successor, the buyer must recognize and bargain with the union

10. Employee Benefits

a. Qualified Plans

(1) Unless the Buyer has expressly assumed responsibility, asset purchase transactions will generally not result in liabilities resulting from the seller's maintenance of a qualified retirement being imposed on the buyer.

(2) Stock transfers will however automatically impose such liability on the Buyer.

(3) Therefore, in a stock purchase transaction, the buyer must be able to quantify that liability prior to the closing. In addition, the Buyer should ascertain to its satisfaction, the level of the Seller's compliance with all ERISA requirements before the transaction is complete..

(4) The purchase agreement should include some or all of the following provisions:

(a) A representation by the seller as to the plans it sponsors (the seller also should be compelled to provide copies of all such plans and all related documents). Caution should be exercised to assure that disclosure is not limited to employee benefit plans as defined under ERISA, but that the scope of disclosure requirements extends to other non-ERISA types of compensation arrangements.

(b) A representation by the seller as to compliance with all applicable laws, including all ERISA reporting obligations.

(c) Representations by the seller about continuing or potential termination liability, including pension plan underfunding and multiemployer plan withdrawal liability.

(d) Representations by the seller regarding operational compliance with various Internal Revenue Code and ERISA requirements, including the prohibited transaction rules, funding waivers, contribution requirements, coverage requirements, reporting requirements.

(e) Affirmative covenants, if any, as to the disposition of benefit plan liabilities (in some transactions, depending on structure, these covenants may not be necessary).

(5) There is the potential for imposition on the buyer of certain liabilities relating to the seller's plans, even though the buyer has attempted expressly to disavow any such liabilities.

(6) In certain situations, the assets purchased by the buyer can be reached by the IRS or the PBGC to satisfy certain current, or even future, liabilities of the seller with respect to its employee benefit plans or plans maintained by affiliates of the seller.

(7) These risks are usually limited to defined benefit plans and multiemployer plans.

(8) The risk of a lien attaching to the acquired assets is greater in the following factual situation: (A) the assets are being purchased from a corporation, which will distribute the proceeds to individual shareholders who may not otherwise have the funds to satisfy any liability imposed by the IRS or the PBGC, and (B) the seller maintains an underfunded pension plan.

(9) The sponsor of a single-employer defined benefit plan must make a minimum contribution every calendar quarter unless the plan is fully funded. See ERISA § 302; Code § 412. All assets of the employer and affiliated entities are subject to a lien in certain circumstances if the employer fails to meet the minimum funding requirements.

(10) Nearly identical definitions of this term are found in ERISA § 4001(3) and Code § 414(f).

(a) An employer may promise in a collective bargaining agreement to contribute an agreed amount to an industry pension plan per hour of covered employment.

(b) Even if the employer makes all agreed contributions, the plan may be underfunded.

(c) An employer that withdraws from or ceases to contribute to a multiemployer plan, either completely or partially, is liable to the plan for its share of unfunded vested benefits

b. Cobra Obligations

(1) Continuation health coverage (known as “COBRA coverage”) should be addressed in both Assets and Stock transactions. Basic COBRA law provides that when a participant loses coverage because of a termination

of employment, the participant is entitled to COBRA coverage from the plan under which the participant was covered.

(2) In the case of a stock sale, since employing entity continues to exist, if the plan participants are not terminated, there is no COBRA event. However, the regulations provide that if the seller ceases to provide group health plan coverage to any employee in connection with the sale, a group health plan maintained by the buyer must make COBRA continuation coverage available to qualified beneficiaries.

(3) As long as the buyer continues to maintain a group health plan, it has a COBRA obligation beginning on the *later* of the following two dates: (a) the date the seller ceases to provide any group health plan to any employee; or (b) the date of the stock sale. This obligation continues for the remainder of the appropriate COBRA period.

(4) In an asset sale, if the seller ceases to provide group health plan to any employee in connection with the sale, then the buyer could be responsible for COBRA under certain circumstances. The buyer is the "successor employer" if the buyer continues the business operations associated with the assets purchased from the seller without interruption or substantial change.

(5) If the buyer is a successor employer, a group health plan maintained by the buyer has the obligation to make COBRA continuation coverage available to qualified beneficiaries with respect to that asset sale. A group health plan of the buyer has this obligation beginning on the later of the following two dates and continuing as long as that group continues to maintain a group health plan: (a) the date the seller ceases to provide any group health plan to any employee; or (b) the date of the asset sale. As is the case in stock sales, this obligation would continue for the remainder of the appropriate COBRA period.

(6) The Agreement should include representations by the seller regarding the disposition of welfare plan liability, including COBRA coverage, and the existence of any retiree obligations (either health, life insurance, or prescription drug coverages).

11. Bulk Sales Compliance

a. In some states failure to comply with certain under the Bulk Sales requirements including notification of creditors can result in liability to the Buyer.

b. Under Article 6 of the Uniform Commercial Code if: (i) the seller's principal business is the sale of inventory from stock; and (ii) on the date of the bulk-sale agreement the seller is located in the state or, if the seller is located in a jurisdiction that is not a part of the United States, the seller's major executive office in the United States is in the state.

c. In a bulk sale the buyer must: (i) obtain from the seller a list of all business names and addresses used by the seller within three years before the date

the list is sent or delivered to the buyer; obtain from the seller or prepare a schedule of distribution; and (ii) give notice of the bulk sale.

d. A buyer who fails to comply is liable to the creditor for damages in the amount of the claim, reduced by any amount that the creditor would not have realized if the buyer had complied

12. FIRPTA

a. The disposition of a U.S. real property interest by a foreign person (the transferor) is subject to the Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA") income tax withholding.

b. FIRPTA authorized the United States to tax foreign persons on dispositions of U.S. real property interests.

c. A disposition means "disposition" for any purpose of the Internal Revenue Code. This includes but is not limited to a sale or exchange, liquidation, redemption, gift, transfers, etc.

d. Persons purchasing U.S. real property interests (transferees) from foreign persons, certain purchasers' agents, and settlement officers are required to withhold ten (10%) percent of the amount realized on the disposition (special rules for foreign corporations). In most cases, the transferee/buyer is the withholding agent.

e. The transferee/buyer must determine if the transferor is a foreign person.

f. If the transferor is a foreign person and the buyer fails to withhold, the buyer may be held liable for the tax. In cases in which a U.S. business entity such as a corporation or partnership disposes of a U.S. real property interest, the business entity itself is the withholding agent.

13. State Tax

a. Some states impose by statute successor liability for certain taxes, such as sales taxes, payable by the target in an asset acquisition..

b. Section 212.10 of the Florida statute is such a provision. Under this section, in an asset acquisition, the seller is required to pay any sales tax within fifteen days of the closing, and the buyer is required to withhold a sufficient portion of the purchase price to cover the amount of such taxes. Further, if the buyer fails to withhold a sufficient amount of the purchase proceeds to cover the tax liability, the buyer "shall be personally liable for the payment of the taxes, interest, and penalties accruing and unpaid on account of the operation of business by [the seller]."

c. In Pennsylvania failure of the purchaser to require a Corporate Clearance Certificate renders the purchaser liable for the unpaid taxes owed by the seller.

d. There is no successor liability imposed on the acquirer for the target's federal income taxes unless the transaction amounts to a fraudulent conveyance.

VII. Agreement of Sale - Asset Sale

A. Overview – In this section we will review the essential provisions of an Asset Sale Agreement.

B. Agreement Provisions.

1. Introductory Paragraph

The Agreement should first set out the date of the Agreement and identify the parties; if individual are making representations or entering into post-closing obligations which are provided in the Agreement they should be made parties to the Agreement.

2. "Whereas" Clauses

The "Whereas" clauses will set the factual background of the transaction, and may in some jurisdiction may be considered to be collusively true as between the parties.

3. The Property to be Sold and Purchased

a. Of course one of the essential elements of any asset sale is the identification of the assets to be sold. Just as important is identification of the assets to be excluded from the sale.

b. In asset transaction, generally, cash, accounts receivable and marketable investment property are excluded.

c. However, there may be other assets which should also be specifically excluded; perhaps a desk or memento which has particular sentimental value to an owner.

d. Also to be considered is a reference to the condition of the property purchased and sold. Sellers will prefer a clause which set forth the premise that the assets are acquired in "as is" condition and the Buyer is not relying on the Seller's representations as to their prospective *"fitness or suitability".*

e. The Seller may also wish to add disclaimers as to financial performance, compliance with legal requirements, codes, etc., state of repair, and value.

f. An alternative clause favoring the Buyer might be the following:

4.9 Equipment. All equipment included among the Assets is in good operating condition and repair, subject only to ordinary wear and tear and is adequate for its intended use.

g. The Buyer may wish to include a clause which makes a general statement that the property purchased include all assets and that such assets are *"used or held for use primarily in, or arise primarily out of or relate primarily to, the Business or the operation or conduct of the Business."*

4. The Purchase Price

a. Overview. The Purchase Price may be a fixed amount or a subject to adjustment either at or post-closing, and could also include consideration outside the Sale of Assets transaction, such as employment agreements, leases, licensing agreements, and covenants.

b. Adjustments to the Price

(1) Purchase price adjustments tend to be most beneficial to buyer. Such adjustments ensure that seller bears the economic risks associated with operating the target company during the pre-closing period.

(2) They also protect buyer against any malfeasance on the part of seller, because they guard against practices like accelerating collection of accounts receivables or delaying payment on accounts payable. In short, purchase price adjustments provide buyer with some certainty that it will receive a target company in the same financial condition it was in when buyer agreed to the acquisition, either because the target company's balance sheet has not changed or because there will be an adjustment to the purchase price to address any change that may occur.

(3) Most purchase price adjustments will be calculated by comparing a certain financial benchmark from the financial statements provided prior to closing (usually referred to as the initial balance sheet or the reference balance sheet) to the same element in the financial statements prepared as of the closing date (usually referred to as the closing date balance sheet).

(4) Alternatively, the closing balance sheet may be compared against a targeted amount agreed to by the parties at some earlier date. Purchase price adjustments can be based on any number of financial metrics, including (a) working capital, (b) earnings before interest, taxes, depreciation and amortization ("EBITDA"), (c) book value, (d) net assets or (e) net worth. The element(s) used will usually have been key to the parties' determination of the original purchase price.

(5) Inventory Value

(a) Often the purchase price will be adjusted based on the value of the inventory on the Closing Date.

(b) If an inventory is required, then determine:

(i) Whether inventory will be made by parties themselves, or by third party.

(ii) How inventoried assets will be valued (e.g., 60% of the wholesale cost).

(iii) When inventory will be conducted.

(6) Working Capital

In many asset transactions liquid assets such as cash and accounts receivable are exclude cash and accounts receivable. The term "working capital" means current assets reduced by current liabilities.

(7) Net Worth

In transactions where there is a significant period of time between signing and closing the acquisition, the parties often use purchase price adjustments, also known as "true-ups," to address certain changes in the target's financial position that may occur between signing and closing.

c. Earn Outs

(1) An "earn out" is a post adjustment to the purchase price based on the post-closing performance of the acquired company.

(2) Acquirers generally will want to have earn-outs based on a net amount, such as earnings, or earnings before interest, taxes, depreciation, and amortization ("EBITDA"), whereas sellers generally prefer to have them based on a gross amount, such as revenue.

(3) In drafting earn-out and other contingent payout provisions, the parties should consider specifically addressing the level of effort (such as 'best effort"), if any, the acquirer is required to put forth in operating the acquired business.

d. Holdbacks/Escrows

(1) The parties may agree that buyer will hold back a certain portion of the purchase price for a certain period of time after closing. If seller is not concerned about buyer's liquidity or if the amount involved is relatively small, seller should consider permitting buyer to retain the holdback in lieu of depositing it into an escrow account.

(2) If buyer is holding the holdback, the acquisition agreement will need to address the (a) amount of the holdback, (b) conditions for releasing the holdback and (c) interest payable on the holdback amount.

(3) The holdback provisions will need to address all of the key elements typically covered in an escrow agreement.

5. Form of the Payment of the Purchase Price

a. All Cash - All cash is the preferred form of consideration from the Seller's perspective. This will of course lessen risk and the need to prove the credit worthiness of the Buyer.

b. Deferred Payment Notes.

(1) This form of consideration makes the Seller at least in part the Buyer's bank.

(2) Deferred Payment will of course increase Seller's risk and require the Buyer prove its creditworthiness.

(3) The increased risk of necessity may mean a higher price.

(4) Seller should realize a Note secured by the business assets is poor security indeed since the ability to take back a failing business will mean the assets are already dissipated and will not be consistent with plans for retirement.

(5) Further if a bank is providing financing they will most likely take a priority position.

(6) Also there is a certain inherent anxiety associated with being a Note holder. See discussion in Section XI, *Secured Notes*.

c. Assumption of Debt

(1) Another form of consideration paid in acquisition transactions is the assumption of target's liabilities by buyer The assumption should take place prior to the closing and relieve the Seller of liability..

(2) From both an accounting and tax perspective, the assumption of liabilities is additional consideration being paid by buyer.

(3) Generally, all liabilities of target are assumed in stock purchase and merger transactions.

(4) Asset purchase agreements typically outline which liabilities are being assumed by Buyer and which remain with the Seller.

(5) The parties should make sure that the value of the assumed liabilities is set forth on a schedule so as to avoid any conflicts in how the two parties report the value of the assumed liabilities for accounting and tax purposes.

d. Stock of the Purchaser –

(1) If all or part of the consideration to be paid in the form of publically traded stock, there are several basic methods for specifying the exchange ratio.

(a) Fixed Exchange Ratio

First, the exchange ratio can be fixed, specifying a set number of shares of the Buyer. The obvious problem with the Fixed Exchange ratio is that the value of the shares received may fluctuate up or down for the date of the agreement which fixes the number and the closing date. The parties could solve this problem the parties could put both a ceiling and a floor on the exchange ratio.

(b) Fixed Value Exchange Ratio

The opposite of the fixed exchange ratio is a fixed value exchange ratio, which provides that the Seller will receive shares of the Buyer with a fixed value; that value to be determine in most cases at the closing date.

(2) Securities Issues – See Section IX, *Securities Issues*, for a discussion of possible securities issues.

e. Allocation of the Price

(1) The allocation of the Purchase Price will create tax consequences for both the Buyer and the Seller.

(2) The parties should agree on the allocation and use the allocation on a consistent basis.

(3) A clause like the following should be part of the Agreement"

"The Purchase Price shall be allocated in accordance with Exhibit 2.5. After the Closing, the parties shall make consistent use of the allocation, fair market value and useful lives specified in Exhibit 2.5 for all Tax purposes and in all filings, declarations and reports with the IRS in respect thereof, including the reports required to be filed under Section 1060 of the Code. Buyer shall prepare and deliver IRS Form 8594 to Seller within forty-five (45) days after the Closing Date to be filed with the IRS. In any proceeding related to the determination of any Tax, neither Buyer nor Seller or Shareholders shall contend or represent that such allocation is not a correct allocation."

6. Representations and Warranties

a. A "representation' is a "presentation of fact... made to induce sooner to act".

b. A "warranty" implies a guarantee.

c. Representations and warranties serve three basic purposes.

(1) First, they act as a supplement to actual due diligence.

(a) Since investigation and verification of every aspect of the transaction by the Buyer can be an expensive proposition the extraction of representations and warranties from the Seller provide the Buyer with the Seller's representation of the state of the business on the date of the Agreement execution, and also, if properly referenced on the date of the Closing as well.

(b) They act as an adjunct to the due diligence process an place the risk of misrepresentation on the seller through the assurance of legal recourse against the seller in the event the representations turned out to be false.

(2) Second, the accuracy of the representations and warranties is generally a condition to closing the transaction, and therefore, if a target's representations and warranties are materially false, the acquirer may be excused from closing the transaction, that is, the acquirer may walk.

(3) Third, the acquisition agreement generally provides that the representations and warranties survive the closing and that the harmed party is indemnified if a representation or warranty is false.

d. Knowledge

(1) Many representations and warranties will be qualified by the "knowledge" of the person making the representation. The sellers will attempt to use knowledge qualifications to limit many of their representations and warranties.

(2) Many representations or warranties are qualified by "knowledge" of the person being asked to make the representation. The agreement should specify just whose knowledge is at issue. A clause like the following could be included;

"Phrases such as knowledge shall mean with respect to either party to this agreement the actual knowledge of such party's executive officers."

(3) You might want to consider making the reference more specific such as the particular individuals such as the following

"Knowledge of Seller", "Seller's knowledge" or any other similar knowledge qualification in this Agreement means to the actual knowledge of James Smith."

(4) Generally speaking the phrase "knowledge" means the actual knowledge of the person making the representation without the need to make additional inquiry. In certain cases the Buyer may want to put the onus on the Seller to investigate the matter at issue. In those cases additional words like the following should be added *"knowledge after reasonable investigation."*

e. Bring Down

(1) As discussed in the conditions section, many if not most acquisition agreements require as a condition to closing that the representations and warranties be materially accurate both on the date of signing and on the date of closing.

(2) The requirement that representations and warranties be accurate on the date of closing is referred to as the "bring-down."

(3) In all cases it is not sufficient that the representations be made at the time of the execution agreement they must also be accurate as of date of closing. The requirement that the representations be accurate on the date of closing is referred to as the "bring-down."

f. Survival

One the primary purposes of the representation clauses is to provide a basis for enforcing Indemnification provisions. Therefore a survival provision like the following is also necessary

g. Typical Seller Representations in an Asset Purchase Agreement

The following are some of the more often representation and warranties clauses expected of the Seller:

All Representations and Warranties are True and Correct

The Seller represents and warrants to the Buyer that the statements contained in this Article 3 are correct and complete as of the date of this Agreement and will be correct and complete as of the Closing Date (as though made then and as though the Closing Date were substituted for the Date of this Agreement throughout this Article 3), except as set forth in the disclosure schedule to be provided as set forth in Section

5.12 of this Agreement (the "Disclosure Schedule"). The Disclosure Schedule will be arranged in paragraphs corresponding to the paragraphs contained in this Article 3.

Organization, Standing, and Power

The Seller is a corporation validly existing and in good standing under the laws of the State of New York. The Seller has been duly qualified as a foreign corporation for the transaction of business and is in good standing under the laws of every jurisdiction where the nature of its business makes such qualifications necessary and where the failure to so qualify would, individually or in the aggregate, have a Material Adverse Effect on the Business or Seller. Schedule 3.2 lists the beneficial ownership of the outstanding shares of the Seller's capital stock. Each holder of such shares is referred to in this Agreement as a "Stockholder" and all such holders are referred to as the "Stockholders."

Capital Structure

The authorized capital stock of the Company consists of 1,000,000 shares of SMLB Common Stock, of which 1,000 shares of SMLB Common Stock are outstanding as of the date hereof. Sellers own 100% of the issued and outstanding shares of Common Stock. All of the issued and outstanding shares of SMLB Common Stock are duly authorized, validly issued, fully paid and non-assessable.

Authority to Enter into the Agreement

The Seller has full power and authority (including full corporate power and authority) to execute and deliver this Agreement and to perform its obligations hereunder. This Agreement constitutes the valid and legally binding obligation of the Buyer, enforceable in accordance with its terms and conditions, except as such enforcement may be limited by bankruptcy, insolvency or other laws affecting the enforcement of creditors' rights or equitable principles generally.

Title to Assets

The Seller has good and marketable title to, or a valid leasehold interest in, the Acquired Assets, free and clear of all Security Interests or restrictions on transfer.

Noncontravention

Except as set forth in Schedule 4.4, neither the execution and the delivery of this Agreement, nor the consummation of the transactions contemplated by this Agreement (including the assignments and assumptions referred to in Article 2 above), will (i) violate any statute, regulations, rule, injunction, judgment, order decree, ruling, charge, or other restriction of any government, governmental agency, or court to which the Buyer is subject, or any provision of its charter or bylaws, or (ii) conflict with, result in a breach of, constitute a default under, result in the acceleration of, create in any party the right to accelerate, terminate, modify, or cancel, or require any notice under any agreement, contract, lease, license, instrument, or other arrangement to which the Buyer is a party or by which it is bound.

Financial Information

a. Attached as Exhibit C are the following financial statements of Seller (collectively the "Financial Statements"): (A) audited balance sheets, statements of income, stockholder equity, operations, and cash flow as of and for the four calendar years ended December 31, [year] (the "Most Recent Calendar Year End"); and (B) unaudited balance sheets, statements of income, stockholder equity, operations, and cash flow (the "Most Recent Financial Statements") as of and for the nine months ended September 30, [year] (the "Most Recent Calendar Month End"). Except as noted in Schedule 3.8, the Financial Statements (including the notes thereto) have been prepared in accordance with GAAP applied on a consistent basis throughout the periods covered thereby and present fairly the financial condition of Seller as of such dates and the results of operations of Seller for such periods are correct and complete and are consistent with the books and records of the Seller (which books and records are correct and complete)

b. Since the Most Recent Calendar Month End, there has not been any Material Adverse Effect on the Business. Without limiting the generality of the foregoing, since that date and except as set forth on Schedule 3.9:

c. Seller has not sold, leased, transferred or assigned any of the Business' assets, tangible or intangible, other than for a fair consideration in the Ordinary Course of Business.

Undisclosed Liabilities

Except as set forth in the Financial Statements (including the notes thereon), there are no liabilities of the Company, whether accrued, absolute, contingent or otherwise, which have occurred or were existing prior to that are required to be set forth in the Balance Sheet in accordance with generally accepted accounting principles. There are no such liabilities which have occurred since the date of the Balance Sheet, other than liabilities incurred in the normal conduct of the Business, none of which has had a material adverse effect on the Seller or the financial condition, or operating results of the Seller. As of the date hereof, there are no circumstances, conditions, happenings, events or arrangements, contractual or otherwise, of which Seller has actual knowledge which could reasonably be expected to give rise to any such liabilities, except in the normal course of the Business and consistent with past practices.

Accounts Receivable

The accounts receivable shown on the Balance Sheet and those arising since the date thereof are valid receivables which arose in the ordinary course of the Business. To Seller's actual knowledge, the accounts receivable of Seller existing on the Closing Date and included in the Closing Date Working Capital are not subject to any counterclaim, set off or

Legal Compliance

3.11 The Seller has complied with all applicable laws (including rules, regulations, codes, plans, injunctions, judgments, orders, decrees, rulings and charges thereunder) of federal, state, local and foreign governments (and all agencies thereof), in connection with the Business and, no action, suit, proceeding, hearing, investigation, charge, complaint, claim, demand, or notice has been filed or

commenced or, to the Knowledge of Seller, threatened against the Seller alleging any failure so to comply except where the failure to comply would not, individually or in the aggregate, have a Material Adverse Effect upon the Business. Schedule 3.11 lists all actions, suits, proceedings, hearings, investigations, charges, complaints, claims, demands or notices which have been filed or commenced against Seller or threatened against Seller since [date] alleging any failure to comply with any applicable laws as herein described and the resolution or current status thereof.

3.25.1 The Seller has made all required registrations and filings with and submissions to all applicable governmental entities relating to the Business as currently conducted and as proposed to be conducted, including, without limitation, all such applicable governmental entities having jurisdiction over any matters pertaining to conservation or protection of the environment, and the treatment, discharge, use, handling, storage or production, or disposal of Hazardous Substances. All such registrations, filings and submissions were in compliance with all legal requirements and other requirements when filed, no material deficiencies have been asserted by any governmental entities with respect to such registrations, filings or submissions and, no facts or circumstances exist which would indicate that a material deficiency may be asserted by any such authority with respect to any such registration, filing or submission.

3.25.2 The Seller possesses and the Business is operating in compliance in all material respects with, all franchises, licenses, permits, certificates, authorizations, rights and other approvals of governmental entities necessary for the Business to (i) occupy, maintain, operate and use the assets of the Business, including, without limitation, the real property currently used in the Business, and (ii) conduct the Business as currently conducted. All Permits or licenses necessary to conduct the Business as presently conducted have been lawfully and validly issued, and no proceeding is pending or, to the Knowledge of the Seller, threatened looking toward the revocation, suspension or limitation of any such permit or license.

3.25.3 Schedule 3.25 lists all Permits presently maintained by Seller for operation of the Business. Except as specifically noted in Schedule 3.25, the Permits listed therein constitute all Permits necessary for the operation of the Business as presently conducted and are transferable by Seller to Buyer at Closing.

Contracts

3.25.1 The Seller has made all required registrations and filings with and submissions to all applicable governmental entities relating to the Business as currently conducted and as proposed to be conducted, including, without limitation, all such applicable governmental entities having jurisdiction over any matters pertaining to conservation or protection of the environment, and the treatment, discharge, use, handling, storage or production, or disposal of Hazardous Substances. All such registrations, filings and submissions were in compliance with all legal requirements and other requirements when filed, no material deficiencies have been asserted by any governmental entities with respect to such registrations, filings or submissions and, no facts or circumstances exist which would indicate that a material deficiency

may be asserted by any such authority with respect to any such registration, filing or submission.

3.25.2 The Seller possesses and the Business is operating in compliance in all material respects with, all franchises, licenses, permits, certificates, authorizations, rights and other approvals of governmental entities necessary for the Business to (i) occupy, maintain, operate and use the assets of the Business, including, without limitation, the real property currently used in the Business, and (ii) conduct the Business as currently conducted. All Permits or licenses necessary to conduct the Business as presently conducted have been lawfully and validly issued, and no proceeding is pending or, to the Knowledge of the Seller, threatened looking toward the revocation, suspension or limitation of any such permit or license.

3.25.3 Schedule 3.25 lists all Permits presently maintained by Seller for operation of the Business. Except as specifically noted in Schedule 3.25, the Permits listed therein constitute all Permits necessary for the operation of the Business as presently conducted and are transferable by Seller to Buyer at Closing.

Completeness of Acquired Assets.

The Acquired Assets together with the assets to be acquired pursuant to the asset purchase agreements dated the date hereof (the "Other Purchase Agreements") with XYZ, Co. and ABC, Inc. constitute all of the assets and properties used in any business or entity which conducts any portion of the Business in the world or activities associated with the Business which are owned or, directly or indirectly, controlled by the Seller, the Stockholders or any of their respective Affiliates.

Labor Matters

3.26.1 To the Knowledge of Seller, no executive, key employee, or group of employees employed with respect to the Business has any plans to terminate employment with Seller or terminate employment with the Business upon or shortly after the Closing.

3.26.2 Seller has not experienced any strikes, grievances, claims of unfair labor practices, or other collective bargaining disputes within the past three years. Seller has not committed any unfair labor practice. Seller has no Knowledge of any organizational effort presently being made or threatened by or on behalf of any labor union with respect to employees of Seller. All wages, salaries, commissions, bonuses, benefits and other compensation which have become due and payable to any employee of Seller have been paid or fully accrued. Seller has complied with all laws, regulations and orders pertaining to federal and state wage and hour requirements. No facility of Seller has been closed, there have not been any group layoffs of any of its employees or implementations of any early retirement, separation or window program within the past three years with respect to Seller nor are there any plans or announcements of any such action or program for the future. Seller is in compliance with its obligations pursuant to the Workers Adjustment and Restraining Notification Act of 1988, as amended ("WARN"), and all other notification and bargaining obligations arising under any statute.

Employee Benefit Plans

Schedule 3.27 lists each Employee Benefit Plan that the Seller maintains or to which the Seller contributes with respect to the Business.

Each such Employee Benefit Plan (and each related trust, insurance contract, or fund) complies in form and in operation in all respects with the applicable requirements of ERISA and the Code and other applicable laws.

Seller does not maintain nor ever has maintained or contributes, nor ever has contributed, or ever has been required to contribute to any Employee Welfare Benefit Plan providing medical, health, or life insurance or other welfare-type benefits for current or future retired or terminated employees, their spouses, or their dependents (other than in accordance

Subsidiaries

There are no subsidiaries of the Seller.

Sufficiency and Completeness of the Acquired Assets

The Acquired Assets constitute all assets, properties, and rights, whether tangible or intangible, necessary to conduct the Business as presently conducted. The Acquired Assets together with the assets to be acquired pursuant to the asset purchase agreements dated the date hereof (the "Other Purchase Agreements") with Co. and Co. constitute all of the assets and properties used in any business or entity which conducts any portion of the Business in the world or activities associated with the Business which are owned or, directly or indirectly, controlled by the Seller, the Stockholders or any of their respective Affiliates.

Disclosure

No written statement of information provided or to be provided by Seller to Buyer pursuant to this Agreement (including, but not limited to, the representations and warranties contained in this Section 3) contains any untrue statement of a material fact or omits to state any material fact necessary in order to make such statements and information not misleading.

Operation of Business

The Seller will not cause or permit the Business to engage in any practice, take any action, or enter into any transaction outside the Ordinary Course of Business. Without limiting the generality of the foregoing, Seller will not engage in any practice, take any action or enter into any transaction of the sort described in Section 3.9 of this Agreement.

Preservation of Business

The Seller will cause the Business to keep its operations and properties substantially intact, including its present operations, physical facilities, working conditions, and relationships with lessors, licensors, suppliers, customers, and employees.

Broker's Fees

Except for fees owed to Securities, Inc. and Co., the Seller has no liability or obligation to pay any fees or commissions to any broker, finder, or agent with respect to the transactions contemplated by this Agreement for which the Buyer could become liable or obligated. Such amount shall be the sole responsibility of the Seller and shall be paid to Securities, Inc. and Co. simultaneously with the Closing.

Computer Hardware and Software

(a) Seller has made full and adequate disclosure to Purchaser of all computer hardware and software programs constituting or forming a part of Seller's management and information or operating systems owned by or under license to Seller and used or useful in the Business (collectively, the "Information Systems"). All of the Information Systems are in executable and usable form, and are owned outright by Seller or available to Seller without material limitation under valid and enforceable licenses, leases or similar arrangements with the owner thereof, which are assignable to Purchaser at the Closing without any restriction which would have a material adverse effect upon Purchaser's use of the Information Systems in the Business.

(b) To the actual knowledge of Seller without investigation, no portion of the Information Systems violates any United States or foreign patent, copyright, trademark, or trade secret of any person.

h. Typical Buyer Representations in an Asset Purchase Agreement

The following are some of the more often representation and warranties clauses expected of the Buyer:

Organization

Purchaser is a corporation duly organized, validly existing and in good standing under the laws of the State of and has full corporate power and authority to carry on its business and to perform all of its obligations under the agreements to which it is a party.

Authority

Purchaser has full and absolute power and authority to enter into this Agreement and to carry out the transactions contemplated hereby. The execution, delivery and performance of this Agreement have been duly authorized by all necessary corporate action on the part of Purchaser and will not result in a violation of any provision of Purchaser's Certificate of Incorporation or By-laws, any provision of any material lease, agreement or instrument to which Purchaser is a party or by which it or its property is bound, or a default (or event which with notice or passage of time, or both, would constitute a default) under any material contract, agreement, instrument or obligation to which Purchaser is a party.

Enforceability

This Agreement constitutes the valid and binding obligation of Purchaser enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency or other laws relating to or affecting the rights of creditors.

Consents and Authorizations

Purchaser is not required to obtain any authorization, consent or approval from, or file any notice or report with, any governmental or regulatory authority or other person in connection with this Agreement or the consummation of the transactions contemplated by this Agreement.

Noncontravention

Except as set forth in Schedule 4.4, neither the execution and the delivery of this Agreement, nor the consummation of the transactions contemplated by this Agreement (including the assignments and assumptions referred to in Article 2 above), will (i) violate any statute, regulations, rule, injunction, judgment, order decree, ruling, charge, or other restriction of any government, governmental agency, or court to which the Buyer is subject, or any provision of its charter or bylaws, or (ii) conflict with, result in a breach of, constitute a default under, result in the acceleration of, create in any party the right to accelerate, terminate, modify, or cancel, or require any notice under any agreement, contract, lease, license, instrument, or other arrangement to which the Buyer is a party or by which it is bound.

Financial Capacity

The Buyer has the financial capacity to perform its obligations under this Agreement in accordance with the terms of this Agreement and is aware of no pending or threatened event which would be reasonably likely to render the Buyer incapable of performing such obligations.

7. Covenants of the Seller and Buyer

a. Often the Agreement will provide covenants to of the Seller and the Buyer to govern activity between conduct of the parties between the date of the execution of the Agreement and the Closing Date.

b. Such covenants made by the Seller are intended to insure cooperation in the Buyer's due diligence process, and also make sure that the Seller's business is essentially maintained intact until the Closing Date

c. The following is an example of those covenants

Seller and Purchaser hereby covenant and agree as follows:

6.1 . From and after the date of this Agreement until the Closing, except to the extent Purchaser consents in writing:

(a) Seller will not sell, pledge, convey, transfer or encumber or enter into any agreement for the transfer or sale of the Seller or any of the Assets, other than in the ordinary course of the business.

(b) Seller will conduct the Business in its usual and customary manner and not dispose of any material property or assets, or incur any material obligation except in the ordinary course of business, and will use reasonable commercial efforts (without making any commitments on behalf of Purchaser) to preserve the goodwill of the Seller.

(c) Seller will not enter into any contract or commitment, incur any liability or engage in any transaction relating to the Business requiring an expenditure in

excess of $10,000, other than in the ordinary course of the business and consistent with past practices, or which is reasonably necessary for the consummation of the transactions contemplated by this Agreement, and then, only with the prior written consent of Purchaser.

(d) Seller will notify Purchaser promptly in writing of any claim, lawsuit, action or proceeding that may be asserted, commenced or threatened (where Seller has knowledge of such threat and has reason to believe that such threat is likely to result in any such action or proceeding) against Seller and affecting in any material respect the Seller, or challenging or seeking to enjoin or restrict, or which could be expected to prevent or restrict, the consummation of the transactions contemplated by this Agreement.

6.2 Access to Information. From and after the date of this Agreement, Seller shall give Purchaser, its counsel, accountants and other representatives, full access during Seller's normal business hours, subject to reasonable security measures and reasonable prior notice, to all of the Assets and all books, records, agreements and commitments relating to the Business, and shall furnish or cause to be furnished to Purchaser's representatives during such period all such information concerning the Business as Purchaser may reasonably request; provided that Purchaser shall hold all such information in confidence (provided Purchaser may disclose such documents and information as required by law, but shall give notice to Seller of receipt of any such legal process so as to provide Seller opportunity to seek a protective or limitation of discovery order).

6.3 Compliance with Laws. Seller will comply with all material applicable laws, rules and regulations of any governmental entity, agency or instrumentality relating to the Business or required to be complied with by it in the performance of this Agreement and for the consummation of the transactions contemplated by this Agreement.

6.4 Corporate Action and Consents. Seller and Purchaser will each take all necessary corporate actions and will use reasonable efforts to obtain all governmental and other consents, approvals, novations, assignments and waivers required to be obtained by Seller and Purchaser for the consummation of the transactions contemplated in this Agreement and the continuation of the Business following the Closing.

6.5 Change of Name. Promptly after the Closing, Seller shall amend its certificate of incorporation to change its name to a name which is not confusingly similar to "."

6.6 Employees. Prior to Closing, Purchaser shall offer employment, effective as of the completion of Closing, to the employees of Seller listed on Schedule 6.6(a) (the "Employees"). Purchaser shall offer such employment at substantially similar compensation and benefit levels as the Employees received as employees of Seller, with credit for term of service while employed by Seller. Seller and Stockholder shall endeavor to assist Purchaser in entering into employment and service agreements with certain key employees

and contractors of Seller including but not limited to . Seller and Stockholder shall not be liable for severance, vacation or sick pay for an Employee that accepts employment with Purchaser (which liability, if any, Purchaser shall either assume or cause the Employee to waive in writing), and Purchaser will be liable for all severance benefits, if any, payable to the Employees that are not offered employment with Purchaser, with the exception of the Employees listed on Schedule 6.6(b) hereto.

8. Conditions Precedent

a. To the Obligations of the Buyer

Before the Buyer is finally legally bound to compete the transactions should be condition on the following:

(1) All required documents have been delivered;

(2) The representation of the Seller are accurate as of the Closing Date;

(3) All covenants have been performed by the Seller;

(4) All required consents, including corporate and governmental consents have been complied obtained;

(5) There is nothing that would legally prohibit the sale from being completed as contemplated by the parties.

b. Condition Precedent to the Obligations of the Seller

Before the Seller is finally legally bound to compete the transactions should be condition on the following:

(1) The Consideration has been delivered;

(2) All required documents have been delivered;

(3) The representations of the Buyer accurate as of the Closing Date;

(4) All covenants have been performed by the Buyer;

(5) All required consents, including governmental consents have been complied with;

(6) There is nothing that would legally prohibit the sale from being completed as contemplated by the parties.

c. Waiver

(1) Always include a waiver clause which allows the complying party to waive a condition of their won completion of the transaction

(2) This will prevent the non-complying party from using their own non-compliance as an excuse not to complete the transaction.

9. Termination

a. The agreement should address the circumstances which will all for a termination of the transaction.

b. The events which allow for termination should include the following:

(1) Mutual consent of the parties;

(2) By the either party in the event there has been a breach of any of the other party's representations, warranties, covenants or agreements contained in this Agreement;

(3) By either party if there is a failure of the condition precedent to their performance

c. Here is an Example of a Termination Clause:

ARTICLE 7

TERMINATION

Section 7.1 Termination Events. This Agreement may, by written notice given before or at the Closing, be terminated:

(a) by mutual consent of the Purchaser and the Seller;

(b) by the Purchaser (so long as the Purchaser is not then in material breach of any of its representations, warranties, covenants or agreements contained in this Agreement) if there has been a breach of any of the Seller's representations, warranties, covenants or agreements contained in this Agreement, which would result in the failure of a condition set forth in Section 6.1(a) or Section 6.1(b), and which breach has not been cured or cannot be cured within 30 days after the notice of the breach from the Purchaser;

(c) by the Seller (so long as the Seller is not then in material breach of any of its representations, warranties, covenants or agreements contained in this Agreement) if there has been a breach of any of the Purchaser's representations, warranties, covenants or agreements contained in this Agreement, which would result in the failure of a condition set forth in Section 6.2(a) or Section 6.2(b), and which breach has not been cured or cannot be cured within 30 days after the notice of breach from the Seller;

(d) by the Purchaser if there has been a Material Adverse Effect;

(e) by either the Purchaser or the Seller if any Governmental Authority has issued a nonappealable final Judgment or taken any other nonappealable final action, in each case having the effect of permanently restraining, enjoining or otherwise prohibiting the transactions contemplated by this Agreement;

(f) by the Purchaser if the Closing has not occurred (other than through the failure of the Purchaser to comply fully with its obligations under this Agreement) on or before January 31, 2012 except in the event the Special Meeting does not occur until January 27, 2012 or later, in which case if the Closing has not occurred by February 7, 2012; or

(g) by the Seller if the Closing has not occurred (other than through the failure of the Seller to comply fully with its obligations under this Agreement) on or before January 31, 2012 except in the event the Special Meeting does not occur until January 27, 2012 or later, in which case by the Seller if the Closing has not occurred by February 7, 2012.

10. Closing

a. The provisions dealing with the Closing should provide the date and location of the Closing and the items which each party will be expected to deliver.

b. The provision in certain cases will also provide the allocation of costs between the Buyer and the Seller.

Closing

9.1 Closing Date. The consummation of the transactions contemplated by this Agreement (the "Closing") shall take place by mail at the offices of and on or before (the "Closing Date"), or at such other time or place as the parties may mutually agree.

9.2 Deliveries.

At the Closing, the following deliveries shall be made and the following actions shall be taken, each of which shall be deemed to have occurred and to have been taken simultaneously and none of which shall be deemed to have been completed until all such deliveries and actions shall have been completed:

(i) the Seller will deliver to the Buyer the various certificates, instruments, and documents referred to in Section 7.1 below and the schedules referred to in clauses (c)(i) and (ii) of the definition of Assumed Liabilities;

(ii) the Buyer will deliver to the Seller the various certificates, instruments, and documents referred to in Section 7.2 below;

(iii) the Seller will execute, acknowledge (if appropriate), and deliver to the Buyer (A) assignments, subleases of Leased Real Property, deeds and bills of sale (including real property and intellectual property transfer documents) in form and substance reasonably satisfactory to Buyer and (B) such other instruments of sale, transfer, conveyance, and assignment as the Buyer and its counsel reasonably may request;

(iv) the Buyer will execute, acknowledge (if appropriate), and deliver to the Seller an assumption of the Assumed Liabilities and subleases of Leased Real Property in the form and substance reasonably satisfactory to Seller;

(v) the Seller shall cause the Stockholders to execute and deliver the Non-Competition, Confidentiality and Non-Solicitation Agreements referred to in Section 5.15;

(vi) the Buyer and the Seller shall deliver a written instruction to the escrow agent under the Escrow Agreement to pay $ from the escrow fund thereunder to the Seller and the balance to the Buyer;

(vii) the Buyer will deliver to the Seller the consideration specified in clause

11. Seller's Indemnity

a. Seller's Indemnification Clauses are generally intended provide the Buyer recourse in the event it did not get the benefit of the bargain it anticipated because of a misrepresentation or breach of a covenant of the Seller

b. In order to insure that Buyer will have recourse against the Seller, the Buyer could negotiate a Hold Back clause pursuant to which the part of the purchase price is held in escrow. See previous discussion of Hold Back provisions.

c. A deferred payment promissory note can also serve the same purpose provided the note contains a right of set off.

d. Also the Agreement should provide that the Seller's representations and warranties survive the Closing.

e. Here is an example:

8.2.1 If the Seller breaches any of its representations, warranties, and covenants contained in this Agreement, within the survival periods set forth above, provided that the Buyer makes a written claim for indemnification against the Seller pursuant to Section 10.7 below within any such survival period, then Seller shall indemnify the Buyer from and against the entirety of any Adverse Consequences the Buyer shall suffer which is caused by the breach; provided, however, that the Seller shall not have any obligation to indemnify the Buyer from and against any Adverse Consequences caused by the breach of any representation or warranty of the Seller contained in this Agreement until the Buyer has suffered Adverse Consequences by reason of such breaches in the aggregate in excess of $50,000, it being understood that, after such amount has been exceeded, Seller shall be liable to Buyer for indemnification of the full amount of all such Adverse Consequences, including the first $ thereof. For purposes of this Section 8.2.1, with respect to any breach of any representation or warranty on the part of Seller contained in this Agreement, any qualifications of such representation or warranty by reference to the materiality of matter stated therein (howsoever phrased), shall be disregarded in determining any inaccuracy, untruth, incompleteness or breach thereof.

8.2.2 Seller agrees to indemnify the Buyer from and against the entirety of any Adverse Consequences the Buyer may suffer which is caused by (i) any Liability of the Seller which is not an Assumed Liability (including any Liability of Seller that becomes a Liability of Buyer or for which Buyer suffers Adverse Consequences under any bulk transfer law of any jurisdiction, under any common law doctrine of de facto merger or successor liability or otherwise by operation of law), (ii) any Liability relating to the Business arising prior to Closing or any period prior to Closing which is not an Assumed Liability that becomes a Liability of Buyer or for which Buyer suffers Adverse Consequences, or (iii) breach of any covenant of Seller contained in this Agreement.

8.2.3 Except for fraud, the aggregate maximum liability of Seller to Buyer under this Section 8.2 shall be $1,000,000 and shall be recoverable from the Holdback Escrow under the Holdback Agreement; provided that this Section 8.2.3 shall not limit the obligations of Seller under Section 2.8 with respect to the Adjusted Purchase Price and the payment of any amounts owing under Section 2.8 by Seller to Buyer.

12. Buyer's Indemnity

a. On the Seller's side the Indemnification of the Buyer may provide the Seller recourse in the event that the Buyer's post-Closing operation of the acquired operation results in Claims against the Seller

b. In addition the Seller may seek indemnification if the Byer fails to fulfill post-Closing covenants such as assumption of debt.

8.3.1 If the Buyer breaches any of its representations, warranties, and covenants contained in this Agreement, provided that the Seller makes a written claim for indemnification against the Buyer pursuant to Section 10.7 within two years from the date of this Agreement, then the Buyer agrees to indemnify the Seller from and against the entirety of any Adverse Consequences the Seller may suffer through and after the date of the claim for indemnification (including any Adverse Consequences the Seller may suffer after the end of any applicable survival period) caused by the breach.

8.3.2 The Buyer agrees to indemnify the Seller from and against the entirety of any Adverse Consequences the Seller may suffer resulting from, arising out of, relating to, in the nature of, or caused by any Assumed Liability.

13. Miscellaneous Clauses

Other provisions in the Agreement to be included are the following:

a. Covenant Not to Compete;

b. Amendments;

c. Allocation of expenses;

d. Notices;

e. Entire Agreement;

f. Assignability;

g. Governing law;

h. Severability.

C. Resolutions and Required Approvals

1. Approval of the Board of Directors and/or the Shareholders

a. Look to state law and the corporate governance documents in order to determine the whether the transaction requires approval of the Board and/or the Shareholders

b. In general, the board of directors of the acquiring corporation, under its management authority, can authorize the acquisition of assets without specific shareholder action.

c. Disposition of a corporation's assets other than in the usual and regular course of business or for the purpose of relocation may require shareholder

approval as well. In certain cases, the articles of incorporation or bylaws may require approval by the shareholders as a limitation on the powers of the board of directors.

d. In addition, shareholder action may be required if an authorization of an increase in the number of shares in the corporation or waiver of any existing preemptive rights is necessary before the acquiring corporation is able to issue shares to the shareholders

e. Shareholder approval may also be required pursuant to the rules of some of the national exchanges, that is, the New York Stock Exchange or NASDAQ. Depending on the financial significance of the assets required, shareholder approval may also be required.

2. Good Practice

a. Good practice is to get both. This will lessen the chances of any conflict with dissident shareholders. Objecting shareholders may be entitled to dissenters' rights.

b. A plan of asset transfer should be drafted that sets forth the terms and conditions of the sale or authorizes the board of directors to fix any of the terms and conditions.

c. The board of directors should pass a resolution approving the plan and directing that the plan be submitted to a vote of the shareholders entitled to vote on it.

d. The plan should then be adopted by a majority of the votes cast by all shareholders entitled to vote on it, and if any class or series of shares is entitled to vote as a class, a majority of the votes cast in each class vote.

D. Other Documents in Asset Sales Transactions

Other documents which are often part of an Asset Sales Transaction include the following:

1. Bill of Sale;
2. Assignment and Assumption Agreement;
3. Assignment and Assumption Agreement of Leases;
4. Escrow Agreement;
5. Employment Agreement;
6. Promissory Note of the Buyer
7. Assignment of Name
8. Assumption of Liabilities
9. Assumption of Contracts

10. Attorney Opinion Letter[1]

VIII. Agreement of Sale - Stock Sale.

A. Overview.

1. The Agreement of Sale in in Stock Purchase Agreement is in some respects an easier transaction, and in most respects more complex.

2. With Asset acquisitions, after price, the primary issues for the Buyer are generally to obtain clear title to the assets purchased, also to the determining the condition those assets. In addition as discussed above the Buyer cannot assume that it will not be assuming liabilities of the Seller.

3. In Stock acquisitions the only asset to be acquired is the stock of the Seller. However, the Buyer generally expects to acquire an ongoing business intact, and in doing so is assuming all of the liabilities and obligations of the selling entity.

4. In a Stock transaction it is important to quantify the assumed liabilities, and for the Buyer to obtain a level of comfort that the business will be transferred intact, without undue exposure to unforeseen issues.

5. This means more than exposure to unknown liabilities, but also other matters that are necessary to the continuation of the business.

6. It is important that the Buyer not assume too much concerning what he is buying. In some cases contracts may nullified by the transaction, and debt obligations may become due when the stock ownership of the Seller changes significantly. In addition key employees may leave and worse yet, leave and compete with the Buyer post-closing.

7. In a Stock acquisition the Buyer has two means of verifying that it will get the benefit of its bargain (1) due diligence investigation, and (2) the representations of the Seller.

8. If the Buyer has not done its due diligence there may hidden liabilities that the Buyer has not factored into its decision making process, but there also may be other aspects of the business that come to light. It is important that the Buyer conduct a thorough

[1] Asset purchase agreements frequently call for the delivery at the closing of one or more legal opinion letters, in which counsel for a party provides opinions to the other party to the transaction concerning the acquired assets (in the case of counsel to the selling company) and the validity of actions taken by its client in connection with the transaction. It is customary and appropriate for the buyer in a typical business acquisition to request that counsel for the selling company provide opinions as to matters that involve legal conclusions based upon matters known to the opining lawyer or capable of verification with reasonable diligence (e.g., due incorporation and good standing of the selling company; validity, binding effect and enforceability of the agreements executed by the selling company in connection with the acquisition; and effect of the acquisition on certain agreements to which the selling company is party).It is inappropriate to request opinions as to matters that counsel cannot know or investigate on a reasonable basis (e.g., compliance by the selling company with all applicable laws), as to factual matters unrelated to the lawyer's expertise (e.g., accuracy of all of Seller's representations and warranties in the acquisition agreement) or that express a certain conclusion as to uncertain legal issues (e.g., compliance with the antitrust laws of an acquisition of the assets of a company that is a competitor of the buyer). It is also not appropriate to request an opinion that has the effect of imposing some of the business risks of the transaction on the opining lawyer.

due diligence investigation in the case of a Stock acquisition. The Buyer should also consider whether an acquisition audit is required.

9. The Seller's representation should also be more detailed and comprehensive than in an Asset sale.

10. The due diligence and the Representation and Warranties should cover all or some of the following matters:

a. Organization and Good Standing.

b. Financial Information.

c. Physical Assets.

d. Real Estate.

e. Intellectual Property.

f. Employees and Employee Benefits.

g. Licenses and Permits.

h. Environmental Issues.

i. Taxes.

j. Material Contracts.

k. Product or Service Lines.

l. Customer Information.

m. Litigation.

n. Insurance Coverage.

o. Professionals.

See Investigation Stage – Buyer's Due Diligence, in Section III, above.

11. It also should be kept in mind that the Seller may be an individual with limited recourse for the Buyer after the closing; therefore it is important to consider an Escrow of the Purchase Price, or Hold Backs; as mentioned previously. Price adjustments in regard to unforeseen liabilities, and net worth, might also be appropriate.

B. Agreement Provisions.

1. The Agreement of Sale in structure and content contains the same basic provisions as the Asset Agreement, by way of review they are the following:

a. Introductory Paragraph;

b. Whereas Clauses;

c. Description of Stock to be Purchased and Purchase Price;

d. Representations and Warranties;

e. Covenants;

f. Conditions of Closing;

g. Indemnification

h. Escrow of Purchase Price;

h. Miscellaneous.

2. Since in this case the Buyer is purchasing in a sense the entire lock stock and barrel, the Seller's representation should be more detailed in regard to some or all of the following matters:

a. Capitalization of the Company

Except as set forth in Schedule 4(b) hereto, the Company has no authorized or outstanding Securities other than its Class A Common Stock, $1.00 par value per share and Class B Common Stock, $1.00 par value per share (the "Common Stock"), which consists of authorized shares Class A Common Stock, of which shares are outstanding and authorized shares of Class B Common Stock, of which are outstanding (the outstanding shares of Class A Common Stock and outstanding shares of Class B Common Stock constitute the "Shares" hereunder). No shares of the Common Stock are reserved for issuance and except for shares of Class B Common Stock, there are no shares in the treasury of the Company.

All of the Shares are duly authorized, validly issued, fully paid and nonassessable. Except as set forth in Schedule 4(b), there are no authorized, issued or outstanding Securities of the Company convertible into shares of the Common Stock, nor are there any outstanding options, warrants, agreements, rights or commitments of any kind relating to the authorized but unissued shares of the Common Stock. All transfer taxes, if any, with respect to transfers of Securities of the Company made prior to the date hereof have been fully paid. Except as set forth in Schedule 4(b), the Shares are owned, both beneficially and of record, by the respective Sellers as described in Schedule 4(b), free and clear of any and all security interests, liens, pledges, claims, charges, escrows, encumbrances, options, subscriptions, warrants, calls, demands, commitments, convertible securities, rights of first refusal, mortgages, indentures, security agreements or other contracts (whether or not relating in any way to credit or the borrowing of money) and the designated owner thereof has the unrestricted right to vote such shares of the Common Stock.

b. The Financial Condition of the Company

(e) Attached hereto as Schedule 4(e)(i) is the balance sheet (the " Balance Sheet") of the Company as of and related statements of operations and deficit and cash flows for the year ending (the Balance Sheet and such related statements are hereinafter referred to collectively as the " Financial Statements"), which have been audited by , independent certified public accountants, and have been prepared in accordance with generally accepted accounting principles consistently applied throughout the periods indicated. Attached hereto as Schedule 4(e)(ii) are the balance sheets (the "Prior Balance Sheets") of the Company as of and related statements of operations

and cash flows for the years ending and (the Prior Balance Sheets and such related statements, together with the Financial Statements, are hereinafter referred to collectively as the "Financial Statements"), which have been reviewed by and have been prepared in accordance with generally accepted accounting principles consistently applied throughout the periods indicated. The Financial Statements (i) are true, correct and complete, (ii) are in accordance with the books and records of the Company, and (iii) fairly, completely and accurately present the financial condition of the Company at the dates specified or the results of its operations for the periods covered. At , the Company had no liability, absolute or contingent, which is not shown on or reserved against on the Balance Sheet. Except as shown or reserved against the Balance Sheet, the Company owns outright, and has good and marketable title to, all of its assets (the "Assets"), free and clear of any mortgage, lien, pledge, charge, claim, conditional sale or other agreement, lease, right or encumbrance of other kind. Each of the Assets is in good operating condition and repair, is adequate and suitable for the purposes for which it is intended in the ordinary course of usage and has been maintained and repaired on a regular basis so as to preserve its utility and value and no expenditure is required to put it in such condition and repair. The Assets include all assets and properties (real, personal and mixed, tangible and intangible) and all rights necessary or desirable to permit the Purchaser to carry on the business of the Company as presently conducted by the Company.

(f) Except as set forth in Schedule 4(f) hereto, since the closing date of the Financial Statements, there have been no adverse changes in the condition (financial or otherwise), assets, liabilities, earnings, properties, business or prospects of the Company and the Company has not:

(i) authorized, issued, sold or converted any Securities, or entered into any agreement with respect thereto;

(ii) declared, set aside, paid or made any dividend or other distribution to stockholders or purchased, redeemed or reclassified any of its capital stock or effected any stock split, stock dividend, exchange or recapitalization or entered into any agreement in respect of the foregoing;

(iii) incurred any damage, destruction or similar loss, whether or not covered by insurance, adversely affecting the business, assets or properties of the Company;

(iv) other than in the ordinary course of business, sold, assigned, transferred or otherwise disposed of any of their tangible or intangible assets or intellectual properties, including, without limitation, any patent, trademark, trade name, copyright, license, franchise, design or other intangible asset or intellectual property right;

(v) other than in the ordinary course of business, mortgaged, pledged, granted or suffered to exist any lien or other encumbrance or charge on any of their assets or properties, tangible or intangible;

(vi) other than in the ordinary course of business, waived any rights of material value or canceled, discharged, satisfied or paid any debt, claim, lien, encumbrance, liability or obligation, whether absolute, accrued, contingent or otherwise and whether due or to become due;

(vii) incurred any obligation or liability (absolute or contingent, liquidated or unliquidated, choate or inchoate), except current obligations and liabilities incurred in the ordinary course of its business;

(viii) other than in the ordinary course of business, leased or effected any transfer of any of the assets, properties or rights of the Company;

(ix) other than in the ordinary course of business and consistent with past practices, entered into, made any amendment of, or terminated any lease, contract, license or other agreement to which the Company is a party;

(x) amended the Articles of Incorporation or the By-laws of the Company;

(xi) effected any change in the accounting practices or procedures of the Company;

(xii) paid, loaned or advanced any amount to, or sold, transferred or leased any properties or assets (real, personal or mixed, tangible or intangible) to, or entered into any agreement, arrangement or transaction of any nature with, any stockholder, any officer or any director of the Company or any business or Entity in which any stockholder, officer or director of the Company or any "affiliate" or "associate" (as such terms are defined in the Rules and Regulations of the Securities and Exchange Commission promulgated under the Securities Act of 1933, as amended) of any such person has any direct or indirect interest, except for regular compensation paid to the stockholders or any affiliates of the stockholders who are also employees of the Company;

(xiii) increased the compensation payable to any of the Company's directors, officers or employees or became obligated to increase any such compensation; or

(xiv) entered into any other transaction other than in the ordinary course of business and consistent with past practices, or changed in any way the business policies or practices of the Company.

c. Tax Matters

(g) The Company has duly filed all foreign, Federal, state, county and local income, excise, sales, property, withholding, social security, franchise, license, information returns and other tax returns and reports required to have been filed by the Company to the date hereof. Each such return is true, correct and complete and the Company has paid all taxing authorities with respect to all periods prior to the date of the Balance Sheet required to have been paid by the Company and created sufficient reserves or made provision for all thereof accrued but not yet due and payable by it. The Company does not have any liability for any taxes, assessments, amounts, interest or penalties of any nature whatsoever, except as reserved against the Balance Sheet and there is

no basis for any additional claim or assessment other than with respect to liabilities for taxes which may have accrued in the ordinary course of business since the date of the Balance Sheet. The Internal Revenue Service has examined and reported on the Federal income tax returns of the Company for all past taxable years through and including the fiscal year ended December 31, _____ (year), no waiver of the statute of limitations has been given with respect thereto and all deficiencies, assessments, interest, penalties and fines proposed, claimed, made or levied as a result of such examinations or otherwise have been paid or settled by the Company, as the case may be. The Company has paid to the proper authorities all customs duties and similar or related charges required to be paid by it with respect to the importation of goods into the United States. No government or governmental authority is now asserting or threatening to assert any deficiency or assessment for additional taxes or any interest, penalties or fines with respect to the Company. Complete and correct copies of the Federal income tax returns of the Company for the year ended December 31, _____ (year), as well as any other tax returns requested by the Purchaser, have been heretofore delivered to the Purchaser.

d. Contracts

(h*) Except only those contracts, agreements and commitments listed and described in Schedule 4(h) hereto (complete and correct copies of each of which have been heretofore delivered to the Purchaser), the Company is not a party to, and has no, contract, agreement or commitment of any kind or nature whatsoever, written or oral, formal or informal, including, without limitation, any (i) sales, advertising, license, franchise, distribution, dealer, agency, manufacturer's representative, or similar agreement, or any other contract relating to the payment of a commission, (ii) pension, profit-sharing, bonus, stock purchase, stock option, retirement, severance, hospitalization, accident, insurance or other similar plan, arrangement or agreement involving benefits to current or former employees, (iii) contract or commitment for the employment of any employee or consultant, (iv) collective bargaining agreement or other contract with any labor union, (v) contract or commitment for services, materials, supplies, merchandise, inventory or equipment, (vi) contract or commitment for the sale or purchase of any of its services, products or assets, (vii) mortgage, indenture, promissory note, loan agreement, guaranty or other contract or commitment for the borrowing of money or for a line or letter of credit, (viii) contract or commitment with any stockholder or any current or former director, officer or employee of the Company which will be in effect on the Closing Date, (ix) contract or commitment with any government or governmental department, agency, bureau or instrumentality thereof, (x) contract pursuant to which its right to compete with any Entity or person in the conduct of its business anywhere in the world is restrained or restricted for any reason or in any way.*

e. Employees

(*t) Schedule 4(t) hereto is a complete and correct list of the names and current annual salary, bonus, commission and perquisite arrangements, written or unwritten, for each director, officer and employee of the Company*

f. Customers

(u) Schedule 4(u) hereto is a complete and correct list of the names and addresses of the [twenty-five (25)] largest customers of the Company during the last fiscal year and the [ten (10)] largest suppliers of the Company during the last fiscal year, and the total sales to, or purchases from, such customers or suppliers made by the Company during the last fiscal year and the salesperson assigned to such customers. No supplier or customer of the Company representing in excess of [two percent (2%)] of the Company's purchases or sales during the last fiscal year has advised the Company or any of the Sellers, formally or informally, that it intends to terminate, discontinue or substantially modify or reduce its business with the Company (i) by reason of the transactions contemplated by this Agreement; or (ii) otherwise.

g. Liability Coverage

(n) Schedule 4(n) hereto is a complete and correct list, together with a brief description (including name of insurer, agent, type of coverage, policy number, annual premium, amount of coverage, expiration date and any pending claims thereunder), of all insurance policies, including, without limitation, liability, burglary, theft, fidelity, life, fire, product liability, workmen's compensation, health and other forms of insurance of any kind held by the Company; each such policy is valid and enforceable, outstanding and in full force and effect; the Company is the sole beneficiary of each such policy; no such policy, or the future proceeds thereof, has been assigned to any other person or Entity; all premiums and other payments due from the Company under, or on account of, any such policy have been paid; there is no act or fact or failure to act which has or might cause any such policy to be canceled or terminated; the Company has given each notice and presented each claim under each such policy and taken any other required or appropriate action with respect thereto in due and timely fashion; and each such policy is adequate for the business in which the Company is engaged. Complete and correct copies of each policy have been heretofore delivered to the Purchaser.

IX. Securities Issues

A. The issuance of stock and also potentially the promissory note of the acquiring corporation in exchange for the assets of the acquired corporation may require registration of the stock under the federal securities laws, unless an exemption is available

B. Possible exemptions include the exemption for purely intrastate transactions, or the exemption for small amounts or limited public offerings, a Reg D offering.

1. Reg D is composed of various rules prescribing the qualifications needed to meet exemptions from registration requirements for the issuance of securities. Rule 501 of Reg

D contains definitions that apply to the rest of Reg D. Rule 502 contains the general conditions that must be met to take advantage of the exemptions under Regulation D.

2. Generally speaking, these conditions are (1) that all sales within a certain time period that are part of the same Reg D offering must be "integrated", meaning they must be treated as one offering, (2) information and disclosures must be provided, (3) there must be no "general solicitation", and (4) that the securities being sold contain restrictions on their resale. Rule 503 requires issuers to file a Form D with the SEC when they make an offering under Regulation D.

3. In Rules 504 and 505, Regulation D implements §3(b) of the Securities Act of 1933 (also referred to as the '33 Act), which allows the SEC to exempt issuances of under $5,000,000 from registration. It also provides (in Rule 506) a "safe harbor" under §4(2) of the '33 Act (which says that non-public offerings are exempt from the registration requirement).

4. In other words, if an issuer complies with the requirements of Rule 506, it can be assured that its offering is "non-public," and thus that it is exempt from registration. Rule 507 penalizes issuers who do not file the Form D, as required by Rule 503. Rule 508 provides the guidelines under which the SEC enforces Regulation D against issuers.

5. On April 5, 2012 President Obama signed into law the Jumpstart Our Business Startups Act, also known as the JOBS Act, which for the first time in over 80 years relaxes investment securities offering rules first enacted during the Great Depression.

C. If the acquiring corporation is a reporting company under the Securities Exchange Act of 1934, it may be required to file a report regarding the transaction with the Securities and Exchange Commission on Form 8-K.

D. If shares of acquiring corporation are not publicly traded, consider advisability of buy-sell agreements among acquiring corporation and new shareholders, and restrictions on transfer of shares issued to new shareholders.

E. If shares of acquiring corporation are publicly traded, securities law must be complied with on any disposition by acquired corporation's shareholders of shares of acquiring corporation issued to them in exchange

F. Of particular note is the fact that shares acquired by virtue of a merger are restricted shares and cannot be readily sold for one year after acquisition. Modest restrictions on transferability also exist thereafter.

G. Rule 144 under the Securities Act provides generally that a security issued in a private transaction will be freely transferrable, after a holding period.

1. If the company that issued the securities is a "reporting company" in that it is subject to the reporting requirements of the Securities Exchange Act of 1934, then you must hold the securities for at least six months.

2. If the issuer of the securities is not subject to the reporting requirements, then you must hold the securities for at least one year.

X. Employment Agreements

A. Overview

1. In many transactions the Buyer will wish to retain the services of one or more of the owners after the closing.

2. This can be because the Buyer wants to smooth the transition with the customer base, or because the individual employed possesses certain expertise which is valuable to the Buyer.

3. Another reason that the Buyer may wish to "employ" one or more of the Seller's ownership group because the amounts paid will produce a current tax deduction for the Buyer. Sellers should understand that such amounts will also be treated as ordinary income.

B. Key Provisions

The key provisions which should be included in any Employment Agreement with a principal of the Seller include the following:

1. Position and Duties

Employment agreement should provide supposedly for the terms of employment stating what for specific duties think expected to perform as well as his or her title and who is to take direction from.

2. Compensation to be Paid

The Agreement should also provide the amount of compensation and the form of the payment as well as specifically when the compensation will be paid.

3. Other Benefits

The agreement should state the type of fringe benefits the employer will provide such as life and health insurance, retirement plan, and other employee benefits.

4. Reimbursement of Expenses

The Agreement should provide the type of expenses that will be reimbursable by the employer, e.g., travel, automobile; entertainment, cell phone.

5. Employee or Independent Contractor

a. The Agreement should address whether the individual employee is to be treated as an independent contractor or employee for tax purposes.

b. The primary factor distinguishing these two relationships is the amount of control exercised, or exercisable, by the employer over the manner in which the work is to be performed. The greater the control, the greater likelihood the worker will be categorized as an employee, not an independent contractor.

c. An employer-employee relationship usually results in greater tax and related obligations for an employer.

d. The employer must withhold income taxes, social security taxes, unemployment insurance contributions, and payroll taxes from the employee's paycheck.

e. In addition, the employer usually pays or contributes to the employee's life and health insurance, retirement plan, and other employee benefits.

f. In contrast, an independent contractor has sole responsibility for paying income taxes and self-employment taxes, obtaining life, health, and disability insurance coverage, and establishing of a retirement arrangement.

6. The Term of Employment and Basis for Early Termination

a. As a general rule, all employment is presumed to be employment-at-will, that is, terminable at will by either party. This presumption may be rebutted by a showing of (1) an agreement for a definite duration, (2) sufficient additional consideration, (3) an agreement specifying that discharge may only be for just cause.

b. The employee will generally want the definition of "cause" to be tightly worded to insure that the agreement cannot be terminate for less than egregious behavior such as conviction of a felony or acts which are materially harmful to the employer.

7. Restrictive Covenants

a. Overview.

(1) An employer may seek to minimize business competition by including in the employment contract a provision prohibiting the employee from engaging in competitive activities after termination of his or her employment agreement.

(2) This type of provision usually prohibits the employee from working for a competitor of the employer as well as from establishing a competing business.

(3) It might also include a provision protecting the trade secrets of an employer from an ex-employee's unlicensed.

b. Enforceability

For a noncompetition covenant to be enforceable, it must (1) relate to (be ancillary to) the employment contract, (2) be supported by adequate consideration, (3) be designed to protect a legitimate business interest of the employer, and (4) be reasonably limited in territory and duration.

c. Issues to be Addressed

(1) The objective of a Covenant Not to Compete is to protect the business acquired from competition by the Seller.

(2) A well drafted covenant Not to Compete should address the following issues:

(a) The duration of the restrictive covenants,

(b) The geographic scope of the noncompetition provisions,

(c) A description of the what is a "competing business" and

(d) The percentage of ownership that the seller may own of a company that is engaged in a competing business.

(3) It is important examine state law in order to ascertain what will held as “reasonable” in a particular jurisdiction.

(a) Care must be taken in drafting language that relates to the scope of noncompetition provisions.

(b) If the restriction is drawn too broadly in terms of duration, the geographic scope, or the definition of "competing business”, then the covenant is more likely not to be upheld by the court. In some jurisdictions courts will not revise overreaching restrictive covenants but will strike them completely.

(c) Also some consideration should be given to the question of just who should be bound by the covenant. In certain cases key employees should be included along with owners. In certain cases the Covenant should also prohibited the hiring of key employees by the Seller or related entities

d. Arbitration

(1) The parties to an employment contract may include a written provision in their contract under which they agree to submit to arbitration any controversy that may arise out of the contract.

(2) Alternatively, at the time a controversy actually arises, the parties may enter into a written agreement to submit that controversy to arbitration.

(3) Whether the arbitration agreement is part of the parties’ original contract or a separate agreement, it is valid, enforceable, and irrevocable, except on grounds that exist at law or in equity relating to the validity, enforceability, or revocation of any contract

XI. Secured Notes

A. Overview

1. In many cases the Seller will be willing to or have to accept the Buyer’s promissory note, or other debt instrument, as the consideration.

2. Most promissory notes will include provisions that (a) require the buyer to pay interest, (b) allow the buyer to prepay without penalty and (c) accelerate upon the occurrence of an event of default, which should be clearly defined in the promissory note.

3. The actual terms and conditions of the promissory note will be set forth on the note itself and should be attached to the acquisition agreement in substantially final form.

4. If the buyer is party to a credit agreement, it may be prohibited from giving seller a promissory note because such agreements usually limit buyer’s ability to incur additional debt or grant liens on its property. Even if the credit agreement does not prohibit

buyer from entering into a promissory note, it may require that all of buyer's debt be subordinated to the debt evidenced by the credit agreement.

5. Issues to be addressed in preparation of the Note:

a. Recourse or Non-Course

b. Collateral and Security

c. Confession of Judgment

d. Performance obligations

e. Events of default and Right to cure

f. Right of Set Off

6. Issues to be Addressed in preparation of the Security Agreement

a. Identity of the Collateral

b. Perfection of the Security Interest

b. Ongoing Obligations of the Debtor

c. Events of Default

6. Guaranty and Suretyship

7. Cross Collateralization

B. Key Provisions – The following are key provisions which should be included in the promissory note.

1. Time of Payment

The Note should provide when it is payable, either: (a) on demand; (b) at definite time. In agreed by the parties include time extensions if desired.

2. To Whom payable.

Payable to order of identified person; or payable to an identified person or order.

3. Identify the Makers and how they share of the liability.

If there multiple makers, state how they are liable: (a) jointly liable; (b) severally liable, (c) jointly and severally liable.

4. State the Interest Rate and the Repayment terms.

a. Principal and interest due in one payment;

b. Principal and interest due in installments.

(1) Installments of interest only with principal due at specified date.

(2) Installments of principal and interest: (a) with interest due on unpaid balance, and (b) with interest fully amortized over term of note.

(3) Partially amortized installments with "balloon" payment of principal balance due at specified date.

(4) Interest-extra note with separate installments of principal and interest.

(5) Discount note with interest subtracted from principal balance.

(6). Notes in a series.

5. Define "Default and Include acceleration clause.

6. Specify place of payment.

7. Provide for late charges.

8. Include prepayment provision

Either: (a) provision for prepayment penalty; or (b) provision permitting prepayment by maker

9. If the Note is secured:

a. Refer to existence of separate security agreement;

b. Do not state that note is subject to or governed by separate security agreement.

c. Draft clause referring to or describing collateral.

d. Include promise or power to maintain or protect

e. If desired, include provision requiring debtor to give additional collateral if initial collateral declines in value.

f. Include provision specifying rights of secured party in regard to collateral on default.

10. If desired limit payment to specified fund or source.

11. Include provision waiving presentment, and notice of.

12. If desired, include provision requiring payment in foreign currency.

13. Include provision requiring maker to pay collection costs.

14. Include provision specifying that forbearance in exercise of any right is not waiver of right.

15. Include provision by which all parties waive jury trial if desired.

16. Include provision specifying that instrument is to be governed by a particular state law.

17. Include consumer protection notices or legends if required.

B. Set-Off Rights

1. Buyer may also like the idea of using a promissory note for all or a portion of the purchase price in order to ensure that there are funds available against which it can offset any indemnification claims that it may have against seller. In order to protect any set-off rights that it may have, the buyer will want to require that the promissory note be non-negotiable.

2. Most states automatically recognize the right to offset. However, in order to avoid any future dispute, buyer's lawyer should ensure that this right is clearly set forth in the promissory note.

C. Security

1. Overview.

a. Depending upon the financial condition of Buyer, Seller may want to require some form of security on the promissory note. Seller could consider demanding a security interest in Buyer's assets, a letter of credit or a guaranty from a third party.

b. Alternatively, seller could require Buyer to pledge the target's stock or assets as security for payment of the note. Any security arrangement should be evidenced by a security agreement, letter of credit, credit agreement or guaranty, which should be attached in substantially final form as an exhibit to the acquisition agreement.

c. Before agreeing to provide any security, Buyer should confirm that there are no prohibitions in its credit agreements that limit its ability to provide such security.

2. Secured Transactions.

a. Overview

(1) A "secured transaction" is one in which a security interest is created.

(2) A "security interest" is an interest in personal property or fixtures that secures payment or performance of an obligation.

(3) The property subject to the security interest is referred to as "collateral."

(4) The agreement that creates or provides for the security interest is referred to as the "security agreement"

(5) The person in whose favor the security interest is created is known as the "secured party."

(6) The person who owes the payment or other obligation secured by the collateral is generally called the “obligor”.

(7) The person having an interest in the collateral, other than the security interest or a lien, is the “debtor,” whether or not that person is also the obligor

(8) Unless otherwise provided in the UCC, a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditor

b. The Uniform Commercial Code

(1) Attachment and perfection are two important events in the creation of a security interest.

(2) Attachment occurs when the security interest becomes enforceable by the secured party against the debtor with respect to the collateral involved.

(3) Perfection occurs when the secured party establishes his or her priority rights in the collateral over other parties with interests in the same collateral. Perfection usually results from the filing of a financing statement, but other methods may be used.

(4) In general, a security interest becomes enforceable against the debtor and third parties with respect to the collateral only if (a) value has been given; (b) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and (c) either the debtor has authenticated a security agreement or the secured party has possession or control over the collateral

c. Value.

(1) A secured transaction is a contract between the debtor and the secured party. Like most contracts, there must be an exchange of consideration between the parties. In other words, there must be an exchange of value.

(2) In the case of secured transactions, the value given by the secured party is usually obvious. For example, a bank gives value to a debtor when, in conjunction with a security agreement, it loans money to the debtor to buy inventory. Similarly, a seller gives value to a debtor when, in conjunction with a security agreement, it sells equipment to the debtor.

d. Debtor’s rights in collateral.

(1) A business may have rights in collateral either by owning the collateral prior to the secured transaction or by purchasing the collateral as part of a secured transaction.

(2) When a business already owns certain property, it should be clear that the business has rights in that property, and can use it as collateral.

In other cases, a business will buy items (materials, inventory, machinery and so on) on credit and want to use those same items as collateral.

(3) In such cases, the business will sign a conditional sales contract, which is also considered a security agreement, and which, under UCC sales rules, will give the business the necessary rights in the purchased items to use them as collateral.

e. Security Agreement.

(1) For purposes of attachment, the debtor must "authenticate" a security agreement. In other words, the debtor must sign the agreement. (The UCC uses the term "authenticate" to include the possibility of electronic signatures.)

(2) A security agreement normally will contain a clear statement that the debtor is granting the secured party a security interest in specified goods.

(3) The UCC recognizes that some security agreements are quite complex, and, therefore, has various special rules regarding certain possible agreement terms.

(a) To take just one example, a security agreement may include a clause that the collateral is to include property that the debtor acquires after the agreement is signed.

(b) For the most part, the UCC allows parties to use "after-acquired property" as collateral; however, the UCC does not allow after-acquired consumer goods to serve as collateral.

f. Perfection

(1) A secured party perfects a security interest in order to help assure that no other party, such as another creditor or a bankruptcy trustee, will be able to claim the same collateral in the event that the debtor becomes insolvent. By perfecting its security interest, a secured party seeks to gain *priority* over other parties regarding the collateral.

(2) The precise details of how to perfect a security interest depend in part on the local jurisdiction where the collateral is located. However, generally speaking, the primary ways for a secured party to perfect a security interest are:

(a) By filing a financing statement with the appropriate public office

(b) By possessing the collateral

(c) By "controlling" the collateral; or

(d) it's done automatically upon attachment of the security interest.

g. Financing statement.

(1) Security interests for most types of collateral are usually perfected by filing a document known simply as a financing statement.

(2) The purpose of the financing statement, which is filed with a public office such as the Secretary of State, is to put other people on notice of the secured party's security interest in the collateral.

(3) The UCC specifies what must be contained in a financing statement:

(a) The name of the debtor

(b) The name of the secured party; and

(c) An indication of the collateral.

(4) Regarding the first of these items, it is important that the name of the debtor be sufficiently specific and accurate, because financing statements are filed under the debtor's name. If the name on the statement is wrong, the statement will fail to provide adequate notice to others, and will not succeed in perfecting the security interest.

(5) The second required item on the statement, the name of the secured party, is generally a straightforward matter.

(6) Finally, as to the third item, the rules for indication of collateral on the financing statement are largely the same as for the description of collateral on a security agreement (see above). However, unlike with a security agreement, on a financing statement it *is* acceptable to use a "supergeneric" description of collateral.

(7) A standard form, known as Form UCC-1, is widely used by secured parties to file a financing statement.

h. Possession.

(1) A security interest in many types of collateral, including "negotiable documents, goods, instruments, money, or tangible chattel paper," may be perfected by the secured party possessing the collateral.

(2) However, so-called "intangible" collateral, such as accounts receivable, cannot be perfected by possession.

(3) While "possession" is not directly defined by the UCC in this context, it does appear to include possession not only by the secured party but also by an agent of the secured party.

i. Control**.**

(1) The UCC states that, "A security interest in investment property, deposit accounts, letter-of-credit rights, or electronic chattel paper may be perfected by control of the collateral

(2) ” The meaning of “control” can vary depending on which type of collateral is involved. For example, a secured party may have control of a deposit account if the bank, the debtor and the secured party have all agreed that the secured party may handle the funds in that account “without further consent by the debtor.”

(3) As another example, a secured party has control over investment property, such as securities (shares of stock or the like), if the property is delivered to the secured party, and, if necessary, “endorsed” (signed) to the secured party.

j. Automatically upon attachment**.**

(1) The most important type of security interest that is perfected immediately upon attachment is what is known as a purchase-money security interest (“PMSI”) in consumer goods.

(2) A PMSI generally involves either:

(a) a debtor buying an item on credit from a seller where the seller will be the secured party; or

(b) a debtor using a loan from a bank directly to buy an item from a seller, where the bank will be the secured party.

(c) When the debtor in one of these circumstances is buying consumer goods, the secured party (seller or bank) does not need to file a financing statement in order to perfect the security interest.

(d) Note, however, that, while it may not be necessary to file a financing statement, not all security interests in PMSIs in consumer goods are perfected upon attachment. For example, some statutes governing certificates of title, such as for cars, require that a security interest be indicated on the certificate in order for the interest to be perfected. Finally, be aware that the UCC states that perfection occurs automatically upon attachment for about a dozen other relatively unusual types of collateral. (For more information, check

k. Importance of Classification of Collateral.

(1) Different procedures regarding attachment and perfection exist for different types of collateral.

(2) In addition, resolution of conflicting security interests in the collateral may depend on the classification of the collateral

(3) Types of Collateral -

(a) Goods – Including (i) consumer goods; (ii) farm products; (iii) inventory; (iv) equipment; (v) fixtures.

(b) Documents.

(c) Instruments.

(d) Chattel Paper.

(e) Accounts.

(f) General Intangibles and Payment Intangibles.

(g) Investment Property.

(h) Letter-of-Credit Right.

(i) Deposit Account.

(j) As-Extracted Collateral.

(k) Commercial Tort Claim.

3. The Security Agreement

a. If person other than the debtor will be owner of collateral, identify that person.

b. Identify secured party.

c. Describe collateral sufficiently to reasonably identify it.

(1) A security agreement normally will contain a clear statement that the debtor is granting the secured party a security interest in specified goods.

(2) The agreement also must provide a *description* of the collateral. Section 9-108 of the UCC indicates generally that a description of collateral is sufficient "if it reasonably identifies what is described."

(3) The same section then goes on to provide a half-dozen different possibilities for a reasonable identification, such a "specific listing," a "category," or a "quantity."

(4) While the description of collateral in a security agreement may not need to be finely detailed, the UCC prohibits descriptions of collateral that are "supergeneric," such as "all the debtor's assets" or "all the debtor's personal property."

d. If desired, include provisions such as following:

(1) Statement of indebtedness and terms of repayment.

(2) Statement that debtor has rights in collateral, describing rights and specifying time when debtor will acquire rights.

(3) Provision clarifying grant of security interest.

(a) If security interest is being given to secure obligation of debtor, clearly show parties' intent not to make absolute transfer of title to secured party.

(b) If transaction is outright sale of accounts or chattel paper, state that debtor (seller) transfers legal title to collateral to secured party (buyer).

(4) Provision that all proceeds of collateral are collateral under security agreement

(5) If collateral is goods that are to be incorporated into product or mass, provision that product or mass is included as part of collateral.

(6) Provision extending security agreement to property acquired subsequently by debtor ("after-acquired" property).

(7) Provision extending security agreement to future advances to be made by secured party to debtor if parties so intend.

(8) Provisions regarding preservation of collateral, such as:

(a) Secured party's right to inspect collateral.

(b) Debtor's obligation to assemble collateral and make it available for inspection by secured party.

(c) Limitations on location of collateral or on debtor's use of collateral.

(d) Duty to insure against loss of or damage to collateral.

(e) Debtor's duty to protect, maintain, and repair collateral.

(f) Debtor's duty to maintain collateral free of taxes, liens, and other obligations.

(g) Debtor's duty to reimburse secured party for expenses incurred in protecting collateral.

(h) If secured party will have possession of collateral, modification of statutory duties with respect to collateral.

(9) If collateral is inventory, provision setting forth duties and rights of debtor regarding sales or other disposition of inventory.

(10) If collateral are accounts or instruments:

(a) Provision setting forth duties and rights of debtor regarding collection and compromise of accounts.

(b) If desired, provision allowing secured party to make collections under instruments or accounts regardless of whether debtor defaults on note secured by security agreement.

(c) Provision specifying whether secured party who makes collections on accounts or instruments can charge debtor for any uncollectible collateral and for reasonable expenses of any collections made.

(11) Provision limiting secured party's right to assign security interest, specifying:

(a) Effect of attempted assignment.

(b) Debtor's right to receive notice of assignment.

(12) Provision that, as against future good-faith assignees of security interest for value, debtor waives any claim or defense that may exist against original secured party.

(13) If the collateral is consumer goods, however, the enforceability of an express or implied waiver may be limited by court decisions or statutes.

(14) If transaction is to create purchase money security interest, provisions modifying warranties and limitations otherwise applicable under Article 2 of Uniform Commercial Code.

(15) Default provisions, such as:

(a) Provision defining events of default.

(b) Provision specifying reasonable standards by which parties will measure fulfillment of debtor's statutory rights.

(c) Provision indicating whether or under what circumstances acceleration of obligation will take place.

(d) Provision defining curable defaults.

(e) Provision that waiver of event of one default does not act as waiver of future events of default.

(f) If desired, provisions supplementing or modifying secured party's statutory remedies:

e. Provision that, on debtor's satisfaction of debts or other obligations, agreement expires and security interest terminates.

f. Do not waive or vary rules stated in sections dealing with:

(1) Use and operation of collateral by secured party.

(2) Requests for an accounting and requests concerning list of collateral and statement of account.

(3) Collection and enforcement of collateral.

(4) Application or payment of noncash proceeds of collection, enforcement, or disposition.

(5) Accounting for or payment of surplus proceeds of collateral.

(6) Imposing on secured party that takes possession of collateral without judicial process duty to do so without breach of peace.

(7) Disposition of collateral.

(8) Calculation of deficiency or surplus when disposition is made to secured party, person related to secured party, or secondary obligor.

(9) Explanation of calculation of surplus or deficiency.

(10). Acceptance of collateral in satisfaction of obligation.

(11) Redemption of collateral.

(12) Permissible waivers.

(13) Secured party's liability for failure to comply with UCC provisions governing secured transactions.

XII. Required Notices

A. Hart-Scott-Rodino

1. Overview

The Hart–Scott–Rodino Antitrust Improvements Act of 1976, provides that parties must not complete certain mergers, acquisitions or transfers of securities or assets, including grants of executive compensation, until they have made a detailed filing with the U.S. Federal Trade Commission and Department of Justice and waited for those agencies to determine that the transaction will not adversely affect U.S. commerce under the antitrust laws

2. Pre-merger notification

a. The Act provides that before certain mergers, tender offers or other acquisition transactions (including certain grants of executive compensation) can be completed, both parties must file a "Notification and Report Form" with the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice.

b. The filing must describe (15-days for all-cash tender offers) then ensues during which time those regulatory agencies may request further information in order to help them assess whether the proposed transaction violates the antitrust laws of the United States or could cause an anti-competitive effect in the parties' markets.

c. The filing is not made public, but the agencies may disclose some information about the transaction, especially in the case of publicly announced transactions.[1]

d. Failure to file the form carries a civil penalty of up to $16,000 per day against the parties, their officers, directors or partners, and the agencies may obtain an order requiring an acquiror to divest assets or securities acquired in violation of the Act. It is also unlawful to complete the transaction during the waiting period, and the same penalties apply.

3. When the notification is required

a. The filing requirement is triggered only if the value of the transaction and, in some cases, the size of the parties, exceeds certain dollar thresholds, which are adjusted periodically under the Act.

b. For the purpose of determining the "size of the parties", one assesses the size of the party's ultimate parent entity and all subsidiaries of that entity. The general rule is that a filing is required if three tests are met;

(1) The transaction affects U.S. commerce;

(2) Either

(a) one of the parties has annual sales or total assets of $151.7 million or more as of 2014, and the other party has sales or assets of $15.2 million or more (where an acquired person is not engaged in manufacturing, only its total assets, not its sales, are counted, unless its sales are over $151.7 million); or

(b) the amount of stock the acquirer has is valued at $272.8 million or more [As of 2012-amount adjusts periodically] at any time; and

(3) The value of the securities or assets of the other party held by the acquirer after the transaction is $68.2 million or more.

B. WARN

1. Either an Asset Sale or a Stock Sale can give rise to notice obligations under the Worker Adjustment and Retraining Notification ("WARN") Act.

2. The WARN Act requires domestic U.S. employers with 100 or more employees to provide 60 days advance notice of a "plant closing" or "mass layoff" to each "affected employee" or their bargaining representatives, as well as to local government officials.

3. Failure to comply subjects the employer to liability for back pay and benefits for each affected employee, up to a maximum of 60 days.

a. There is no particular form of notice required, but the notice must be in writing.

b. Additionally, notice must be specific and sufficiently definite. Notice must be delivered in a manner reasonably calculated to arrive at least 60 days prior to the date of the anticipated termination.

4. While the WARN Act does not supersede other laws or contracts that provide heightened notice requirements, those portions of a collective bargaining agreement that seek to reduce employee rights under the WARN Act are invalid.

5. However, waivers that release employers from liability after a WARN Act violation has occurred have been upheld when employees had sufficient time to consult with an attorney and were paid adequate consideration.

C. Take Over Notification

1. In Pennsylvania the Takeover Disclosure Act requires certain persons purchasing equity securities of any corporation incorporated in Pennsylvania or having its principal office and substantial assets located in Pennsylvania to make full and fair disclosure to offerees of all material information in regard to takeover offers.

2. A “takeover offer” is the acquisition of, or offer to acquire, any equity security of a target company, pursuant to a tender offer, if after the acquisition the offeror would, directly or indirectly, be a beneficial owner of more than 5 percent of any class of the outstanding equity securities of the target company.

3. Information and disclosure statements regarding a takeover offer must be filed with the Pennsylvania Securities Commission and disclosures must be made to the target company and to that company’s employee representatives prior to making the offer.