2. Sale and Transfer of Assets; Closing

2.1 ASSETS TO BE SOLD

Upon the terms and subject to the conditions set forth in this Agreement, at the Closing, but effective as of the Effective Time, Seller shall sell, convey, assign, transfer and deliver to Buyer, and Buyer shall purchase and acquire from Seller, free and clear of any Encumbrances other than Permitted Encumbrances, all of Seller's right, title and interest in and to all of Seller's property and assets, real, personal or mixed, tangible and intangible, of every kind and description, wherever located, including the following (but excluding the Excluded Assets):

(a) all Real Property, including the Real Property described in Parts 3.7 and 3.8;
(b) all Tangible Personal Property, including those items described in Part 2.1(b);
(c) all Inventories;
(d) all Accounts Receivable;
(e) all Seller Contracts, including those listed in Part 3.20(a), and all outstanding offers or solicitations made by or to Seller to enter into any Contract;
(f) all Governmental Authorizations and all pending applications therefor or renewals thereof, in each case to the extent transferable to Buyer, including those listed in Part 3.17(b);
(g) all data and Records related to the operations of Seller, including client and customer lists and Records, referral sources, research and development reports and Records, production reports and Records, service and warranty Records, equipment logs, operating guides and manuals, financial and accounting Records, creative materials, advertising materials, promotional materials, studies, reports, correspondence and other similar documents and Records and, subject to Legal Requirements, copies of all personnel Records and other Records described in Section 2.2(g);
(h) all of the intangible rights and property of Seller, including Intellectual Property Assets, going concern value, goodwill, telephone, telecopy and e-mail addresses and listings and those items listed in Parts 3.25(d), (e), (f) and (h);

(i) all insurance benefits, including rights and proceeds, arising from or relating to the Assets or the Assumed Liabilities prior to the Effective Time, unless expended in accordance with this Agreement;

(j) all claims of Seller against third parties relating to the Assets, whether choate or inchoate, known or unknown, contingent or noncontingent, including all such claims listed in Part 2.1(j); and

(k) all rights of Seller relating to deposits and prepaid expenses, claims for refunds and rights to offset in respect thereof that are not listed in Part 2.2(d) and that are not excluded under Section 2.2(h).

All of the property and assets to be transferred to Buyer hereunder are herein referred to collectively as the "Assets."

Notwithstanding the foregoing, the transfer of the Assets pursuant to this Agreement shall not include the assumption of any Liability related to the Assets unless Buyer expressly assumes that Liability pursuant to Section 2.4(a).

COMMENT

The identities of the specific assets to be transferred and the liabilities to be assumed (see Section 2.4) are the heart of an asset purchase transaction. The acquisition agreement and the disclosure letter should identify, in detail, those assets the buyer will acquire. The mechanism used for this identification will depend in part upon the amount of detail the parties desire, the nature of the assets involved and the status of the buyer's due diligence at the time the acquisition agreement is finalized. The identification could be guided by a consideration of which assets listed on the balance sheet the buyer intends to purchase. The asset description could also be used as part of the buyer's due diligence investigation or to confirm that investigation. To this end, the buyer could give the seller an exhaustive list of assets and leave it to the seller to tailor the list to fit the assets the seller has and considers part of the assets to be sold.

The Model Agreement initially describes the assets to be acquired in a general way, followed by a categorization into the groupings listed in Section 2.1. This general description is further supplemented, to the extent appropriate, by reference to Parts of the Disclosure Letter to list or describe particular items within certain groupings. This method works well when the buyer's due diligence is well under way at the time the acquisition agreement is finalized and allows the parties to specify, for example, which particular contracts buyer will acquire.

Alternatively, the parties might omit any specific identification or description and describe the acquired assets only by categorizing them into general groupings. Although the parties should always pay close attention to the definition of Excluded Assets, the mechanism by which the assets that are excluded from the transaction are described assumes even greater significance when the acquired assets are described in only a general way.

The interplay between the section that lists acquired assets and the section that lists the excluded assets also requires close attention. The Model Agreement specifically provides that the listing of Excluded Assets set forth in Section 2.2 takes priority over the listing of Assets set forth in Section 2.1. This priority is established both by the parenthetical at the end of the introductory paragraph of Section 2.1 and the language at the beginning of Section 2.2. As a result, particular care needs to be given to the listing of excluded assets because that list will control in any situation in which a particular asset could be both an asset and an excluded asset.

The categories of assets in Section 2.1 are described using a combination of defined terms and specific descriptions. This approach represents a blend of two extremes: (a) defining all terms elsewhere and using only the defined terms in Section 2.1 and (b) placing the complete description of all assets in Section 2.1 with the definitions at the end of each category. In the Model Agreement, defined terms are used to cover categories of assets where that defined term is used elsewhere in the Model Agreement (for example, in the representations). Reference is made to the definitions of the various defined terms used in Section 2.1 and the related Comments for further description of the scope of those terms. If no defined term is needed elsewhere in the Model Agreement, a specific description of the category of assets is used. Where defined terms are used, the definitions need to be carefully drafted to transfer only the assets intended and to ensure that the defined terms are used consistently throughout the Agreement.

For example, Buyer is purchasing all of Seller's "Tangible Personal Property," a term that includes personal property owned or leased by Seller (see Section 2.1(b)). Therefore, because Buyer is purchasing all leased personal property, the associated lease contracts should be listed on the Part of the Disclosure Letter referred to in Section 2.1(e), should not be listed on Exhibit 2.2(f), which identifies Excluded Assets and should be listed on the Part of the Disclosure Letter referred to in Section 2.4(a)(v).

Whether a defined term or a specific description is utilized, the buyer can reduce the risk that an unlisted item will be excluded from the acquired assets by using such language as "including." Although Section 1.2(a)(vii) expressly recognizes that the word "including" does not limit the preceding words or terms, the rule of ejusdem generis has been applied to construe the meaning of a broad phrase to include only matters that are of a nature similar to those specifically described. See the Comment to Section 1.2.

If there are specific assets that are of significant importance to the buyer, the buyer may want to specifically list those assets instead of relying on an introductory "catch-all" phrase or any "including" clause that lists assets of a similar type. For example, if a seller owns subsidiaries, the buyer may want to specifically identify stock of the subsidiaries as assets in Section 2.1. Similarly, if the seller owns or has access to certain business development assets, such as luxury boxes, event tickets or the like, the buyer may want to specifically identify those assets as well.

Under Section 2.1(i), all insurance benefits are transferred to Buyer unless expended in accordance with the terms of the Model Agreement. In most asset acquisitions, insurance policies are not transferred primarily because such policies typically may not be transferred without the consent of the insurance company. Transferable policies, however, may be purchased. This delineation requires the parties to review the seller's policies to determine whether each is transferable. The approach taken in the Model Agreement is that the policies themselves stay with Seller, but all unexpended benefits are transferred. Given this split and the typical nontransferability language in insurance policies, the buyer may need to utilize the further assurances clause set forth in Section 10.11 and rely on the seller to take certain actions on behalf of the buyer to receive any insurance proceeds. Note that only insurance benefits relating to the Assets and Assumed Liabilities are transferred. Therefore, life insurance under "key man" policies would not be transferred. Finally, the buyer would receive no rights under this section to the extent the seller self-insures with respect to a certain risk. The parties would need to adjust this provision, however, if the seller had another variant of self-insurance where an insurance policy covers the risk at issue, but the insured agrees to reimburse the insurance company dollar for dollar for any claims. Under Section 2.1(i), the benefits under such a policy would transfer to the buyer, and the seller would be left with the reimbursement obligation. The parties and their insurance consultants usually will be able to structure reasonable insurance backup mechanisms as joint protection for pre-closing occurrences, or, failing that, the buyer may require a substantial escrow or setoff right to cover these risks. See Sections 2.7 and 11.8.

Section 2.1(k) provides that the rights of Seller with respect to deposits and prepaid expenses, and claims for refunds and rights to offset relating thereto, are included in the Assets unless specifically excluded. The term "prepaid expenses" is an accounting term and is used in that sense. Accounting reference materials will, therefore, be helpful in the application of this term. Finally, note that this section provides that it is Seller's rights that are to be sold rather than the actual deposits, prepaid expenses and related items.

In many asset purchase transactions, including the transaction outlined under the Fact Pattern upon which the Model Agreement is predicated, the buyer is seeking to acquire a business and all of the seller's operating assets necessary to conduct the business. Because the Fact Pattern assumes the acquisition of all of Seller's operating assets, the Model Agreement does not attempt to define the "business" to be acquired or include in Section 2.1 a statement to the effect that the Assets include all of the assets of Seller's business. See, however, the representation in Section 3.6.

Many drafters prefer to include a defined term "Business" and a catch-all statement to the effect that the Assets include all of the properties and assets of any kind or nature used in the Business. This approach is particularly useful (and may be necessary) in situations where the buyer is acquiring a division of the seller (see Appendix C regarding the importance of the definition of the "business" in the acquisition of a division). If this approach were used, the lead-in to Section 2.1 could be revised, and a new subsection (l) could be added to Section 2.1, to read as follows:

> **Upon the terms and subject to the conditions set forth in this Agreement, at the Closing and effective as of the Effective Time, Seller shall sell, convey, assign, transfer and deliver to Buyer, and Buyer shall purchase and acquire from Seller, free and clear of any Encumbrances other than Permitted Encumbrances, all of Seller's right, title and interest in and to all of Seller's property and assets, real, personal or mixed, tangible and intangible, of every kind and description, wherever located, belonging to Seller and which relate to the business currently conducted by the ____________ Division of Seller as a going concern, including the design, manufacture and sale of its products and the furnishing of advisory and consulting services to customers as well as any goodwill associated therewith (the "Business"), including the following (but excluding the Excluded Assets):**

* * *

(l) all other properties and assets of every kind, character and description, tangible or intangible, owned by Seller and used or held for use in connection with the Business, whether or not similar to the items specifically set forth above.

See also Section 3.6 and the related Comment.

2.2 EXCLUDED ASSETS

Notwithstanding anything to the contrary contained in Section 2.1 or elsewhere in this Agreement, the following assets of Seller (collectively, the "Excluded Assets") are not part of the sale and purchase contemplated hereunder, are excluded from the Assets and shall remain the property of Seller after the Closing:

(a) all cash, cash equivalents and short-term investments;
(b) all minute books, stock Records and corporate seals;
(c) the shares of capital stock of Seller held in treasury;
(d) those rights relating to deposits and prepaid expenses and claims for refunds and rights to offset in respect thereof listed in Part 2.2(d);
(e) all insurance policies and rights thereunder (except to the extent specified in Section 2.1(i) and (j));
(f) all of the Seller Contracts listed in Part 2.2(f);
(g) all personnel Records and other Records that Seller is required by law to retain in its possession;
(h) all claims for refund of Taxes and other governmental charges of whatever nature;
(i) all rights in connection with and assets of the Employee Plans;
(j) all rights of Seller under this Agreement, the Bill of Sale, the Assignment and Assumption Agreement, the Promissory Note and the Escrow Agreement; and
(k) the property and assets expressly designated in Part 2.2(k).

COMMENT

As with the description of the assets to be acquired, the parties should always pay close attention to the identity of the assets to be excluded from the acquisition and, therefore, not transferred from the seller to the buyer. As with the acquired assets, the excluded assets could be described generally, identified specifically or described using some combination of the two. Whichever method of description is used, it is important that the method chosen be consistent with the method used to describe the acquired assets.

In general, the Model Agreement uses general descriptions to categorize the Excluded Assets. One of these descriptions, Section 2.2(e), is qualified by reference to the Assets to reflect that, in general, this category of assets is to be retained by Seller, but selected assets are to be acquired by Buyer. Sections 2.2(d) and 2.2(f) reflect the opposite approach. Each category of assets described in these sections is to be acquired by Buyer, and only selected assets are to be retained by Seller. Through Part 2.2(k), however, the Model Agreement also provides for the specific identification of certain assets to be retained by Seller, which do not fit within a general category and do not merit a special category or identification in the text of the Agreement.

The description of excluded assets must also be consistent with the description of the assumed and excluded liabilities. For example, Section 2.2(i) of the Model Agreement provides that Seller will retain all rights and assets relating to the Employee Plans. Correspondingly, Section 2.4(b)(vi) of the Model Agreement provides that Seller will retain all Liabilities relating to the Employee Plans.

A number of the categories are designated as Excluded Assets because Seller will continue in existence as an independent company after the Closing of the transactions contemplated by the Model Agreement. Seller should retain all of its rights under the Model Agreement and related documents. Also in this category are Seller's minute books, stock records and corporate seal, all of which are properly retained by the seller in an asset purchase, as well as personnel Records and other Records Seller is legally required to retain. The buyer, however, may want to ensure that it has access to these retained items and the ability to make copies to address post-closing matters. The buyer should also specify where this inspection will occur because the seller may liquidate and move the records to an inconvenient location. Finally, the buyer may want the right to obtain these items if the seller ever decides to discard them. The Model Agreement provides that Buyer will receive a copy of certain of these items in subsection 2.1(g). See Section 10.10 and the related Comment.

Section 2.2(a) reflects the norm in asset purchase transactions that a buyer typically will not buy cash and cash equivalents. There usually is no reason to buy cash because this simply would have a dollar-for-dollar impact on the purchase price, and excluding cash provides logistical simplicity. There may be situations, however, when the purchase of cash should be considered. First, the logistics of the particular transaction may be such that purchasing cash is easier. For example, when purchasing a chain of retail stores, it may be easier to buy the cash in the cash registers rather than collecting all the cash and then restocking the registers with the buyer's cash. Second, the buyer may be able to buy cash for a note with deferred payments. This would provide the buyer with immediate working capital without requiring the infusion of additional capital—in essence, a form of seller financing.

A buyer may at times include a category in Section 2.2 that would authorize the buyer, in its discretion, to designate certain of the seller's property or assets as excluded assets, often without altering the purchase price or other terms of the agreement. This right typically can be exercised from the signing of the agreement until shortly before closing. The buyer may request such a right to allow the buyer the greatest benefit from its due diligence analysis (which typically continues up to the closing). The seller may desire to carefully review the breadth of this right because the buyer's decision to exclude assets may materially change the deal for the seller, particularly if the seller is exiting the business. For example, there may be assets that the seller would no longer want or that are worth less than the related operating costs or real estate, which may be subject to environmental problems. If the seller agrees to this kind of provision, the seller may insist upon a right to renegotiate the purchase price depending upon the assets left behind. As an alternative to renegotiating the purchase price, the seller may request limitation of the proposed exclusion right so that the buyer could not exclude certain assets, which could include assets that neither party wants. Whether the buyer will have the ability to insist on the inclusion of this provision is a matter of the parties' relative bargaining positions.

2.3 CONSIDERATION

The consideration for the Assets (the "Purchase Price") will be (a) ____________ dollars ($________) plus or minus the Adjustment Amount and (b) the assumption of the Assumed Liabilities. In accordance with Section 2.7(b), at the Closing, the Purchase Price, prior to adjustment on account of the Adjustment Amount, shall be delivered by Buyer to Seller as follows: (a) ________ dollars ($________) by wire transfer; (b) ________ dollars ($________) payable in the form of the Promissory Note; (c) _____ dollars ($________) paid to the escrow agent pursuant to the Escrow Agreement; and (d) the balance of the Purchase Price by the execution and delivery of the Assignment and Assumption Agreement. The Adjustment Amount shall be paid in accordance with Section 2.8.

COMMENT

In Section 2.3 of the Model Agreement, the consideration to be paid by Buyer for the assets purchased includes both a monetary component and the assumption of specific liabilities of Seller. In addition to the consideration set forth in Section 2.3, Seller and Shareholders may receive payments under noncompetition and employment agreements. If an earnout, consulting, royalty or other financial arrangement is negotiated by the parties in connection with the transaction, additional value will be paid.

The amount a buyer is willing to pay for the purchased assets depends upon several factors, including the seller's industry, state of development and financial condition. A buyer's valuation of the seller may be based upon some measure of historical or future earnings, cash flow or book value (or some combination of revenues, earnings, cash flow and book value) as well as the risks inherent in the seller's business. A discussion of modern valuation theories and techniques in acquisition transactions is found in Thompson, *A Lawyer's Guide to Modern Valuation Techniques in Mergers and Acquisitions*, 21 J. CORP. L. 457 (Spring 1996). *See also* DICKIE, FINANCIAL STATEMENT ANALYSIS AND BUSINESS VALUATION FOR THE PRACTICAL LAWYER (1998). The monetary component of the purchase price is also dependent in part upon the extent to which liabilities are assumed by the buyer. The range of liabilities a buyer is willing to assume varies with the particulars of each transaction and, as the Comment to Section 2.4 observes, the assumption and retention of liabilities is often a heavily negotiated issue.

The method of payment selected by the parties depends upon a variety of factors, including the buyer's ability to pay, the parties' views on the value of the assets, the parties' tolerance for risk and the tax and accounting consequences to the parties (especially if the buyer is a public company). See the Comment to Section 10.2 and Appendix B for a discussion of the tax aspects of asset acquisitions and the Comment to Section 2.5 for a discussion of the allocation of the purchase price. The method of payment may include some combination of cash, debt and stock and may also have a contingent component based upon future performance. For example, if a buyer does not have sufficient cash or wants to reduce its initial cash outlay, it could require that a portion of the purchase price be paid by a note. This method of payment, together with an escrow arrangement for indemnification claims, is reflected in Section 2.3. If the method of payment includes a debt component, issues such as security, subordination and post-closing covenants will have to be resolved. Similarly, if the method of payment includes a stock component, issues such as valuation, negative covenants and registration rights must be addressed.

If a buyer and a seller cannot agree on the value of the assets, they may make a portion of the purchase price contingent upon the performance of the operations following the acquisition. The contingent portion of the purchase price (often called an "earnout") is commonly based upon the assets' earnings over a specified period of time following the acquisition. Although an earnout may bridge a gap between the buyer's and the seller's views of the value of the assets, constructing an earnout raises many issues, including how earnings will be determined, the formula for calculating the payment amount and how that amount will be paid (cash or stock), how the acquired business will be operated, who will have the authority to make major decisions and the effect of a sale of the buyer during the earnout period. Resolving these issues may be more difficult than agreeing on a purchase price. See the form of Earnout Agreement attached as Ancillary Document 4.

The Model Agreement assumes that the parties have agreed on a fixed price, subject only to an adjustment based upon the difference between Seller's Working Capital on the date of the Balance Sheet and the date of the Closing (see Sections 2.8 and 2.9).

2.4 LIABILITIES

(a) *Assumed Liabilities.* On the Closing Date, but effective as of the Effective Time, Buyer shall assume and agree to discharge only the following Liabilities of Seller (the "Assumed Liabilities"):

(i) any trade account payable reflected on the Interim Balance Sheet (other than a trade account payable to any Shareholder or a Related Person of Seller or any Shareholder) that remains unpaid at and is not delinquent as of the Effective Time;

(ii) any trade account payable (other than a trade account payable to any Shareholder or a Related Person of Seller or any Shareholder) incurred by Seller in the Ordinary Course of Business between the date of the Interim Balance Sheet and the Effective Time that remains unpaid at and is not delinquent as of the Effective Time;

(iii) any Liability to Seller's customers incurred by Seller in the Ordinary Course of Business for nondelinquent orders outstanding as of the Effective Time reflected on Seller's books (other than any Liability arising out of or relating to a Breach that occurred prior to the Effective Time);

(iv) any Liability to Seller's customers under written warranty agreements in the forms disclosed in Part 2.4(a)(iv) given by Seller to its customers in the Ordinary Course of Business prior to the Effective Time (other than any Liability arising out of or relating to a Breach that occurred prior to the Effective Time);

(v) any Liability arising after the Effective Time under the Seller Contracts described in Part 3.20(a) (other than any Liability arising under the Seller Contracts described on Exhibit 2.4(a)(v) or arising out of or relating to a Breach that occurred prior to the Effective Time);

(vi) any Liability of Seller arising after the Effective Time under any Seller Contract included in the Assets that is entered into by Seller after the date hereof in accordance with the provisions of this Agreement (other than any Liability arising out of or relating to a Breach that occurred prior to the Effective Time); and

(vii) any Liability of Seller described in Part 2.4(a)(vii).

(b) *Retained Liabilities.* The Retained Liabilities shall remain the sole responsibility of and shall be retained, paid, performed and discharged solely by Seller. "Retained Liabilities" shall mean every Liability of Seller other than the Assumed Liabilities, including:

(i) any Liability arising out of or relating to products of Seller to the extent manufactured or sold prior to the Effective Time other than to the extent assumed under Section 2.4(a)(iii), (iv) or (v);

(ii) any Liability under any Contract assumed by Buyer pursuant to Section 2.4(a) that arises after the Effective Time but that arises out of or relates to any Breach that occurred prior to the Effective Time;

(iii) any Liability for Taxes, including (A) any Taxes arising as a result of Seller's operation of its business or ownership of the Assets prior to the Effective Time, (B) any Taxes that will arise as a result of the sale of the Assets pursuant to this Agreement and (C) any deferred Taxes of any nature;

(iv) any Liability under any Contract not assumed by Buyer under Section 2.4(a), including any Liability arising out of or relating to Seller's credit facilities or any security interest related thereto;

(v) any Environmental, Health and Safety Liabilities arising out of or relating to the operation of Seller's business or Seller's leasing, ownership or operation of real property;

(vi) any Liability under the Employee Plans or relating to payroll, vacation, sick leave, workers' compensation, unemployment benefits, pension benefits, employee stock option or profit-sharing plans, health care plans or benefits or any other employee plans or benefits of any kind for Seller's employees or former employees or both;

(vii) any Liability under any employment, severance, retention or termination agreement with any employee of Seller or any of its Related Persons;

(viii) any Liability arising out of or relating to any employee grievance whether or not the affected employees are hired by Buyer;

(ix) any Liability of Seller to any Shareholder or Related Person of Seller or any Shareholder;

(x) any Liability to indemnify, reimburse or advance amounts to any officer, director, employee or agent of Seller;

(xi) any Liability to distribute to any of Seller's shareholders or otherwise apply all or any part of the consideration received hereunder;

(xii) any Liability arising out of any Proceeding pending as of the Effective Time;

(xiii) any Liability arising out of any Proceeding commenced after the Effective Time and arising out of or relating to any occurrence or event happening prior to the Effective Time;

(xiv) any Liability arising out of or resulting from Seller's compliance or noncompliance with any Legal Requirement or Order of any Governmental Body;

(xv) any Liability of Seller under this Agreement or any other document executed in connection with the Contemplated Transactions; and

(xvi) any Liability of Seller based upon Seller's acts or omissions occurring after the Effective Time.

COMMENT

The differences between asset and stock acquisitions is clearly seen in the area of liabilities. In a stock acquisition, the buyer, in effect, acquires all assets of the company subject to all its liabilities. In an asset acquisition, the buyer typically will not agree to assume all liabilities of the business to be acquired, although some areas of liability may follow the assets in the hands of a successor. See the discussion of successor liability in Appendix A.

In an asset acquisition, the assumption and retention of liabilities is ordinarily a heavily negotiated issue, dependent in large part upon the economic agreement of the parties. The outcome of that negotiation will depend upon the results of the buyer's due diligence and negotiations between the parties on other economic matters.

As to approach, most buyers will desire to identify the liabilities they will assume with as much specificity as practicable to reduce the chance for unanticipated exposure and controversy. In order to protect itself after the effective time, the buyer will want indemnification if, for some reason, it is forced to pay any liability retained by the seller. It will be important to the buyer to negotiate the indemnification provisions to reflect its agreement that retained liabilities remain the responsibility of the seller. Counsel to the buyer should be aware of this position in drafting limitations on the responsibility of the seller to indemnify, such as collars, baskets, limitation periods on the initiation of claims and exclusivity of the indemnification. Conversely, counsel to the seller should recognize that unlimited indemnification for retained liabilities, broadly defined, can facilitate an end run by the buyer around limitations on indemnification for breaches of representations and warranties. Finally, knowledge about liabilities the seller is to retain, whether determined or contingent as of the effective time, may influence the buyer's decision to require an escrow of part of the purchase price, the amount to be held in escrow and its duration. See Article 11 (which provides for indemnification) and Section 2.7 (clauses (a)(viii) and (b)(iii) require execution of an escrow agreement).

The assumption and retention of liabilities set forth in the provisions of the Model Agreement is based upon the specific fact situation posited. Those provisions reflect at least two general dividing lines, which are likely to be the typical buyer's position. The first is that, except for specific liabilities arising before the effective time which the buyer elects to assume, the buyer generally will expect the seller to continue to be responsible for and pay all liabilities of the seller's business that arise out of or relate to circumstances before the effective time. The second is that the buyer will be willing to assume only liabilities arising in the ordinary course of the business of the seller.

The division of liabilities along these lines requires an understanding of the seller's business, which may not be easily achieved. For example, when dividing liabilities arising from nonserialized products, an artificial division based upon when liabilities arise relative to the closing date may be the only practical way to assign responsibility. In addition, the careful drafter will have to be concerned about consistency among the assumption and other provisions of the agreement, the completeness of coverage and the inevitable redundancies that may occur in specifically enumerating the liabilities that the buyer will assume. As a case in point, compare Section 2.4(a)(vi), which deals with the assumption of liabilities under Seller Contracts (as broadly defined in Section 1.1), with Sections 2.4(a)(ii) and (iii), which deal with the assumption of liabilities under trade accounts payable and work orders, all of which may fall within the definition of Seller Contracts.

The Model Agreement addresses the Liabilities that Buyer will assume in Section 2.4(a). In defining the term "Assumed Liabilities," the Model Agreement provides that Buyer will take on only specifically enumerated Liabilities. Special care should be taken in areas where the description of liabilities to be assumed might be construed to encompass contingent liabilities. The importance of the primacy of the enumeration of liabilities is demonstrated by the attention paid to avoid contrary indications in other provisions of the Model Agreement. For example, Section 2.1, which lists the assets to be transferred, is qualified to indicate that Buyer is not agreeing thereby to assume any Liabilities of Seller unless expressly assumed under Section 2.4(a). In addition, the specificity required to limit the exposure of Buyer is evident from analysis of the particular provisions of Section 2.4(a).

In clauses (i) and (ii) of Section 2.4(a), Buyer's agreement to assume trade accounts payable is restricted to nondelinquent payables that are not paid before the Effective Time. If Buyer assumed delinquent payables, Seller would have an incentive to delay paying trade accounts. Payables not assumed must be paid by Seller under Section 10.3. In clause (i), the Liabilities are particularly described by reference to the Interim Balance Sheet, which Buyer has presumably received and examined before execution of the agreement. The Interim Balance Sheet rather than the last audited Balance Sheet (both of which are warranted by Seller under its representations) is used because it provides a more current listing of Seller's trade accounts payable. As for trade accounts payable arising from the date of the Interim Balance Sheet to the Effective Time, the agreement of Buyer is limited to Liabilities incurred in the Ordinary Course of Business. Finally, Buyer's agreement to assume trade accounts payable does not include any payable to a Related Person of Seller or any Shareholder. This position is taken in the

Model Agreement because, at the time of a first draft, Buyer may not know enough about such payables to determine whether the underlying transactions are arm's length.

In Section 2.4(a)(iv), Buyer agrees to assume only the warranty obligations of Seller under specifically identified forms of agreements given by Seller in the Ordinary Course of Business and does not assume any Liability due to a Breach before the Effective Time. The intent of this provision is to avoid assuming products liability risk for products manufactured or sold by Seller before the Closing. The allocation of product liability risk between a seller and a buyer is determined not only by the extent to which the buyer contractually assumes such risk but also by the application of de facto merger and other theories of successor liability. See Appendix A. The buyer may wish to address this possibility through indemnification, taking into account the availability of existing and potential insurance coverage for the risk.

Under clauses (v) and (vi) of Section 2.4(a), Buyer agrees to assume Liabilities under Seller Contracts, but this assumption is limited in several respects. For Seller Contracts existing at the time the agreement is signed, Buyer will assume only those Liabilities and obligations arising under the specifically identified Seller Contracts listed in Part 3.20 and not arising out of any Breach of those Seller Contracts. As to Seller Contracts entered into between the date the agreement is signed and the Effective Time, Buyer's assumption is further limited to those Contracts that are entered into by Seller in compliance with the terms of the Model Agreement, most importantly Seller's covenants in Section 5.2 about how it will operate its business during that period. Because such covenants serve as the standard for determining the Liabilities assumed under subsection (a)(vi), they should be scrutinized to avoid Buyer's assumption of unanticipated Liabilities.

In Section 2.4(b), the Model Agreement provides that, if a Liability is not specifically assumed by Buyer, it remains the responsibility of Seller. Although the drafter must keep in mind the implications of the doctrine of ejusdem generis (see the Comment to Section 1.2), the list of Retained Liabilities found in this subsection is intended to be illustrative of the types of Liabilities retained but is not, by its terms, intended to be exclusive. The benefit of such a list is to focus the parties' attention on the division of liabilities between them. Of course, as in the description of the liabilities to be assumed and the coordination of that provision with other provisions of the Model Agreement, care should be taken to avoid implications and ambiguities that might raise questions about what liabilities the buyer has agreed to assume. If there is concern about which party will bear responsibility for a specific liability or category of liabilities, it should be carefully addressed in the agreement. With regard to Section 2.4(b)(iii), note that some state statutes prohibit sellers and buyers from agreeing that the seller will pay sales taxes.

2.5 ALLOCATION

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.

COMMENT

From a federal tax perspective, a sale of the assets of a business is treated as if there were a number of sales of individual assets. Section 2.5 represents the agreement between Buyer and Seller as to how the aggregate Purchase Price is allocated among the specific assets to be purchased. The purpose of this agreement is to assure that both Buyer and Seller are consistent in their reporting of the transaction for tax purposes. In general, an arm's-length agreement between the parties as to allocation of the purchase price will be given effect unless the IRS determines that the allocation is inappropriate.

An agreement on allocation is important because, in most asset transactions involving the sale of an entire business, the parties will have to comply with Section 1060 of the Code. Section 1060 requires the buyer and the seller to file IRS Form 8594 (Asset Acquisition Statement under Section 1060), generally describing the allocation with their returns for the year in which there was a transfer of assets used in a trade or business if (a) any good will or going concern value could attach to any of the assets and (b) the buyer's basis in the assets is determined wholly by the amount paid for the assets.

Compliance with Section 1060 will also require disclosure of the consideration paid for employment or consulting agreements with shareholders of the seller who previously were key employees. The IRS carefully monitors such arrangements and may recharacterize the amounts if there is no economic justification for such payments and the arrangements are unreasonable.

Section 1060 does *not* require the buyer and the seller to agree on a purchase-price allocation and this agreement can be an unforeseen area of dispute between the parties because of the different tax effects an allocation may have. From the seller's perspective, the allocation determines how much, and the tax character (which may result in a material differential in marginal rates) of, gain, loss or income the seller will recognize as a result of the asset sale. For the buyer, the allocation will determine what value the assets will have on its books for tax (and financial-statement) purposes, and this determination will affect if and how it can depreciate or amortize that purchase price against its income. In addition, consequences other than direct income tax effects may give rise to controversy. For example, a substantial allocation to land to be sold may give rise to material real estate transfer taxes and may affect future ad valorem property taxes. Also, different tax effects may have an unfavorable impact on the financial statements of the seller or buyer. Nonetheless, parties often agree to file identical IRS Forms 8594 to reduce the likelihood that the IRS will scrutinize the allocation.

A more detailed discussion of the implications of current tax law on the purchase-price allocation is found in Appendix B.

2.6 CLOSING

The purchase and sale provided for in this Agreement (the "Closing") will take place at the offices of Buyer's counsel at ______________, commencing at 10:00 a.m. (local time) on the later of (a) ______________, _____, or (b) the date that is five (5) Business Days following the termination of the applicable waiting period under the HSR Act, unless Buyer and Seller otherwise agree. Subject to the provisions of Article 9, failure to consummate the purchase and sale provided for in this Agreement on the date and time and at the place determined pursuant to this Section 2.6 will not result in the termination of this Agreement and will not relieve any party of any

obligation under this Agreement. In such a situation, the Closing will occur as soon as practicable, subject to Article 9.

COMMENT

Depending upon the nature of the acquisition and the interest of the parties in completing the acquisition within a specific time frame, there are many ways to set the date of the closing. *See* FREUND, ANATOMY OF A MERGER 321–23 (1975). Section 2.6 of the Model Agreement provides that the Closing will take place on the later to occur of a specific date or five days after the satisfaction of a specific condition to closing unless Buyer and Seller agree otherwise. Either the buyer or the seller may want to add the right to postpone the closing for a specified period of time if it is unable to satisfy a condition. Note that the term "Contemplated Transactions" is not used in this Section 2.6 because some of the actions encompassed within that defined term will occur after the Closing.

By specifying a date in clause (a) of Section 2.6, the parties have fixed the earliest date that the Closing may occur. This may be necessary in certain circumstances, such as when the buyer wants to complete its due diligence investigation, needs to obtain financing or will be required to give notice under the Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. §§ 2101–2109 (the "WARN Act"), although these circumstances could also be addressed by making these types of events conditions to closing and determining the closing date by reference to their satisfaction. A party may wish to specify a particular closing date if it suspects that the other party may be motivated to delay the closing. For example, a buyer that uses a calendar year may not want to close in mid-December to avoid unnecessary costs such as preparation of a short-period tax return or interim financial statements for an unusual period of time. Also, a seller may desire to close a transaction after the end of its current tax year to defer the tax consequences of the transaction.

The second clause of Section 2.6 determines a closing date by reference to a specific condition to the closing, in this case, termination of the applicable waiting period under the HSR Act. Generally, this type of clause attempts to fix the date upon which the closing will take place by reference to the condition to closing which the parties expect will take the longest amount of time to satisfy. Conditions that typically take a long time to satisfy include shareholder approval (in the case of a sale of all or substantially all of the assets of the seller, depending upon state corporate law requirements), termination of the waiting period under the HSR Act, expiration of the notice periods under the WARN Act, receipt of all regulatory approvals (if a seller is in a regulated industry) and receipt of all (or certain specified) other third-party consents (e.g., assignments of contracts or of industrial revenue bonds where the assets to be sold include real estate). When there is doubt about which condition will take the most amount of time to satisfy, the parties might consider agreeing to close the transaction within so many days after the satisfaction of the last condition or certain specified conditions. The parties might keep in mind, however, that the satisfaction of some conditions may be influenced by a party, even though the agreement contains provisions (such as Sections 5.7 and 6.2) requiring both parties to use their best efforts to satisfy all conditions to the closing of the transaction.

There are also tax, accounting and other practical considerations in scheduling the closing. For example, if the buyer is paying the purchase price in funds that are not immediately available (see the Comment to Section 2.7), the seller may not want to close on a Friday (especially the Friday before a three-day weekend) because the seller would not have use of the funds over the weekend. If the buyer is paying the purchase price by a wire transfer, the seller may want to determine the time by which its bank must receive the funds in order to invest the funds overnight. The amount the seller could lose as a result of not having use of the funds for a few days depends upon the purchase price but may be substantial in large transactions. Furthermore, if a physical inventory will be performed shortly before closing, the parties may want to schedule the closing on a day and at a time to permit this physical inventory with minimal disruption to the business.

The next to last sentence of Section 2.6 establishes that failure to consummate the acquisition on the date and time and at the place specified does not relieve any party from its obligations under the acquisition agreement or give any party an independent right to terminate the acquisition agreement. The dates set forth in Section 2.6 should not be confused with the ability to terminate the agreement under Article 9. Because Section 2.6 provides that failure to close does not terminate the acquisition agreement, the Model Agreement provides in Section 9.1(f) and (g) that either party may terminate the agreement if the Closing has not taken place by a specified "drop-dead" date. The inclusion of a drop-dead date assures the parties that they will not be bound by the acquisition agreement (and, in particular, by pre-closing covenants) for an unreasonably long period of time. This drop-dead date could be placed in the Closing section; however, it is typically placed in the termination provision to keep all termination rights in a single section. Notably, if Section 2.6 states a specific Closing Date without reference to conditions that must be met, the effect of Sections 9.1(c) and 9.1(d) may be to give a party the right to terminate the agreement if the Closing does not take place on the date specified.

2.7 CLOSING OBLIGATIONS

In addition to any other documents to be delivered under other provisions of this Agreement, at the Closing:

(a) Seller and Shareholders, as the case may be, shall deliver to Buyer, together with funds sufficient to pay all Taxes necessary for the transfer, filing or recording thereof:

- **(i) a bill of sale for all of the Assets that are Tangible Personal Property in the form of Exhibit 2.7(a)(i) (the "Bill of Sale") executed by Seller;**
- **(ii) an assignment of all of the Assets that are intangible personal property in the form of Exhibit 2.7(a)(ii), which assignment shall also contain Buyer's undertaking and assumption of the Assumed Liabilities (the "Assignment and Assumption Agreement") executed by Seller;**
- **(iii) for each interest in Real Property identified on Part 3.7(a) and (b), a recordable warranty deed, an Assignment and Assumption of Lease in the form of Exhibit 2.7(a)(iii) or such other appropriate document or instrument of transfer, as the case may require, each in form and substance satisfactory to Buyer and its counsel and executed by Seller;**
- **(iv) assignments of all Intellectual Property Assets and separate assignments of all registered Marks, Patents and Copyrights in the form of Exhibit 2.7(a)(iv) executed by Seller;**
- **(v) such other deeds, bills of sale, assignments, certificates of title, documents and other instruments of transfer and conveyance as may reasonably be requested by Buyer, each in form and substance satisfactory to Buyer and its legal counsel and executed by Seller;**

(vi) an employment agreement in the form of Exhibit 2.7(a)(vi), executed by [________] (the "Employment Agreement");

(vii) noncompetition agreements in the form of Exhibit 2.7(a)(vii), executed by each Shareholder (the "Noncompetition Agreements");

(viii) an escrow agreement in the form of Exhibit 2.7(a)(viii), executed by Seller and each Shareholder and the escrow agent (the "Escrow Agreement");

(ix) a certificate executed by Seller and each Shareholder as to the accuracy of their representations and warranties as of the date of this Agreement and as of the Closing in accordance with Section 7.1 and as to their compliance with and performance of their covenants and obligations to be performed or complied with at or before the Closing in accordance with Section 7.2; and

(x) a certificate of the Secretary of Seller certifying, as complete and accurate as of the Closing, attached copies of the Governing Documents of Seller, certifying and attaching all requisite resolutions or actions of Seller's board of directors and shareholders approving the execution and delivery of this Agreement and the consummation of the Contemplated Transactions and the change of name contemplated by Section 5.9 and certifying to the incumbency and signatures of the officers of Seller executing this Agreement and any other document relating to the Contemplated Transactions and accompanied by the requisite documents for amending the relevant Governing Documents of Seller required to effect such change of name in form sufficient for filing with the appropriate Governmental Body.

(b) Buyer shall deliver to Seller and Shareholders, as the case may be:

(i) ________ dollars ($________) by wire transfer to an account specified by Seller in a writing delivered to Buyer at least three (3) business days prior to the Closing Date;

(ii) a promissory note executed by Buyer and payable to Seller in the principal amount of ________ dollars ($________) in the form of Exhibit 2.7(b)(ii) (the "Promissory Note");

(iii) the Escrow Agreement, executed by Buyer and the escrow agent, together with the delivery of ________ dollars ($________) to the escrow agent thereunder, by wire transfer to an account specified by the escrow agent;

(iv) the Assignment and Assumption Agreement executed by Buyer;

(v) the Employment Agreement executed by Buyer;

(vi) the Noncompetition Agreements executed by Buyer and ____________ dollars ($________) by wire transfer to an account specified by each Shareholder in a writing delivered to Buyer at least three (3) days prior to the Closing Date;

(vii) a certificate executed by Buyer as to the accuracy of its representations and warranties as of the date of this Agreement and as of the Closing in accordance with Section 8.1 and as to its compliance with and performance of its covenants and obligations to be performed or complied with at or before the Closing in accordance with Section 8.2; and

(viii) a certificate of the Secretary of Buyer certifying, as complete and accurate as of the Closing, attached copies of the Governing Documents of Buyer and certifying and attaching all requisite resolutions or actions of Buyer's

board of directors approving the execution and delivery of this Agreement and the consummation of the Contemplated Transactions and certifying to the incumbency and signatures of the officers of Buyer executing this Agreement and any other document relating to the Contemplated Transactions.

COMMENT

Because of the length and complexity of many acquisition agreements, particularly asset acquisition agreements, some drafters attempt to list all of the documents that will be exchanged at the closing in a separate section so that the parties have a checklist, but this is often impracticable. In addition, such a list may expose a party to liability because of an obligation to deliver documents that must come from a nonparty. In order to avoid unnecessary repetition and possible construction problems, the Model Agreement lists in this section only those deliveries that are within the control of the party obligated to deliver them.

In Section 2.7, the parties covenant to make certain deliveries. The parties should be aware of the distinction between (a) deliveries to be treated as covenants, the breach of which will give the nonbreaching party a right to damages and (b) deliveries to be treated as conditions, the breach of which will give the nonbreaching party the right to terminate the acquisition (a "walk right") but not a right to damages. If Seller fails to deliver a particular transfer document, for example, Buyer can pursue its damage remedy. In contrast, if Seller fails to deliver the legal opinion or Consents (or other documents reasonably requested by Buyer) contemplated by Article 7 (Buyer's conditions), Buyer would have the right to terminate the acquisition, but it would not have a right to damages unless Seller breached its covenant in Section 5.7 to use its Best Efforts to obtain such documents. If, however, Seller covenanted to deliver a particular Consent (because, for example, the seller or a party related to the seller was the lessor under a lease that was to be transferred and that required a consent), Seller's failure to deliver that Consent (regardless of the efforts used) would give Buyer a right to damages as well as the right to terminate the acquisition (see the introductory comment to Article 7). Articles 7 and 8 of the Model Agreement provide that the deliveries required by Section 2.7 are conditions precedent to the applicable party's obligation to consummate the contemplated transaction.

Parties' Closing Certificates. The reciprocal certificates required to be delivered at the closing in regard to the accuracy of each party's representations and warranties and the performance of its covenants provide a basis for the post-closing indemnification remedies under subsections 11.2(a) and (b) and 11.4(a) and (b). *See* KLING & NUGENT SIMON, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 14.02[5] (1998). See also the Comments to Sections 7.1 and 8.1.

The parties may wish to specify by name or position the officers who are to execute the closing certificates on behalf of the seller and the buyer (e.g., the chief executive officer and the chief financial officer). The secretary will ordinarily be the officer executing certificates dealing with corporate proceedings and approvals.

Officers who are asked to sign closing certificates might express concern about their personal liability, particularly if they are not shareholders or otherwise benefiting from the transaction. The buyer might claim that, in addition to its right to indemnification, it relied on these certificates and was damaged to the extent that the statements made by the officers were inaccurate. Although there is a dearth of authority dealing specifically with this issue, there have been instances where buyers have sought to recover directly against the officers signing officers' certificates based upon theories of negligent misrepresentation and fraud. *See, e.g.,* Morgan Guar. Trust Co. of N.Y. v. Tisdale, No. 95 Civ. 8023, 1996 WL 544240 (S.D.N.Y. Sept. 25, 1996).

The seller's counsel might attempt to minimize the officers' exposure by adding a knowledge qualification to the closing certificates and making clear that the certificates are to be signed by the officers in their corporate capacity and not as individuals. The buyer's counsel might find this objectionable, particularly the knowledge qualification, because of a concern over the effect it might have on the buyer's indemnification rights. That concern can be alleviated, however, by adding to the certificate an express statement to the effect that the knowledge qualification will have no such effect. The officers' exposure might be less of a problem if the seller is successful in adding a clause to the effect that the indemnification provisions are the sole remedy for any claims relating to the sale.

Manner of Payment. The Model Agreement provides for payment by wire transfer because such transfers are the norm in most substantial transactions. In some circumstances, however, the parties may choose to have payment made by bank cashier's or certified check for various reasons, including the size of the transaction. Although all three forms of payment are commonly used and should be acceptable to a seller, parties should be aware of certain differences in a buyer's ability to stop payment and in the availability of the funds for use by a seller.

A certified check is a check of the drawer that contains the drawee bank's certification on its face. As a result of the bank's certification, the drawee bank's liability is substituted for that of the drawer. A cashier's check is a check drawn by a bank on itself. Thus, a cashier's check is the primary promissory obligation of the drawee bank.

Once a certified check has been certified and delivered, and once a cashier's check has been delivered to the payee, the customer who procured the check has no right to stop payment. Although there have been a few cases involving banks that stopped payment on certified and cashier's checks at the request of customers, courts generally have held that the customer has no right to stop payment. *See* CLARK, THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS ¶ 3.06 (rev. ed. 1999).

Except for a wire transfer of federal funds, there is no difference among a cashier's check, a certified check and a wire transfer in terms of the availability of funds. For cashier's checks, certified checks and wire transfers of clearinghouse funds, a bank into which such checks are deposited or into which such wire transfers are sent is required to make the funds available to the payee or beneficiary no later than the business day following the deposit or receipt of the transfer. For wire transfers of federal funds, a bank is required to make the funds available immediately on the date of receipt of the transfer. Therefore, if a seller wants immediate use of the funds, the acquisition agreement should specify that payment will be made by wire transfer of immediately available funds. *See generally* CLARK, THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS ¶ ¶ 7.01–7.25 (rev. ed. 1999). If a buyer is a foreign firm, a seller may want to specify that payments will be made in U.S. dollars.

Promissory Notes. Exhibit 2.7(b)(ii) to the Model Agreement contains a form of Buyer's nonnegotiable Promissory Note to be delivered to Seller. This Promissory Note is subject to the rights of setoff in favor of Buyer, which provide some security to Buyer for the enforcement of Seller's post-closing indemnification obligations. The Promissory Note bears interest, is subject to prepayment without penalty and may be accelerated following the occurrence of an event of default.

The Promissory Note is neither subordinated to the rights of other creditors of Buyer nor secured by a security interest in favor of Seller. Whether such features are included depends upon the proportion of the purchase price paid in cash at closing, the buyer's need for third-party financing, the financial strength of the party responsible for future payments, the length of the payout period, the guaranty of future payments by another and the bargaining position of the parties.

When a promissory note is subordinated with regard to payment, the parties must determine the degree of subordination. A full subordination of payments prohibits any payment of interest or principal under the note until completion of payment of all senior debt. Alternatively, the parties may agree to prohibit subordinated payments only when an event of default has occurred or in the event of a bankruptcy or reorganization proceeding involving a buyer.

A seller in a strong bargaining position may demand collateral to secure a buyer's note, especially if the buyer is financially weak. The property to serve as collateral will vary but typically will come from the assets sold. A seller may take a security interest in all of the assets sold, and in future replacements and substitutes for those assets, in order to take back the business in case of default. A similar result is achieved if the assets, when sold, go into a newly formed entity, and the seller takes the ownership interest in that entity as collateral. Alternatively, a seller may take a collateral interest in specific property that the seller believes is of sufficient value and readily marketable. In order to prevent the value of the collateral from being unduly diminished, a seller may also seek certain covenants from a buyer regarding the operation of the company after closing. In addition or as a substitute, a seller might obtain the guaranty of another party related to the buyer. A seller will desire to perfect whatever security interest is taken in order to take the most superior position possible as compared to other creditors, whereas a buyer may need to have that interest subordinated to the interests of some or all of its other creditors.

A detailed discussion of the technical aspects of taking a secured interest to protect a seller is beyond the scope of this Comment. If there is to be security for the buyer's note, however, the details of that understanding should be included in the acquisition agreement and the forms of security documents attached to it as exhibits.

The Promissory Note is nonnegotiable to protect Buyer's setoff rights. See the Comment to Section 11.8.

Escrow Agreement. Exhibit 2.7(a)(viii) contains a form of an escrow agreement providing for an escrow of funds to assist Buyer in realizing on any successful indemnification claims that it may have under the acquisition agreement (see Article 11). The escrow agreement may also be used to facilitate payment of the purchase-price adjustment amount. Consideration should be given to whether Buyer desires both an escrow and a right of setoff. See the Comment to Section 11.8.

2.8 ADJUSTMENT AMOUNT AND PAYMENT

The "Adjustment Amount" (which may be a positive or negative number) will be equal to the amount determined by subtracting the Closing Working Capital from the Initial Working Capital. If the Adjustment Amount is positive, the Adjustment Amount shall be paid by wire transfer by Seller to an account specified by Buyer. If the Adjustment Amount is negative, the difference between the Closing Working Capital and the Initial Working Capital shall be paid by wire transfer by Buyer to an account specified by Seller. All payments shall be made together with interest at the rate set forth in the Promissory Note, which interest shall begin accruing on the Closing Date and end on the date that the payment is made. Within three (3) business days after the calculation of the Closing Working Capital becomes binding and conclusive on the parties pursuant to Section 2.9, Seller or Buyer, as the case may be, shall make the wire transfer payment provided for in this Section 2.8.

COMMENT

The Model Agreement contains a purchase-price adjustment mechanism to modify the Purchase Price in the event of changes in the financial condition of Seller during the period between the date of the Initial Balance Sheet and Closing. Such a mechanism permits the parties to lessen the potentially adverse impact of a flat price based upon stale pre-closing information. Through use of a purchase-price adjustment mechanism, the parties are able to modify the purchase price to reflect more accurately the seller's financial condition as of the closing date. Not all transactions contain purchase-price adjustment mechanisms, however. Such mechanisms are complex in nature and are frequently the subject of contentious negotiations. As a result, the parties rely on other mechanisms in many cases, such as resorting to claims for breach of representations and warranties, indemnification rights and walk-away or termination provisions to achieve their objectives.

In the absence of a purchase-price adjustment mechanism such as the one employed in the Model Agreement, provision is frequently made for the proration of certain items (such as rent under Leases included within the Assumed Liabilities and ad valorem taxes with respect to the Real Property and Tangible Personal Property) to ensure that the seller is responsible for such liabilities only to the extent they cover periods up to and including the date of closing, and the buyer is responsible for such liabilities only to the extent that they cover periods subsequent to the closing. A proration mechanism is rarely appropriate if the parties have agreed to a purchase-price adjustment mechanism. The following is a sample of a proration provision:

ADJUSTMENTS TO PURCHASE PRICE

The Purchase Price shall be subject to the following credits and adjustments, which shall be reflected in the closing statements to be executed and delivered by Buyer and Seller as hereinabove provided:

(a) ***Prorations.*** **Any rents, prepaid items and other applicable items with respect to the Assumed Liabilities shall be prorated as of the Closing Date. Seller shall assign to Buyer all unused deposits with respect to the Assumed Liabilities and shall receive a credit in the amount thereof with respect to the Purchase Price.**

(b) ***Ad Valorem Taxes.*** **Ad valorem real and tangible personal property taxes with respect to the Assets for the calendar year in which the Closing occurs shall be prorated between Seller and Buyer as of the Closing Date on the basis of no applicable discount. If the amount of such taxes with respect to any of the Assets for the calendar year in which the Closing occurs has not been determined as of the Closing Date, then the taxes with respect to such Assets for the preceding calendar year, on the basis of no applicable discount, shall be used to calculate such prorations, with known changes in valuation or millage applied. The prorated taxes shall be an adjustment to the amount of cash due from Buyer at the Closing. If the actual amount of any such taxes varies by more than _______ dollars ($_______) from estimates used at the Closing to prorate such taxes, then the parties shall re-prorate such taxes within ten (10) days following request by either party based on the actual amount of the tax bill.**

The type of purchase-price adjustment mechanism selected depends upon the structure of the transaction and the nature of the target company's business. There are many yardsticks available to use as the basis of a post-closing adjustment to the nominal purchase price. They can include, among others, book value, net assets, working capital, sales, net worth or shareholders' equity. In some cases, it will be appropriate to adjust the purchase price by employing more than one adjustment mechanism. For example, in a retail sales business, it may be appropriate to measure variations in both sales and inventory. Finally, the nominal purchase price may be subject to an upward or downward adjustment or both. The purchase price also may be adjusted dollar for dollar or by an amount equal to some multiple of changes in the yardstick amount.

The Fact Pattern indicates that Seller is a manufacturing concern with a full range of business activities and, for purposes of illustration, the Model Agreement provides for an adjustment to the Purchase Price based upon changes in Seller's Working Capital. Working Capital of Seller is determined as of the date of the Balance Sheet and the Closing Date, and the nominal Purchase Price is adjusted either upward or downward based upon the amount of the increase or decrease in the level of Seller's Working Capital. In order to lessen the opportunity for manipulation of the Working Capital amount during the measurement period, restrictions on Seller's ability to manipulate its business operations and financial condition are set forth in Seller's pre-closing covenants contained in Article 5.

The parties may also choose to place limits on the amount of the purchase-price adjustment. Depending upon the relative bargaining position of the parties, the acquisition agreement may provide an upper limit (a "cap" or "ceiling") to any adjustment amount the buyer will be obligated to pay the seller. Alternatively, the parties may agree upon an upper limit to any adjustment amount the seller will be obligated to pay or give back to the buyer after the closing, the effect of which is to reduce the final purchase price paid by the buyer to a specified "floor." The acquisition agreement may further provide for both a cap or ceiling and a floor (when used in such combination, a "collar") on the adjustment amount. The purchase-price adjustment provision can also contain a de minimis "window" (i.e., a range within which neither party pays a purchase price adjustment amount).

2.9 ADJUSTMENT PROCEDURE

(a) "Working Capital" as of a given date shall mean the amount calculated by subtracting the current liabilities of Seller included in the Assumed Liabilities as of that date from the current assets of Seller included in the Assets as of that date. The Working Capital of Seller as of the date of the Balance Sheet (the "Initial Working Capital") was _______ dollars ($_______).

(b) Buyer shall prepare financial statements ("Closing Financial Statements") of Seller as of the Effective Time and for the period from the date of the Balance Sheet through the Effective Time on the same basis and applying the same accounting principles, policies and practices that were used in preparing the Balance Sheet, including the principles, policies and practices set forth on Exhibit 2.9. Buyer shall then determine the Working Capital as of the Effective Time minus accruals in accordance with GAAP in respect of liabilities to be incurred by Buyer after the Effective Time (the "Closing Working Capital") based upon the Closing Financial Statements and using the same methodology as was used to calculate the Initial Working Capital. Buyer shall deliver the Closing Financial Statements and its determination of the Closing Working Capital to Seller within sixty (60) days following the Closing Date.

(c) If within thirty (30) days following delivery of the Closing Financial Statements and the Closing Working Capital calculation Seller has not given Buyer written notice of its objection as to the Closing Working Capital calculation (which notice shall state the basis of Seller's objection), then the Closing Working Capital calculated by Buyer shall be binding and conclusive on the parties and be used in computing the Adjustment Amount.

(d) If Seller duly gives Buyer such notice of objection, and if Seller and Buyer fail to resolve the issues outstanding with respect to the Closing Financial Statements and the calculation of the Closing Working Capital within thirty (30) days of Buyer's receipt of Seller's objection notice, Seller and Buyer shall submit the issues remaining in dispute to _______, independent public accountants (the "Independent Accountants") for resolution applying the principles, policies and practices referred to in Section 2.9(b). If issues are submitted to the Independent Accountants for resolution, (i) Seller and Buyer shall furnish or cause to be furnished to the Independent Accountants such work papers and other documents and information relating to the disputed issues as the Independent Accountants may request and are available to that party or its agents and shall be afforded the opportunity to present to the Independent Accountants any material relating to the disputed issues and to discuss the issues with the Independent Accountants; (ii) the determination by the Independent Accountants, as set forth in a notice to be delivered to both Seller and Buyer within sixty (60) days of the submission to the Independent Accountants of the issues remaining in dispute, shall be final, binding and conclusive on the parties and shall be used in the calculation of the Closing Working Capital; and (iii) Seller and Buyer will each bear fifty percent (50%) of the fees and costs of the Independent Accountants for such determination.

COMMENT

The specific terms of the business deal must be considered when developing a purchase-price adjustment mechanism. For example, if the transaction contemplates an accounts receivable repurchase obligation requiring the seller to repurchase all or a portion of its accounts receivable uncollected prior to a certain date, the purchase-price adjustment procedure must take such repurchases into account when determining the adjustment amount. The Model Agreement provides that Buyer will prepare the Closing Financial Statements and calculate the Working Capital as of the Effective Time. In order to account for the effects of the underlying transaction, Working Capital is limited to the difference between the current liabilities of Seller included in the Assumed Liabilities and the current assets of Seller included in the Assets.

In order to minimize the potential for disputes with respect to the determination of the adjustment amount, the acquisition agreement specifies the manner in which the adjustment amount is calculated and the procedures to be utilized in determining the adjustment yardstick as of a given date. The Model Agreement addresses this objective by stating that the Closing Financial Statements shall be prepared on the same basis and applying the same accounting principles, policies and practices that were used in preparing the Balance Sheet, including the principles, policies and practices listed on Exhibit 2.9. Therefore, the buyer's due diligence ordinarily will focus not only on the items reflected on the Balance Sheet but also on the accounting principles, policies and practices used to produce it because it may be difficult for the buyer to dispute these matters after closing. For cost, timing and other reasons, the parties may elect to prepare less comprehensive financial statements for the limited purpose of determining the adjustment amount. Determination of the adjustment amount will depend upon the type of financial statements that have been prepared, and special accounting procedures may need to be employed in calculating the adjustment components. Where the parties engage the accountant to issue a report of findings based upon the application of agreed-upon procedures to specified elements, accounts or items of a financial statement, such agreed-upon procedures should follow applicable statements on accounting standards and be clearly set forth in the acquisition agreement. *See* Statement on Auditing Standards No. 75, "Engagements to Apply Agreed-Upon Procedures to Specified Elements, Accounts, or Items of a Financial Statement," and Statement on Standards for Attestation Engagements No. 4, "Agreed-Upon Procedures Engagements." Unless consistent accounting principles, policies and practices are applied, the purchase-price adjustment will not be insulated from the effects of changes in accounting principles, policies and practices. Because purchase-price adjustment mechanisms rely heavily on the application of accounting principles and methods to particular fact situations, the input of the parties' accountants is important to the crafting of a mechanism that is responsive to the facts, workable and reflects the expectations and intentions of the parties in establishing the ultimate purchase price.

Provisions establishing dispute resolution procedures follow the provisions for the initial determination and objection. If the parties are unable to amicably resolve any disputes with respect to the Closing Financial Statements and the Closing Working Capital, Section 2.9(d) provides for dispute resolution by independent accountants previously agreed to by the parties. If the acquisition agreement does not specify who will serve as the independent accountants, the parties should establish the procedure for selection. Even if the independent accountants are named, it may be wise to provide replacement procedures in case a post-closing conflict arises with respect to the selection of the independent accountants (e.g., through merger of the independent accountants with accountants for the buyer or the seller).

The procedure to be followed and the scope of authority given for resolution of disputes concerning the post-closing adjustments vary in acquisition agreements. Section 2.9 provides that Buyer will determine the Closing Working Capital based upon the Closing Financial Statements using the same methodology as was used to calculate the Initial Working Capital. The Closing Financial Statements and Buyer's determination of the Closing Working Capital are then delivered to Seller, and, if Seller has not objected within the requisite time period to the Closing Working Capital calculation (stating the basis of the objection), the calculation is "binding and conclusive on the parties". If Seller objects and the issues outstanding are unresolved, the "issues remaining in dispute" are to be submitted to the accountants for resolution "applying the principles, policies and practices referred to in Section 2.9(b)." The determination by the accountants of the issues remaining in dispute is "final, binding and conclusive on the parties" and is to be used in the calculation of the Closing Working Capital.

The procedure set forth in Section 2.9 does not provide for the accountants to act as arbitrators, and there is no separate arbitration provision governing disputes under the Model Agreement. See the Comment to Section 13.4. Section 2.9, however, provides that the determination by the accountants is to be "final, binding and conclusive" on the parties. To what extent will this determination be binding on the parties, arbitrable or confirmable by a court? This is largely a question of state law, except that the Federal Arbitration Act will preempt any state law that conflicts or stands as an obstacle to the purpose of the Act to favor arbitration. The issue is often addressed in the context of a motion to compel arbitration by one of the parties to the acquisition agreement. The court in *Talegen Holdings, Inc. v. Fremont General Corp.,* No. 98 Civ. 0366 (DC), 1998 WL 513066, *3 (S.D.N.Y. Aug. 19, 1998), dealt with such a motion as follows:

> In resolving a motion to compel arbitration under the Federal Arbitration Act . . . , a court must: (1) determine whether the parties agreed to arbitrate; (2) ascertain the scope of that agreement to see if the claims raised in the lawsuit fall within the terms of the agreement; (3) if federal statutory claims are asserted, decide whether Congress has deemed those claims to be nonarbitrable; and (4) if some,

> but not all claims are to be arbitrated, determine whether to stay the balance of the proceedings pending arbitration.

It then stated that "[c]ourts have consistently found that purchase price adjustment dispute resolution provisions such as the one at issue here constitute enforceable arbitration agreements." *Id.* The clauses providing for dispute resolution mechanisms need not expressly provide for arbitration in order for a court to determine that the parties have agreed to arbitration.

If a court determines that the parties agreed to arbitration, the extent to which arbitration will be compelled under the Federal Arbitration Act depends upon whether the provision is broadly or narrowly drawn. A broad clause creates a presumption of arbitrability, whereas a narrow clause allows a court to consider "whether the claims fall reasonably within the scope of that clause." *Id.* Even with a narrow provision, "[b]ecause the [Federal Arbitration Act] embodies Congress's strong preference for arbitration, 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Id.; see also* Wayrol PLC v. Ameritech Corp., No. 98 Civ. 8451 (DC), 1999 WL 259512 (S.D.N.Y. April 30, 1999); Advanstar Communications, Inc. v. Beckley-Cardy, Inc., No. 93 Civ. 4230 (KTD), 1994 WL 176981 at *3 (S.D.N.Y. May 6, 1994) (although a narrow clause must be construed in favor of arbitration, courts may not disregard boundaries set by the agreement).

The question of what comes within the arbitrable issues is a matter of law for a court. If the dispute arises over the accounting methods used in calculating the closing working capital or net worth, a court might compel arbitration as to those issues. *See Advanstar*, 1994 WL 176981 (clauses allowing arbitration of disagreements about balance sheet calculations "include disputes over the accounting methods used"). A court can disregard whether the claims might be characterized in another way. *See Talegen* at *17. On the other hand, some courts require that the provision include on its face the issue in dispute. In *Gestetner Holdings, PLC v. Nashua Corp.,* 784 F. Supp. 78 (S.D.N.Y. 1992), the court held that an objection as to the closing net book value includes an objection to whether the closing balance sheet failed to comply with generally accepted accounting principles; however, the court did not rule on whether the initial balance sheet, for which the defendant argued that indemnification was the exclusive remedy, could also be considered an arbitrable dispute. *See also* Gelco Corp. v. Baker Indus., Inc., 779 F.2d 26 (8th Cir. 1985) (clause covering disputes concerning adjustments to closing financial statements did not encompass state court claims for breach of contract); Twin City Monorail, Inc. v. Robbins & Myers, Inc., 728 F.2d 1069 (8th Cir. 1984) (clause extended only to disputed inventory items and not to all disputes arising out of the contract); Basix Corp. v. Cubic Corp., No. 96 Civ. 2478, 1996 WL 517667 (S.D.N.Y. Sept. 11, 1996) (clause applied only to well defined class of disagreements over the closing balance sheet); Stena Line (U.K.) Ltd. v. Sea Containers Ltd., 758 F. Supp. 934 (S.D.N.Y. 1991) (only limited issues concerning impact of beginning balance sheet on later balance sheet are arbitrable); Medcom Holding Co. v. Baxter Travenol Lab., Inc., 689 F. Supp. 841 (N.D. Ill. 1988) (clause limited to accounts or items on balance sheet does not encompass objections to valuation of property or accounting principles by which property is valued).

The scope of the accountants' authority in Section 2.9(d) is expressly limited to those issues remaining in dispute and does not extend more broadly to the Closing Financial Statements or to the calculation of the Initial Working Capital or the Closing Working Capital. The authority cited above suggests that, if there is a dispute over whether the financial statements from which the Initial Working Capital or the Closing Working Capital are calculated have been prepared in accordance with generally accepted accounting principles or reflect the consistent application of those principles, Buyer may not be able to resolve the matter under the procedure established in Section 2.9(c) and (d). Buyer might, however, be able to make a claim for indemnification based upon a breach of the financial statement representations and warranties in Section 3.4. If any of the items in the financial statements from which Initial Working Capital is computed are in error, the inaccuracy could affect the Adjustment Amount payable under Section 2.8. Again, Buyer's recourse might be limited to a claim for indemnification. If the error is to the disadvantage of Seller, it may not be able to restate the financial statements or cause the Initial Working Capital to be adjusted and, therefore, would have no recourse for its own error. *See* Melun Indus., Inc. v. Strange, 898 F. Supp. 995 (S.D.N.Y. 1992).

In view of this authority, the buyer may wish to weigh the advantages and disadvantages of initially providing for a broad or narrow scope of issues to be considered by the accountants. By narrowing the issues, it will focus the accountants on the disputed accounting items and prevent them from opening up other matters concerning the preparation of the financial statements from which the working capital calculation is derived. Reconsideration of some of the broader accounting issues, however, might result in a different overall resolution for the parties. The buyer might also consider whether to provide that the accountants are to act as arbitrators, thereby addressing the question of arbitrability, at least as to the issues required to be submitted to the accountants. This may, however, have procedural or other implications under the Federal Arbitration Act or state law.

The phrase "issues remaining in dispute" in the second sentence of Section 2.9(d) limits the inquiry of the independent accountants to the specific unresolved items. The parties might consider parameters on the submission of issues in dispute to the independent accountants. For example, they could agree that, if the amount in dispute is less than a specified amount, they will split the difference and avoid the costs of the accountants' fees and the time and effort involved in resolving the dispute. The parties may also want to structure an arrangement for the payment of amounts not in dispute.

Purchase-price adjustment mechanisms do not work in isolation, and the seller may want to include in these provisions a statement to the effect that any liabilities included in the calculation of the adjustment amount will not give the buyer any right to indemnification. The rationale for such a clause is that the buyer is protected from damages associated with such claims by the purchase-price adjustment.

2.10 CONSENTS

(a) If there are any Material Consents that have not yet been obtained (or otherwise are not in full force and effect) as of the Closing, in the case of each Seller Contract as to which such Material Consents were not obtained (or otherwise are not in full force and effect) (the "Restricted Material Contracts"), Buyer may waive the closing conditions as to any such Material Consent and either:

(i) elect to have Seller continue its efforts to obtain the Material Consents; or

(ii) elect to have Seller retain that Restricted Material Contract and all Liabilities arising therefrom or relating thereto.

If Buyer elects to have Seller continue its efforts to obtain any Material Consents and the Closing occurs, notwithstanding Sections 2.1 and 2.4, neither this Agreement nor the Assignment and Assumption Agreement nor any other document related to the consummation of the Contemplated Transactions shall constitute a sale, assignment, assumption, transfer, conveyance or delivery or an attempted sale, assignment, assumption, transfer, conveyance or delivery of the Restricted

Material Contracts, and following the Closing, the parties shall use Best Efforts, and cooperate with each other, to obtain the Material Consent relating to each Restricted Material Contract as quickly as practicable. Pending the obtaining of such Material Consents relating to any Restricted Material Contract, the parties shall cooperate with each other in any reasonable and lawful arrangements designed to provide to Buyer the benefits of use of the Restricted Material Contract for its term (or any right or benefit arising thereunder, including the enforcement for the benefit of Buyer of any and all rights of Seller against a third party thereunder). Once a Material Consent for the sale, assignment, assumption, transfer, conveyance and delivery of a Restricted Material Contract is obtained, Seller shall promptly assign, transfer, convey and deliver such Restricted Material Contract to Buyer, and Buyer shall assume the obligations under such Restricted Material Contract assigned to Buyer from and after the date of assignment to Buyer pursuant to a special-purpose assignment and assumption agreement substantially similar in terms to those of the Assignment and Assumption Agreement (which special-purpose agreement the parties shall prepare, execute and deliver in good faith at the time of such transfer, all at no additional cost to Buyer).

(b) If there are any Consents not listed on Exhibit 7.3 necessary for the assignment and transfer of any Seller Contracts to Buyer (the "Nonmaterial Consents") which have not yet been obtained (or otherwise are not in full force and effect) as of the Closing, Buyer shall elect at the Closing, in the case of each of the Seller Contracts as to which such Nonmaterial Consents were not obtained (or otherwise are not in full force and effect) (the "Restricted Nonmaterial Contracts"), whether to:

(i) accept the assignment of such Restricted Nonmaterial Contract, in which case, as between Buyer and Seller, such Restricted Nonmaterial Contract shall, to the maximum extent practicable and notwithstanding the failure to obtain the applicable Nonmaterial Consent, be transferred at the Closing pursuant to the Assignment and Assumption Agreement as elsewhere provided under this Agreement; or

(ii) reject the assignment of such Restricted Nonmaterial Contract, in which case, notwithstanding Sections 2.1 and 2.4, (A) neither this Agreement nor the Assignment and Assumption Agreement nor any other document related to the consummation of the Contemplated Transactions shall constitute a sale, assignment, assumption, conveyance or delivery or an attempted sale, assignment, assumption, transfer, conveyance or delivery of such Restricted Nonmaterial Contract, and (B) Seller shall retain such Restricted Nonmaterial Contract and all Liabilities arising therefrom or relating thereto.

COMMENT

Section 2.10 addresses the issue of how to handle situations where required Third-Party Consents are not obtained prior to the Closing. This section provides for different approaches if the contracts are material or nonmaterial.

This differentiation is made by use of Exhibit 7.3. On that Exhibit, Buyer designates those Contracts that are important enough that Buyer reserves a right not to consummate the transaction if the required Consents are not obtained. In preparing Exhibit

7.3, Buyer should be careful not to omit nonmaterial contracts if a group or significant number of them, each individually nonmaterial, may be material when considered collectively.

If Buyer does agree to close where a material consent has not yet been obtained, Buyer has an election under Section 2.10. Buyer can either have Seller continue its efforts to obtain the consent or have Seller retain the material contract.

A seller may object to the buyer's right to elect to have the seller retain a material contract after the business is sold. Under such circumstances, the seller may be in a difficult position to meet its obligations under the contract, particularly if it is exiting the business sold. The seller could also argue that such an election may materially alter its realization from the transaction and, therefore, its desire to sell. If the seller agrees to this kind of provision, the seller may insist on a right to renegotiate the purchase price depending upon the material contract to be retained. Alternatively, the seller might negotiate a limitation on the application to specific material contracts. Whether the buyer will have the ability to insist on the inclusion of this provision is a matter of the parties' relative bargaining positions.

If Buyer elects to have Seller continue its efforts to obtain consent, Section 2.10(a) provides that (a) the contract is not yet assigned to Buyer (because such a purported assignment might not be valid and would be in violation of the assignment restrictions of the contract, and, therefore, the third party might attempt to cancel the contract or bring a claim for Breach thereof); (b) in the interest of leaving the parties as close as possible to the positions bargained for in the Model Agreement, the parties must do all they legally and reasonably can to procure for Buyer the benefits Buyer would have received had the contract been assigned at the closing; (c) the parties must continue after the closing to attempt to obtain the missing Consent (note that parties will sometimes negotiate the issue of how long these efforts must continue); and (d) once the missing Consent relating to a particular Contract is obtained, that Contract will be assigned to and assumed by Buyer pursuant to a special-purpose assignment and assumption agreement, which will generally follow the form of the assignment and assumption agreement attached as Exhibit 2.7(a)(ii). Parties might prefer to reach agreement on the form of the special-purpose assignment and assumption agreement in advance.

Section 2.10(b) deals with consent to nonmaterial contracts. Nonmaterial contracts include, for example, the lease of the office postage meter, the photocopier machine service agreement and the water cooler rental agreement. Such nonmaterial contracts often are cancelable by either party upon thirty days' notice, are contracts that simply provide for pay-as-you-go services, are contracts for which a substitute is readily available or are contracts where the third-party vendor is not likely to care who the contracting party is so long as the third party is paid in a timely manner.

Section 2.10(b) provides Buyer at the Closing with an election as to each Restricted Nonmaterial Contract as to which a required consent has not been obtained by the Closing. The buyer can choose to have the contract assigned to it even in violation of the contract's assignment provisions, figuring that (a) the risk of the third party canceling the contract or bringing a breach of contract claim if and when such third party becomes aware of the unauthorized transfer is not significant, or (b) even if such cancellation of or claim under the contract is pursued by the third party, the amount of potential damages is minimal. Alternatively, the buyer can elect not to take the contract, forcing the seller to retain the contract and all the liabilities thereunder.

Arguably, it should be the buyer's decision whether to accept or reject nonmaterial contracts where consents have not been obtained. After all, it is the buyer's post-closing operation of the business that will suffer if the contracts are not assigned; thus, the buyer should decide what contracts it truly needs. The seller may argue, however, that it, too, can be held responsible if a contract is purportedly assigned in violation of the assignment restrictions of such contract and, therefore, that the seller should have some say in whether such a contract is transferred to a buyer in violation of the assignment restrictions (or at least should be protected in some way, such as through indemnification, if the third party pursues a claim against the seller). The parties' negotiating positions and strengths will govern the outcome of this issue.

Sections 5.4, 5.7, 6.1 and 6.2 should be coordinated to clarify that the parties must cooperate to obtain both the material consents and the nonmaterial consents before the closing.