5. Covenants of Seller Prior to Closing

COMMENT

Articles 3 and 4 contain the parties' representations to each other. Although some acquisition agreements intermingle covenants and conditions with representations, the Model Agreement segregates the representations in Articles 3 and 4 from the covenants to be performed prior to the Closing in Articles 5 and 6 and from the conditions to the parties' obligations to complete the acquisition in Articles 7 and 8. Article 10 contains certain additional covenants that do not relate solely to the period between signing and Closing.

A breach of a covenant in Article 5, like the breach of any other covenant under normal contract principles, will result in liability by the breaching party (Seller) to the nonbreaching party (Buyer) if the transaction does not close. Article 11 provides that Seller and Shareholders are obligated to indemnify Buyer after the Closing for breaches of the covenants in Article 5. Additionally, Seller and Shareholders could be obligated to indemnify Buyer for such breaches if the Agreement is terminated pursuant to Article 9.

5.1 ACCESS AND INVESTIGATION

Between the date of this Agreement and the Closing Date, and upon reasonable advance notice received from Buyer, Seller shall (and Shareholders shall cause Seller to) (a) afford Buyer and its Representatives and prospective lenders and their Representatives (collectively, "Buyer Group") full and free access, during regular business hours, to Seller's personnel, properties (including subsurface testing), Contracts, Governmental Authorizations, books and Records and other documents and data, such rights of access to be exercised in a manner that does not unreasonably interfere with the operations of Seller; (b) furnish Buyer Group with copies of all such Contracts, Governmental Authorizations, books and Records and other existing documents and data as Buyer may reasonably request; (c) furnish Buyer Group with such additional

financial, operating and other relevant data and information as Buyer may reasonably request; and (d) otherwise cooperate and assist, to the extent reasonably requested by Buyer, with Buyer's investigation of the properties, assets and financial condition related to Seller. In addition, Buyer shall have the right to have the Real Property and Tangible Personal Property inspected by Buyer Group, at Buyer's sole cost and expense, for purposes of determining the physical condition and legal characteristics of the Real Property and Tangible Personal Property. In the event subsurface or other destructive testing is recommended by any of Buyer Group, Buyer shall be permitted to have the same performed.

COMMENT

Section 5.1 provides the Buyer Group with access to Seller's personnel, properties and Records so that Buyer can continue its investigation of Seller, confirm the accuracy of Seller's representations and verify satisfaction of the various conditions to its obligation to complete the acquisition, such as the absence of a material adverse change in the financial condition, results of operations, business or prospects of Seller.

Note that the access right provided for in Section 5.1 extends to the Buyer Group, which includes prospective lenders and their Representatives. A prospective lender to a buyer may want to engage environmental consultants, asset appraisers and other consultants to present their findings before making a definitive lending commitment.

The access right in Section 5.1(a) is accompanied by the rights in subsection (b) to obtain copies of existing documents, which may include licenses, certificates of occupancy and other permits issued in connection with the ownership, development or operation of the Real Property, and in subsection (c) to obtain data not yet reduced to writing or data storage.

In many acquisitions, the buyer's investigation occurs both before and after the signing of the acquisition agreement. Although the Model Agreement provides for comprehensive representations from Seller, the importance of these representations increases if the buyer is unable to complete its investigation prior to execution of the acquisition agreement. In those circumstances, the representations can be used to elicit information that the buyer will be unable to ferret out on its own prior to execution (see the introductory comment to Article 3 under the caption "Purposes of the Seller's Representations"). If a buyer later discovers a material inaccuracy in the seller's representations during its post-signing investigation, the buyer can terminate or consummate the acquisition, as discussed below. Conversely, if the buyer has been able to conduct a significant portion of its investigation prior to execution and is comfortable with the results of that investigation, the buyer may have greater latitude in responding to the seller's requests to pare down the seller's representations.

The seller may want to negotiate certain limitations on the scope of the buyer's investigation. For example, the seller may have disclosed that it is involved in a dispute with a competitor or is the subject of a governmental investigation. Although the buyer clearly has a legitimate interest in ascertaining as much as it can about the dispute or investigation, both the seller and the buyer should exercise caution in granting access to certain information for fear that such access would deprive the seller of its attorney-client privilege. *See generally* Hundley, *White Knights, Pre-Nuptial Confidences and the Morning After: The Effect of Transaction-Related Disclosures on the Attorney-Client and Related Privileges*, 5 DEPAUL BUS. L.J. 59 (1993). Section 12.6 provides that the parties do not intend any waiver of the attorney-client privilege.

The seller is likely to resist subsurface testing by the buyer. Test borings could disclose the existence of one or more adverse environmental situations, which the seller or the buyer or its tester may be obligated to report to a governmental agency without

certainty that the closing will ever occur. A test boring could exacerbate or create an adverse environmental situation by carrying an existing subsurface hazardous substance into an uncontaminated subsurface area or water source. The seller would ordinarily not be in privity of contract with the buyer's testing organization nor would communications and information received from the testing organization ordinarily be protected by an attorney-client privilege available to the seller. Assuming testing is to be permitted, the seller would also be concerned that the buyer undertake to fully indemnify, defend and hold the seller harmless from any physical damage and liens claimed or asserted to have been caused or arisen as a result of the testing by or on behalf of the buyer.

Special considerations apply when the seller and the buyer are competitors. The seller may be reluctant to share sensitive information with its competitor until it is certain that the transaction will close. Moreover, both parties will want to consider the extent to which the sharing of information prior to closing may raise antitrust concerns. *See generally* Steptoe, *Premerger Coordination/Information Exchange*, Remarks before the American Bar Association Section of Antitrust Law Spring Meeting, April 7, 1994, 7 TRADE REG. REP. (CCH) ¶ 50,134.

The buyer's right of access is not limited to testing the seller's representations and confirming the satisfaction of conditions to closing. The buyer may want to learn more about the operations of the seller in order to make appropriate plans for operating the business after the closing. In particular, the buyer may want to have some of its personnel investigate the seller to prepare for the integration of the buyer's and the seller's product lines, marketing strategies and administrative functions.

During the investigation, the buyer has access to a great deal of information concerning the seller. If the information reveals a material inaccuracy in the seller's representations as of the date of the acquisition agreement, the buyer has several options. If the inaccuracy results in the inability of the seller to satisfy the applicable closing condition in Section 7.1, the buyer can terminate the acquisition and pursue its remedies under Section 9.2. The buyer may, however, want to complete the acquisition despite the inaccuracy if it can obtain, for example, an adjustment in the purchase price. If the seller refuses to reduce the purchase price, the buyer must either terminate the acquisition and pursue its remedies for Breach under Section 9.2 or close and pursue its indemnification rights (and any available claim for damages) based upon the inaccuracy of the seller's representation (see the Comment to Section 7.1 and Appendix D, scenario 4).

If the buyer's investigation does not reveal an inaccuracy that actually exists because the inaccuracy is subtle or because the buyer's personnel did not read all the relevant information or realize the full import of apparently inconsequential matters, the buyer may be unable to exercise its right to terminate the acquisition prior to closing. Upon discovery of such an inaccuracy following closing, however, the buyer should be entitled to pursue its indemnification rights. Section 11.1 attempts to preserve Buyer's remedies for breach of Seller's representations regardless of any Knowledge acquired by Buyer before the signing of the acquisition agreement or between the signing of the acquisition agreement and the Closing. This approach reflects the view that the risks of the acquisition were allocated by the representations when the acquisition agreement was signed. The Model Agreement thus attempts to give Buyer the benefit of its bargain regardless of the results of its investigation and regardless of any information furnished to Buyer by Seller or its shareholders. There is case law, however, indicating that this may not be possible in some jurisdictions. See the Comment to Section 11.1.

The seller may want the contract to include pre-closing indemnification from the buyer in the event the closing does not occur with respect to any claim, damage or expense arising out of inspections and related testing conducted on behalf of the buyer,

including the cost of restoring the property to its original condition, the removal of any liens against the real property and improvements and compensation for impairment to the seller's use and enjoyment of the same. If the contract is terminated, the seller does not want to be left without recourse against the buyer with respect to these matters. Any such indemnification should survive the termination of the agreement. In addition, upon termination, the seller may wish to have the buyer prove payment for all work performed and deliver to the seller copies of all surveys, tests, reports and other materials produced for the buyer to compensate the seller for the inconvenience of enduring the inspection only to have the contract terminated. Having the benefit of use of the reports will save the seller time in coming to terms with the next prospective buyer.

5.2 OPERATION OF THE BUSINESS OF SELLER

Between the date of this Agreement and the Closing, Seller shall (and Shareholders shall cause Seller to):

(a) conduct its business only in the Ordinary Course of Business;

(b) except as otherwise directed by Buyer in writing, and without making any commitment on Buyer's behalf, use its Best Efforts to preserve intact its current business organization, keep available the services of its officers, employees and agents and maintain its relations and good will with suppliers, customers, landlords, creditors, employees, agents and others having business relationships with it;

(c) confer with Buyer prior to implementing operational decisions of a material nature;

(d) otherwise report periodically to Buyer concerning the status of its business, operations and finances;

(e) make no material changes in management personnel without prior consultation with Buyer;

(f) maintain the Assets in a state of repair and condition that complies with Legal Requirements and is consistent with the requirements and normal conduct of Seller's business;

(g) keep in full force and effect, without amendment, all material rights relating to Seller's business;

(h) comply with all Legal Requirements and contractual obligations applicable to the operations of Seller's business;

(i) continue in full force and effect the insurance coverage under the policies set forth in Part 3.21 or substantially equivalent policies;

(j) except as required to comply with ERISA or to maintain qualification under Section 401(a) of the Code, not amend, modify or terminate any Employee Plan without the express written consent of Buyer, and except as required under the provisions of any Employee Plan, not make any contributions to or with respect to any Employee Plan without the express written consent of Buyer, provided that Seller shall contribute that amount of cash to each Employee Plan necessary to fully fund all of the benefit liabilities of such Employee Plan on a plan-termination basis as of the Closing Date;

(k) cooperate with Buyer and assist Buyer in identifying the Governmental Authorizations required by Buyer to operate the business from and after the Closing

Date and either transferring existing Governmental Authorizations of Seller to Buyer, where permissible, or obtaining new Governmental Authorizations for Buyer;

(l) upon request from time to time, execute and deliver all documents, make all truthful oaths, testify in any Proceedings and do all other acts that may be reasonably necessary or desirable in the opinion of Buyer to consummate the Contemplated Transactions, all without further consideration; and

(m) maintain all books and Records of Seller relating to Seller's business in the Ordinary Course of Business.

COMMENT

Section 5.2(a) requires Seller to operate its business only in the "Ordinary Course of Business" (as defined in Section 1.1). This provision prohibits Seller from taking certain actions that could adversely affect the value of the Assets to Buyer or interfere with Buyer's plans for the business.

If a buyer is uncomfortable with the leeway that the Ordinary-Course-of-Business restriction provides to the seller, the buyer may want to provide a list of activities it considers to be outside of the Ordinary Course of Business and perhaps set dollar limits on the seller's right to take certain types of action without the buyer's prior approval as well. Note, however, that Section 5.3 incorporates a number of specific prohibitions by reference to Section 3.19.

Because many companies are not accustomed to operating under such restrictions, the seller may have to implement new procedures to ensure that the restrictions will be honored. Depending upon the nature of the restricted activity, the seller should ensure that the appropriate persons (such as directors, officers and employees) are aware of the obligations imposed on the seller and that procedures are implemented and monitored at the appropriate levels.

When the acquisition agreement is signed, the buyer typically expects to become informed about and involved to some extent in material decisions concerning the seller. Thus, Sections 5.2(c) and (d) require Seller to confer with Buyer on operational matters of a material nature and to cause Seller to report periodically to Buyer on the status of its business, operations and finances. The reach of subsection (c) is broader than that of subsection (a) because it provides that Seller must confer with Buyer on operational matters of a material nature even if such matters do not involve action outside the Ordinary Course of Business. On matters falling into this category, however, Buyer has only a right to be conferred with, and Seller retains the freedom to make the decisions. Seller has the obligation to take the initiative in conferring with Buyer under subsection (c) and in reporting to Buyer under subsection (d). For example, if a seller were a retail company, subsection (c) would require the seller to confer with the buyer about large purchases of seasonal inventory within the Ordinary Course of Business. The decision whether to purchase such inventory, however, would remain with the seller.

Because the transaction involves the transfer of assets, it is likely that the environmental permits and other governmental authorizations possessed by the seller will need to be transferred or obtained by the buyer. Some permits, for example RCRA Part B Permits for the storage, treatment or disposal of hazardous waste and many National Pollution Discharge Elimination Systems (NPDES), require pre-closing notification and approval. Other permits may be transferred post-closing. Because the actual requirements vary by jurisdiction, it is important that these issues are addressed initially in the due diligence stage and more definitively in the time between signing and closing.

In negotiating the covenants in Sections 5.2 and 5.3, a buyer should consider whether the exercise of the power granted to the buyer through expansive covenants might result in the buyer incurring potential liability under statutory or common law. For example, because of the broad reach of many environmental statutes (see Section 3.22 and "Environmental Law" (as defined in Section 1.1)) and expanding common law tort theories, the buyer should be cautious in exercising its powers granted by expansive covenants to become directly involved in making business decisions. Similarly, if the seller is financially troubled, the buyer may want to be circumspect in the degree of control it exercises over the seller, lest the acquisition fail to close and claims akin to "lender liability" be asserted against the buyer. If the seller and the buyer are competitors, they will want to consider the extent to which control by the buyer over the seller's conduct of its business may raise antitrust concerns. *See* Steptoe, *Premerger Coordination/Information Exchange*, Remarks before the American Bar Association Section of Antitrust Law Spring Meeting, April 7, 1994, 7 TRADE REG. REP. (CCH) ¶ 50,134. If the seller is publicly held, the buyer should consider the impact of any exercise of rights with respect to the seller's public disclosure on control person liability under Section 20(a) of the Exchange Act and Section 15(a) of the Securities Act. *See* Radol v. Thomas, 556 F. Supp. 586, 592 (S.D. Ohio 1983), *aff'd*, 772 F.2d 244 (6th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986). *See generally* BLUMBERG & STRASSER, THE LAW OF CORPORATE GROUPS: STATUTORY LAW, SPECIFIC chs. 2–7 (1992 & Supp. 1993); BLUMBERG & STRASSER, THE LAW OF CORPORATE GROUPS: STATUTORY LAW, GENERAL chs. 19–28 (1989 & Supp. 1993).

5.3 NEGATIVE COVENANT

Except as otherwise expressly permitted herein, between the date of this Agreement and the Closing Date, Seller shall not, and Shareholders shall not permit Seller to, without the prior written Consent of Buyer, (a) take any affirmative action, or fail to take any reasonable action within its control, as a result of which any of the changes or events listed in Sections 3.15 or 3.19 would be likely to occur; (b) make any modification to any material Contract or Governmental Authorization; (c) allow the levels of raw materials, supplies or other materials included in the Inventories to vary materially from the levels customarily maintained; or (d) enter into any compromise or settlement of any litigation, proceeding or governmental investigation relating to the Assets, the business of Seller or the Assumed Liabilities.

COMMENT

Section 5.2 requires Seller to conduct its business between the signing of the acquisition agreement and the Closing only in the Ordinary Course of Business. Section 5.3 eliminates any risk to Buyer that the items specified in Section 3.19 could be deemed to be within the Ordinary Course of Business by expressly prohibiting Seller from taking such actions without Buyer's prior consent.

Buyer should understand, however, that Section 5.3 applies only to matters within the control of Seller. Some of the changes and events described in Section 3.19 (such as the suffering of damage or loss of property as a result of an earthquake) are not within the control of Seller. Section 5.3 does not require Seller to not suffer damage due to events described in Section 3.19 that are beyond its control; such a covenant is impossible to perform. Accordingly, if Seller suffers damage or loss of property between the signing of the acquisition agreement and the Closing, and that damage or loss was not the result of Seller's failure to take steps within its control to prevent the

damage or loss, Buyer would have the right to terminate the acquisition, but Buyer would not have the right to obtain damages from Seller or Shareholders unless Buyer had obtained a warranty that the representations in Article 3 would be accurate as of the Closing Date (see the Comment to Section 7.1 under the caption "Supplemental Bring Down Representation"). If, however, the seller could have prevented the damage or loss (because, for example, the loss resulted from a fire that was caused by the seller's negligent storage of hazardous substances), the buyer not only would have the right to terminate the acquisition but would also have the right to pursue damages from the seller and its shareholders (regardless of whether the buyer elects to proceed with the acquisition).

In addition to the items listed in Section 3.19, there may be other items of concern to the buyer between the signing of the acquisition agreement and the closing. Such items could be added to either Section 5.2 or Section 5.3.

Note that Section 5.7, operating in conjunction with Section 7.1, requires Seller to use its Best Efforts to ensure that the representations in Section 3.19 are accurate as of the Closing Date. Thus, Sections 5.3 and 5.7 overlap to some degree.

5.4 REQUIRED APPROVALS

As promptly as practicable after the date of this Agreement, Seller shall make all filings required by Legal Requirements to be made by it in order to consummate the Contemplated Transactions (including all filings under the HSR Act). Seller and Shareholders also shall cooperate with Buyer and its Representatives with respect to all filings that Buyer elects to make or, pursuant to Legal Requirements, shall be required to make in connection with the Contemplated Transactions. Seller and Shareholders also shall cooperate with Buyer and its Representatives in obtaining all Material Consents (including taking all actions requested by Buyer to cause early termination of any applicable waiting period under the HSR Act).

COMMENT

Section 5.4 works in conjunction with Section 6.1. Section 5.4 requires Seller to make all necessary filings as promptly as practicable and to cooperate with Buyer in obtaining all approvals Buyer must obtain from Governmental Bodies and private parties (including, for example, lenders) to complete the acquisition. Section 5.4 does not contain a proviso similar to that in Section 6.1 limiting Seller's obligations because the potential incremental burdens on Seller normally are not as great as those that could be imposed upon Buyer.

The need for governmental approvals invariably arises in acquisitions of assets, which include such items as permits and licenses. Even in stock acquisitions, however, governmental notifications or approvals may be necessary if a company to be acquired conducts business in a regulated industry (see the Comment to Section 3.2). *See generally* BLUMBERG & STRASSER, THE LAW OF CORPORATE GROUPS: STATUTORY LAW, SPECIFIC chs. 2–7 (1992 & Supp. 1993); BLUMBERG & STRASSER, THE LAW OF CORPORATE GROUPS: STATUTORY LAW, GENERAL chs. 19–28 (1989 & Supp. 1993).

The HSR Act requires both the seller and the buyer (or their ultimate parent entities, which includes a shareholder who owns fifty percent or more of the stock) to make separate filings. Accordingly, Sections 5.4 and 6.1 impose mutual filing obligations on Seller and Buyer and provide that each party will cooperate with the other party in connection with these filings. There may be circumstances, however, in which it is appropriate to give one party control over certain aspects of the approval process. For

example, under the HSR Act, the acquisition cannot be consummated until the applicable waiting period expires. Although the parties have the ability to request early termination of the waiting period, Section 5.4 gives Buyer control over the decision to request early termination.

The obligation to pay the HSR Act filing fee is generally the obligation of the buyer, but the Model Agreement allocates responsibility for the HSR Act filing fee equally in Section 13.1.

5.5 NOTIFICATION

Between the date of this Agreement and the Closing, Seller and Shareholders shall promptly notify Buyer in writing if any of them becomes aware of (a) any fact or condition that causes or constitutes a Breach of any of Seller's representations and warranties made as of the date of this Agreement or (b) the occurrence after the date of this Agreement of any fact or condition that would or be reasonably likely to (except as expressly contemplated by this Agreement) cause or constitute a Breach of any such representation or warranty had that representation or warranty been made as of the time of the occurrence of, or Seller's or either Shareholders' discovery of, such fact or condition. Should any such fact or condition require any change to the Disclosure Letter, Seller shall promptly deliver to Buyer a supplement to the Disclosure Letter specifying such change. Such delivery shall not affect any rights of Buyer under Section 9.2 and Article 11. During the same period, Seller and Shareholders also shall promptly notify Buyer of the occurrence of any Breach of any covenant of Seller or Shareholders in this Article 5 or of the occurrence of any event that may make the satisfaction of the conditions in Article 7 impossible or unlikely.

COMMENT

Section 5.5 requires that Seller and Shareholders notify Buyer if they discover that a representation made when they signed the acquisition agreement was inaccurate or that a representation will be inaccurate if made as of the Closing Date because of occurrences after the acquisition agreement was signed. This notification is not simply for Buyer's information. Section 7.1 makes it a condition to Buyer's obligation to complete the acquisition that Seller's representations were materially correct when the acquisition agreement was signed and that they are still correct as of the Closing Date. Section 5.5 also requires Seller to provide a supplement to the Disclosure Letter that clarifies which representations or conditions are affected by the newly discovered facts or conditions.

A seller's disclosure of an inaccurate representation does not cure the resulting breach of that representation. (See Appendix D, scenarios 2.2, 2.4, 3.2 and 3.4.) Depending upon the seriousness of the matter disclosed by the seller, the buyer may decide to terminate the acquisition or at least to cease incurring expenses until the buyer concludes, on the basis of further evaluation and perhaps price concessions from the seller, to proceed with the acquisition. Section 5.5 notwithstanding, if the buyer proceeds with the acquisition without an amendment to the acquisition agreement after the seller has disclosed a real or anticipated breach, the buyer's remedies for this breach could be affected (see the Comment to Section 11.1). A seller may object to a provision that permits the buyer to close and seek indemnification for a breach of a representation that has been disclosed prior to closing.

The provision in Section 5.5 requiring notice of events that render unlikely the satisfaction of closing conditions also gives Buyer an opportunity to limit its ongoing expenses and decide whether to abandon the acquisition.

5.6 NO NEGOTIATION

Until such time as this Agreement shall be terminated pursuant to Section 9.1, neither Seller nor either Shareholder shall directly or indirectly solicit, initiate, encourage or entertain any inquiries or proposals from, discuss or negotiate with, provide any nonpublic information to or consider the merits of any inquiries or proposals from any Person (other than Buyer) relating to any business combination transaction involving Seller, including the sale by Shareholders of Seller's stock, the merger or consolidation of Seller or the sale of Seller's business or any of the Assets (other than in the Ordinary Course of Business). Seller and Shareholders shall notify Buyer of any such inquiry or proposal within twenty-four (24) hours of receipt or awareness of the same by Seller or either Shareholder.

COMMENT

Section 5.6 is commonly called a "no-shop" provision. This provision was originally developed for acquisitions of public companies to prevent another buyer from interfering with the acquisition during the period between signing and closing. A no-shop provision may be unnecessary if the acquisition agreement is a legally binding undertaking of the seller and its shareholders to consummate the acquisition, subject only to the satisfaction of the various closing conditions (not including shareholder approval). Thus, in the Fact Pattern, Seller and Shareholders (who own ninety percent of the stock) would be liable for damages if they breach the acquisition agreement by pursuing a transaction with another buyer, and the other buyer may be liable for tortious interference with the signed acquisition agreement. Nonetheless, a buyer has a legitimate interest in preventing the seller from seeking to obtain a better offer and in learning of any third-party inquiries or proposals, and the no-shop provision may provide a basis for the buyer to obtain injunctive relief if appropriate.

Section 5.6 is not qualified by a "fiduciary-out" exception. A fiduciary-out exception typically is not appropriate in a merger, a share exchange or a sale of substantially all of the assets of a company where the directors and the shareholders of that company are the same or the number of shareholders is small enough to obtain shareholder approval prior to the signing of the acquisition agreement or, as is the case in the Model Agreement, all of the principal shareholders sign the acquisition agreement. If shareholder approval cannot be obtained at that time, however, the seller may want a fiduciary-out provision. See the Comment to Section 3.2.

5.7 BEST EFFORTS

Seller and Shareholders shall use their Best Efforts to cause the conditions in Article 7 and Section 8.3 to be satisfied.

COMMENT

Section 5.7 establishes a contractual obligation of Seller and Shareholders to use their Best Efforts (as defined in Section 1.1) to cause the Article 7 conditions to Buyer's

obligation to complete the acquisition to be satisfied. The condition in Section 8.3 (a condition to Seller's obligation) as well as those in Article 7 are included in this provision because obtaining the Consents specified as a condition to Seller's obligation to close may be partly within the control of Seller and Shareholders, and Buyer will want assurance that they have exercised their Best Efforts to cause that condition to be satisfied.

The definition of Best Efforts in Section 1.1 makes it clear that Seller and Shareholders are obligated to do more than merely act in good faith; they must exert the efforts that a prudent person who desires to complete the acquisition would use in similar circumstances to ensure that the Closing occurs as expeditiously as possible.

Thus, Section 5.7, for example, requires that Seller and Shareholders use their Best Efforts to ensure that their representations are accurate in all material respects as of the Closing Date, as if made on that date, because Section 7.1(a) makes such accuracy a condition to Buyer's obligation to complete the acquisition. Section 5.7 also requires Seller and Shareholders to use their Best Efforts to obtain all of the Material Consents necessary for Seller and Buyer to complete the acquisition (those listed on Exhibits 7.3 and 8.3) because Sections 7.3 and 8.3 make the obtaining of such Consents conditions to the parties' obligations to consummate the acquisition.

If the Closing does not occur because one of the conditions in Article 7 or Section 8.3 is not satisfied, Seller and Shareholders may have some liability to Buyer for breach of their Best-Efforts covenant if they, in fact, have not used their Best Efforts to cause the condition to be satisfied (see also the introductory Comment to Article 7).

5.8 INTERIM FINANCIAL STATEMENTS

Until the Closing Date, Seller shall deliver to Buyer within _____ (_____) days after the end of each month a copy of the [describe financial statements] for such month prepared in a manner and containing information consistent with Seller's current practices and certified by Seller's chief financial officer as to compliance with Section 3.4.

COMMENT

Section 5.8 requires Seller to deliver interim, monthly financial statements to Buyer to enable Buyer to monitor the performance of Seller during the period prior to the Closing. This provision also supplements the notification provisions of Section 5.5.

5.9 CHANGE OF NAME

On or before the Closing Date, Seller shall (a) amend its Governing Documents and take all other actions necessary to change its name to one sufficiently dissimilar to Seller's present name, in Buyer's judgment, to avoid confusion and (b) take all actions requested by Buyer to enable Buyer to change its name to Seller's present name.

COMMENT

This provision should be included in the acquisition agreement if the buyer (or the division or subsidiary that will conduct the purchased business) desires to continue business under the seller's name. Although the use of this name by the buyer could cause some confusion, particularly with respect to liabilities that are not assumed, this

risk is acceptable if the name of the seller and the goodwill associated with it are important to the continued conduct of the business. A change in the seller's name prior to the closing may not be practicable, in which case Section 5.9 should be reworded and moved to Article 10.

5.10 PAYMENT OF LIABILITIES

Seller shall pay or otherwise satisfy in the Ordinary Course of Business all of its Liabilities and obligations. Buyer and Seller hereby waive compliance with the bulk-transfer provisions of the Uniform Commercial Code (or any similar law) ("Bulk Sales Laws") in connection with the Contemplated Transactions.

COMMENT

A buyer will desire assurance that the seller will pay its liabilities in the Ordinary Course of Business and before there is any default in order that the seller's creditors will not seek to collect them from buyer under some successor liability theory. See the Comments to Sections 3.13, 3.32, 10.3 and 10.4 and Appendix A. This is particularly the case where the buyer does not require the seller to comply with the Bulk Sales Laws described below.

Statutory provisions governing bulk transfers (Article 6 of the Uniform Commercial Code (UCC), various versions of which are in effect in certain states) (the "Bulk Sales Laws") require the purchaser of a major part of the materials, supplies or other inventory of an enterprise whose principal business is the sale of merchandise from stock (including those who manufacture what they sell) to give advance notice of the sale to each creditor of the transferor. In order to properly analyze the issue, the parties must review the Bulk Sales Laws in effect for the state(s) containing the transferor's principal place of business, its executive offices and the assets to be transferred. The purchaser and the transferor often waive the requirement of notices under Bulk Sales Laws, despite the serious consequences of noncompliance, and include an indemnity by the transferor against claims arising as a result of the failure to comply.

Noncompliance with the Bulk Sales Laws may give a creditor of the transferor a claim against the transferred assets or a claim for damages against the transferee, even against a transferee for full value without notice of any wrongdoing on the part of the transferor. This claim may be superior to any acquisition lender's security interest; for this reason, a lender may not allow waiver of compliance with Bulk Sales Laws without a very strong indemnity from the transferor. In addition, some states have imposed upon the purchaser the duty to ensure that the transferor applies the consideration received to its existing debts; this may include an obligation to hold in escrow amounts sufficient to pay any disputed debts. In Section 5.10, compliance with the Bulk Sales Laws is waived and the contractual indemnities in Section 11.2(f) cover the risk of noncompliance.

Bulk Sales Laws provide a specific kind of protection for creditors of businesses that sell merchandise from stock. Creditors of these businesses are vulnerable to a "bulk sale" in which the business sells all or a large part of inventory to a single buyer outside the Ordinary Course of Business, following which the proprietor absconds with the proceeds. The original Article 6 of the UCC ("Original UCC 6") requires "bulk sale" buyers to provide notice of the transaction to the transferor's creditors and to maintain a list of the transferor's creditors and a schedule of property obtained in a "bulk sale" for six months after the "bulk sale" takes place. In those jurisdictions that have adopted optional Section 6-106, there is also a duty to assure that the new consideration for

the transfer is applied to pay debts of the transferor. Unless these procedures are followed, creditors may void the sale.

Compliance with the notice provisions of Original UCC 6 can be extremely burdensome, particularly when the transferor has a large number of creditors, and can adversely affect relations with suppliers and other creditors. When the goods that are the subject of the transfer are located in several jurisdictions, the transferor may be obligated to comply with Article 6 as enacted in each jurisdiction.

Failure to comply with the provisions of Original UCC 6 renders the transfer entirely ineffective, even when the transferor has attempted compliance in good faith, and even when no creditor has been injured by the noncompliance. A creditor, or a bankruptcy trustee, of the transferor may be able to set aside the entire transaction and recover from the noncomplying transferee all the goods transferred or their value. In contrast to the fraudulent transfer laws discussed in the Comment to Section 3.32, a violation of Original UCC 6 renders the entire transfer ineffective without awarding the transferee any corresponding lien on the goods for value given in exchange for the transfer. Thus, the transferee could pay fair value for the goods, yet lose the goods entirely if the transfer is found to have violated Original UCC 6.

Because (a) business creditors can evaluate credit-worthiness far better than was the case when Original UCC 6 was first promulgated; (b) modern fraudulent transfer actions under the Uniform Fraudulent Transfer Act overlap the Bulk Sales Law in a significant way; and (c) a Bulk Sales Law impedes normal business transactions, the National Conference of Commissioners on Uniform State Laws and the American Law Institute have recommended the repeal of UCC Article 6. The Commissioners have proposed an alternative Article 6 ("Revised UCC 6"), which addresses many of the concerns with the Original UCC 6. As a result, as of December 31, 2000, the breakdown of states with the Original UCC 6, the Revised UCC 6 and no Bulk Sales Law was as follows:

Original UCC 6:

Georgia	New York	South Carolina
Maryland	North Carolina	Wisconsin
Missouri	Rhode Island	

Adoption of Revised UCC 6:

Arizona	District of Columbia	Virginia
California	Indiana	

Repeal of UCC 6:

Alabama	Louisiana	Ohio
Alaska	Maine	Oklahoma
Arkansas	Massachusetts	Oregon
Colorado	Michigan	Pennsylvania
Connecticut	Minnesota	Puerto Rico
Delaware	Mississippi	South Dakota
Florida	Montana	Tennessee
Hawaii	Nebraska	Texas
Idaho	Nevada	Utah
Illinois	New Hampshire	Vermont
Iowa	New Jersey	Washington
Kansas	New Mexico	West Virginia
Kentucky	North Dakota	Wyoming

A "bulk transfer" under Original UCC 6 took place with the transfer "of a major part of the materials, supplies, merchandise or other inventory" outside the ordinary

course of business. Under Revised UCC 6, a bulk sale takes place if there is a sale of "more than half the seller's inventory" outside the ordinary course of business and under conditions in which the "buyer has notice . . . that the seller will not continue to operate the same or a similar kind of business after the sale." Because the risk to creditors arises from the sale in which the seller goes out of business, Revised UCC 6 applies only to those situations. Revised UCC 6 also excepts, for the first time, any asset sales that fall below a net value of $10,000 or that exceed a value of $25,000,000.

The duties of the transferee under Revised UCC 6 are primarily the same as those under Original UCC 6. The transferee must obtain a list of creditors ("claimants" under Revised UCC 6) and provide them with notice of the bulk sale. Revised UCC 6, however, provides that, if the transferor submits a list of 200 or more claimants or provides a verified statement that there are more than 200, the transferee may simply file a written notice of the bulk sale with the office of the Secretary of State (or other applicable official, as a statute provides) rather than send written notice to all claimants.

Under Original UCC 6, the transferee was required to keep a schedule of property and a list of claimants for a six-month period following the sale. Under Revised UCC 6, the transferor and transferee instead must agree on "a written schedule of distribution" of the net contract proceeds, which schedule must be included in the notice to claimants. The "schedule of distribution" may provide for any distribution that the transferor and transferee agree to, including distribution of the entire net contract price to the seller, but claimants will have received advance notice of the intended distribution, giving them the opportunity to file an action for appropriate relief.

The last significant change in Revised UCC 6 is the basic remedy available to creditors. In Original UCC 6, a bulk sale in violation of the statute was entirely void. Revised UCC 6 provides for money damages rather than for voiding the sale. The creditor must prove its losses resulting from noncompliance with the statute. There are cumulative limits on the damages that may be assessed, and buyers are given a "good-faith" defense in complying with Revised UCC 6.

Finally, Revised UCC 6 extends the statute of limitations on creditor's actions from six months under Original UCC 6 to one year. The period runs from the date of the sale. Concealed sales toll the statute of limitations in Revised UCC 6 as they do under Original UCC 6.

5.11 CURRENT EVIDENCE OF TITLE

(a) As soon as is reasonably possible, and in no event later than _____ (_____) Business Days after the date of this Agreement, Seller shall furnish to Buyer, at Seller's expense, for each parcel, tract or subdivided land lot of Real Property or Ground Lease Property:

(i) from _____ (the "Title Insurer"):

(A) title commitments issued by the Title Insurer to insure title to all Land, Improvements, insurable Appurtenances, if any, and Ground Lease Property in the amount of that portion of the Purchase Price allocated to the Real Property, as specified in Part 2.5, covering such Real Property, naming Buyer as the proposed insured and having an effective date after the date of this Agreement, wherein the Title Insurer shall agree to issue an ALTA 1992 form owner's policy of title insurance (each a "Title Commitment"); and

(B) complete and legible copies of all recorded documents listed as

Schedule B-1 matters to be terminated or satisfied in order to issue the policy described in the Title Commitment or as special Schedule B-2 exceptions thereunder (the "Recorded Documents"); and

(ii) a survey of the Real Property made after the date of this Agreement by a land surveyor licensed by the state in which the Facility is located and bearing a certificate, signed and sealed by the surveyor, certifying to Buyer and the Title Insurer that:

(A) such survey was made (1) in accordance with "Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys," jointly established and adopted by ALTA and ACSM in 1992, and includes Items 1–4, 6, 7(a), 7(b)(1), 7(c), 8–11 and 13 of Table A thereof, and (2) pursuant to the Accuracy Standards (as adopted by ALTA and ACSM and in effect on the date of said certificate) of an "Urban" survey; and

(B) such survey reflects the locations of all building lines, easements and areas affected by any Recorded Documents affecting such Real Property as disclosed in the Title Commitment (identified by issuer, commitment number, and an effective date after the date hereof) as well as any encroachments onto the Real Property or by the Improvements onto any easement area or adjoining property (each a "Survey"); and

(iii) complete and current searches in the name of Seller and other appropriate parties of all Uniform Commercial Code Financing Statements records maintained by the Secretary of State of the state in which Seller is incorporated, the state in which Seller maintains its principal place of business, each state in which a Facility is located, each jurisdiction in which a filing would be required in order to perfect a security interest in the Assets, the clerk or recorder of deeds (or other governmental office where real property documents are filed for recording) of each county in which any Facility is located and wherever else Seller or Buyer, based upon its investigation, is aware that a Uniform Commercial Code Financing Statement has been filed, together with such releases, termination statements and other documents as may be necessary to provide reasonable evidence that all items of Intangible Personal Property, Tangible Personal Property and fixtures to be sold under this Agreement are free and clear of Encumbrances, other than as permitted under this Agreement.

(b) Each Title Commitment shall include the Title Insurer's requirements for issuing its title policy, which requirements shall be met by Seller on or before the Closing Date (including those requirements that must be met by releasing or satisfying monetary Encumbrances, but excluding Encumbrances that will remain after Closing and those requirements that are to be met solely by Buyer).

(c) If any of the following shall occur (collectively, a "Title Objection"):

(i) any Title Commitment or other evidence of title or search of the appropriate real estate records discloses that any party other than Seller has title to the insured estate covered by the Title Commitment;

(ii) any title exception is disclosed in Schedule B to any Title Commitment that is not one of the Permitted Real Estate Encumbrances or one that Seller specifies when delivering the Title Commitment to Buyer as one that Seller will cause to be deleted from the Title Commitment concurrently with the

Closing, including (A) any exceptions that pertain to Encumbrances securing any loans that do not constitute an Assumed Liability and (B) any exceptions that Buyer reasonably believes could materially and adversely affect Buyer's use and enjoyment of the Real Property described therein; or

(iii) any Survey discloses any matter that Buyer reasonably believes could materially and adversely affect Buyer's use and enjoyment of the Real Property described therein;

then Buyer shall notify Seller in writing ("Buyer's Notice") of such matters within [ten (10)] business days after receiving all of the Title Commitment, Survey and copies of Recorded Documents for the Facility covered thereby.

(d) Seller shall use its Best Efforts to cure each Title Objection and take all steps required by the Title Insurer to eliminate each Title Objection as an exception to the Title Commitment. Any Title Objection that the Title Company is willing to insure over on terms acceptable to Seller and Buyer is herein referred to as an "Insured Exception." The Insured Exceptions, together with any title exception or matters disclosed by the Survey not objected to by Buyer in the manner aforesaid shall be deemed to be acceptable to Buyer.

(e) Nothing herein waives Buyer's right to claim a breach of Section 3.9(a) or to claim a right to indemnification as provided in Section 11.2 if Buyer suffers Damages as a result of a misrepresentation with respect to the condition of title to the Real Property.

COMMENT

Title insurance is an important checklist item for a buyer acquiring real property as part of an overall asset acquisition if the real property is of significant value or important to the operation of the business to be acquired. Title searches should be conducted in any event in order to determine whether liabilities such as unpaid real estate taxes are inadvertently assumed. The title insurer will provide information regarding all matters affecting title to the insured real property, including copies of any recorded instruments pertaining to the same, and will insure against the existence of any other matters unless the same are known to the buyer and not disclosed to the title insurer. If a copy of the deed reflecting the current owner of the property is not provided by the title insurer, the buyer may wish to obtain a copy of the deed in order to confirm that the seller, and not an affiliate, is the proper party to execute the deed.

Although the title insurer must pay on a claim that title was not properly vested, the buyer should insist on evidence of title beyond what is stated in the title commitment, as actual ownership of the real property is preferable to ownership of a claim against the title insurer. This is particularly so in light of the fact that the limits of the policy may not cover the full loss to the buyer of having to give up the use and possession of the insured real property.

For similar reasons, the buyer may not wish to include provisions in the agreement allowing title objections to be cured by obtaining affirmative coverage over the defect from the title insurer, at least not without a reduction in purchase price. The buyer may wish to include a reduction in purchase price as an alternative to accepting the property with the defect, insuring over it or terminating the agreement. Another possible middle ground between accepting the defect and walking from the deal is to escrow money or pledge liquid collateral to secure an indemnity from the seller against any loss arising out of the defect in title.

With respect to the seller's responsibility to cure a title objection, the seller may wish to cap the expense it may be required to incur in attempting to cure the defect to some percentage of the amount of the purchase price allocated to the real property. If the seller succeeds in persuading the buyer to accept affirmative title insurance coverage over the defect (which, from the buyer's perspective, should extend to subsequent purchasers), the seller may also wish to cap the expense it may be required to incur in obtaining such affirmative coverage. If the cost to cure or insure over exceeds such amounts, the buyer would have the same options as with defects that cannot be cured. The seller may also want to avoid being required to engage in litigation in order to cure a title objection.

If the real property does not constitute a significant part of the assets to be acquired, the seller may insist that no independent walk rights be given to the buyer based upon matters revealed by survey or title work. Under such circumstances, the buyer would be required to close unless the matter at issue constitutes a breach of seller's representations regarding the real property.

Because the buyer has a remedy against the title insurer in the event the seller does not deliver good and marketable title or title as reflected in the title policy, and has a remedy against the surveyor in the event errors or omissions occur in connection with the surveyor's preparation of the plat of survey, the seller may wish to include a provision establishing the title policy and the plat of survey as conclusive evidence of the seller's good and marketable title to the real property with respect to all matters insured or disclosed thereby.

Who bears the cost of obtaining title insurance, like many real estate-related matters, varies, depending upon the customs of the applicable jurisdiction.