10. Additional Covenants

10.1 EMPLOYEES AND EMPLOYEE BENEFITS

(a) *Information on Active Employees.* For the purpose of this Agreement, the term "Active Employees" shall mean all employees employed on the Closing Date by Seller for its business who are:

(i) bargaining unit employees currently covered by a collective bargaining agreement or

(ii) employed exclusively in Seller's business as currently conducted, including employees on temporary leave of absence, including family medical leave, military leave, temporary disability or sick leave, but excluding employees on long-term disability leave.

(b) *Employment of Active Employees by Buyer.*

(i) Buyer is not obligated to hire any Active Employee but may interview all Active Employees. Buyer will provide Seller with a list of Active Employees to whom Buyer has made an offer of employment that has been accepted to be effective on the Closing Date (the "Hired Active Employees"). Subject to Legal Requirements, Buyer will have reasonable access to the Facilities and personnel Records (including performance appraisals, disciplinary actions, grievances and medical Records) of Seller for the purpose of preparing for and conducting employment interviews with all Active Employees and will conduct the interviews as expeditiously as possible prior to the Closing Date. Access will be provided by Seller upon reasonable prior notice during normal business hours. Effective immediately before the Closing, Seller will terminate the employment of all of its Hired Active Employees.

(ii) Neither Seller nor either Shareholder nor their Related Persons shall solicit the continued employment of any Active Employee (unless and until Buyer has informed Seller in writing that the particular Active Employee will not receive any employment offer from Buyer) or the employment of any Hired Active Employee after the Closing. Buyer shall inform Seller promptly of

the identities of those Active Employees to whom it will not make employment offers, and Seller shall assist Buyer in complying with the WARN Act as to those Active Employees.

(iii) It is understood and agreed that (A) Buyer's expressed intention to extend offers of employment as set forth in this section shall not constitute any commitment, Contract or understanding (expressed or implied) of any obligation on the part of Buyer to a post-Closing employment relationship of any fixed term or duration or upon any terms or conditions other than those that Buyer may establish pursuant to individual offers of employment, and (B) employment offered by Buyer is "at will" and may be terminated by Buyer or by an employee at any time for any reason (subject to any written commitments to the contrary made by Buyer or an employee and Legal Requirements). Nothing in this Agreement shall be deemed to prevent or restrict in any way the right of Buyer to terminate, reassign, promote or demote any of the Hired Active Employees after the Closing or to change adversely or favorably the title, powers, duties, responsibilities, functions, locations, salaries, other compensation or terms or conditions of employment of such employees.

(c) ***Salaries and Benefits.***

(i) Seller shall be responsible for (A) the payment of all wages and other remuneration due to Active Employees with respect to their services as employees of Seller through the close of business on the Closing Date, including pro rata bonus payments and all vacation pay earned prior to the Closing Date; (B) the payment of any termination or severance payments and the provision of health plan continuation coverage in accordance with the requirements of COBRA and Sections 601 through 608 of ERISA; and (C) any and all payments to employees required under the WARN Act.

(ii) Seller shall be liable for any claims made or incurred by Active Employees and their beneficiaries through the Closing Date under the Employee Plans. For purposes of the immediately preceding sentence, a charge will be deemed incurred, in the case of hospital, medical or dental benefits, when the services that are the subject of the charge are performed and, in the case of other benefits (such as disability or life insurance), when an event has occurred or when a condition has been diagnosed that entitles the employee to the benefit.

(d) ***Seller's Retirement and Savings Plans.***

(i) All Hired Active Employees who are participants in Seller's retirement plans shall retain their accrued benefits under Seller's retirement plans as of the Closing Date, and Seller (or Seller's retirement plans) shall retain sole liability for the payment of such benefits as and when such Hired Active Employees become eligible therefor under such plans. All Hired Active Employees shall become fully vested in their accrued benefits under Seller's retirement plans as of the Closing Date, and Seller will so amend such plans if necessary to achieve this result. Seller shall cause the assets of each Employee Plan to equal or exceed the benefit liabilities of such Employee Plan on a plan-termination basis as of the Effective Time.

(ii) **Seller will cause its savings plan to be amended in order to provide that the Hired Active Employees shall be fully vested in their accounts under such plan as of the Closing Date and all payments thereafter shall be made from such plan as provided in the plan.**

(e) ***No Transfer of Assets.*** **Neither Seller nor Shareholders nor their respective Related Persons will make any transfer of pension or other employee benefit plan assets to Buyer.**

(f) ***Collective Bargaining Matters.*** **Buyer will set its own initial terms and conditions of employment for the Hired Active Employees and others it may hire, including work rules, benefits and salary and wage structure, all as permitted by law. Buyer is not obligated to assume any collective bargaining agreements under this Agreement. Seller shall be solely liable for any severance payment required to be made to its employees due to the Contemplated Transactions. Any bargaining obligations of Buyer with any union with respect to bargaining unit employees subsequent to the Closing, whether such obligations arise before or after the Closing, shall be the sole responsibility of Buyer.**

(g) ***General Employee Provisions.***

(i) **Seller and Buyer shall give any notices required by Legal Requirements and take whatever other actions with respect to the plans, programs and policies described in this Section 10.1 as may be necessary to carry out the arrangements described in this Section 10.1.**

(ii) **Seller and Buyer shall provide each other with such plan documents and summary plan descriptions, employee data or other information as may be reasonably required to carry out the arrangements described in this Section 10.1.**

(iii) **If any of the arrangements described in this Section 10.1 are determined by the IRS or other Governmental Body to be prohibited by law, Seller and Buyer shall modify such arrangements to as closely as possible reflect their expressed intent and retain the allocation of economic benefits and burdens to the parties contemplated herein in a manner that is not prohibited by law.**

(iv) **Seller shall provide Buyer with completed I-9 forms and attachments with respect to all Hired Active Employees, except for such employees as Seller certifies in writing to Buyer are exempt from such requirement.**

(v) **Buyer shall not have any responsibility, liability or obligation, whether to Active Employees, former employees, their beneficiaries or to any other Person, with respect to any employee benefit plans, practices, programs or arrangements (including the establishment, operation or termination thereof and the notification and provision of COBRA coverage extension) maintained by Seller.**

COMMENT

A sale of assets presents both unique problems and opportunities in dealing with employees and employee benefits. In a sale of assets, unlike a stock purchase or statutory combination, the buyer can be selective in determining who to employ and has more flexibility in establishing the terms of employment. The action taken by the buyer,

however, will have an impact on its obligations with respect to any collective bargaining agreements (see the Comment to Section 3.24) and the application of the WARN Act (see the Comment to Section 3.23).

Although many of the obligations of a seller and a buyer will flow from the structure of the acquisition or legal requirements, it is customary to set out their respective obligations with respect to employees and employee benefits in the acquisition agreement. Section 10.1 has been drafted to deal with these issues from Buyer's perspective. Subsection (b) provides that Buyer may interview and extend offers of employment to employees, all of whom will be terminated by Seller immediately before the Closing. Buyer is not committed to extend offers and is not restricted with respect to termination, reassignment, promotion or demotion or changes in responsibilities or compensation after the Closing. In subsection (c), Seller's obligations for payment of wages, bonuses, severance and other items are set forth.

In most cases, the seller and buyer share a desire to make the transition as easy as possible so as not to adversely affect the morale of the workforce. For this reason, the seller may prevail upon the buyer to agree to employ all the employees after the closing. The seller may also want to provide for a special severance arrangement applicable to long-time employees who may be terminated by the buyer within a certain period of time after the acquisition. Section 10.1 should be modified accordingly.

Subsections (d) and (e) deal with certain employee benefit plans. The employees hired by Buyer are to retain their accrued benefits and become fully vested under the retirement and savings plans, which will be maintained by Seller. The seller may want to provide, however, that certain benefits be made available to its employees under the buyer's plans, particularly if its management will continue to have a role in managing the ongoing business for the buyer. It is not uncommon for a seller to require that its employees be given prior service credit for purposes of vesting or eligibility under a buyer's benefit plans. A review and comparison of the terms and scope of the seller's and buyer's plans will suggest provisions to add to this portion of the Model Agreement.

If special provisions benefitting the seller's employees are included in the acquisition agreement, the seller may ask that these employees be made third-party beneficiaries with respect to these provisions. See the Comment to Section 13.9.

See the Comment to Section 3.24 regarding a buyer's obligations with respect to collective bargaining agreements.

10.2 PAYMENT OF ALL TAXES RESULTING FROM SALE OF ASSETS BY SELLER

Seller shall pay in a timely manner all Taxes resulting from or payable in connection with the sale of the Assets pursuant to this Agreement, regardless of the Person on whom such Taxes are imposed by Legal Requirements.

COMMENT

Federal. See Appendix B for a discussion of federal income taxes that would be payable if the seller were a C corporation. If the seller is an S corporation, it will not owe federal income taxes on the sale unless it is subject to the built-in gains tax under Code Section 1374.

State. States commonly impose an obligation upon the buyer to pay sales tax on sales of assets and impose upon the seller an obligation to collect the tax due. "Sale" is normally defined to include every transfer of title or possession except to the extent that specific exceptions are prescribed by the legislature. In many (but not all) states, however, there are exemptions for isolated sales of assets outside of the ordinary course of business, although the exemptions tend to be somewhat imprecisely drafted and narrow in scope. For example, (a) California exempts the sale of assets of a business activity only when the product of the business would not be subject to sales tax if sold in the ordinary course of business (CAL. REV. AND TAX. CODE § 6006.5(a)), and (b) Texas exempts a sale of the "entire operating assets" of a "business or of a separate division, branch or identifiable segment of a business" (TEX. TAX CODE § 151.304(b)(2)). In contrast, Illinois has a sweeping exemption that applies to the sale of any property to the extent the seller is not engaged in the business of selling that property (ILL. RETAILERS OCC. TAX § 1; Reg. § 130.110(a)). This will often exempt all of the seller's assets except inventory, which will be exempted because the buyer will hold it for resale (Illinois Department of Revenue Private Letter Ruling No. 91-0251 [March 27, 1991]). In states that impose separate tax regimes on motor vehicles, an exemption for these assets must be found under the applicable motor vehicle tax statute. *See, e.g.,* TEX. TAX CODE § 152.021 (no exemption for assets and tax is paid on registration of transfer of title). Accordingly, the availability and scope of applicable state sales-and-use tax exemptions should be carefully considered.

10.3 PAYMENT OF OTHER RETAINED LIABILITIES

In addition to payment of Taxes pursuant to Section 10.2, Seller shall pay, or make adequate provision for the payment, in full all of the Retained Liabilities and other Liabilities of Seller under this Agreement. If any such Liabilities are not so paid or provided for, or if Buyer reasonably determines that failure to make any payments will impair Buyer's use or enjoyment of the Assets or conduct of the business previously conducted by Seller with the Assets, Buyer may, at any time after the Closing Date, elect to make all such payments directly (but shall have no obligation to do so) and set off and deduct the full amount of all such payments from the first maturing installments of the unpaid principal balance of the Promissory Note pursuant to Section 11.8. Buyer shall receive full credit under the Promissory Note and this Agreement for all payments so made.

COMMENT

The buyer will desire assurances that the ascertainable retained liabilities, including tax liabilities, will be paid from the proceeds of the sale so that these liabilities will not blossom into lawsuits in which the creditor names buyer as a defendant and seeks to "follow the assets."

The seller will likely resist being required to determine and to pay amounts that may be unknown at the time of the closing or that may otherwise go unclaimed by the creditor in question. Moreover, the seller will argue that this section deprives it not only of its right to contest or compromise these retained liabilities but also of its right of defense provided under Section 11.9 relating to indemnification. The seller would likely request that this section be stricken or, at a minimum, that it be limited to specifically identified retained liabilities, with the seller preserving the right to contest, compromise and defend.

10.4 RESTRICTIONS ON SELLER DISSOLUTION AND DISTRIBUTIONS

Seller shall not dissolve, or make any distribution of the proceeds received pursuant to this Agreement, until the later of (a) thirty (30) days after the completion of all adjustment procedures contemplated by Section 2.9; (b) Seller's payment, or adequate provision for the payment, of all of its obligations pursuant to Sections 10.2 and 10.3; or (c) the lapse of more than one year after the Closing Date.

COMMENT

Section 10.4 of the Model Agreement imposes restrictions on Seller's ability to dissolve or distribute the proceeds of the asset sale to its shareholders. The limitation is not lifted until the parties complete any Purchase-Price adjustment procedures contemplated by Section 2.9 and Seller has either paid, or made provision for the payment of, its obligations pursuant to Sections 10.2 and 10.3.

Section 10.4(a), restricting Seller's dissolution or its distribution of the sales proceeds until completion of all Purchase-Price adjustment procedures under Section 2.9, is intended to assure Buyer that Seller will continue to work until those post-closing procedures are concluded and will have the assets necessary to satisfy any obligations to Buyer under the Model Agreement. Without such a restriction, Buyer might have to address the settlement of any disputes arising from those procedures or the payment of any adjustment owed (particularly if owed to Buyer) with all of Seller's shareholders, some of whom are not parties to the Model Agreement. Depending upon tax and other considerations, however, a seller may want to dissolve or distribute more quickly. The parties may then negotiate a means by which the buyer can resolve any post-closing procedures without dealing with all of the seller's shareholders (for example, a liquidating trust) and the determination and, if needed, inclusion in the escrow of an estimated amount to provide a sufficient source for any post-closing adjustment that may be payable to the buyer.

The Section 10.4(b) limitation upon dissolution and distribution until payment, or provision for payment, of Seller's obligations reflects Buyer's concern about its exposure to the risks that fraudulent conveyance or Bulk Sales statutes may adversely affect Buyer's ownership or enjoyment of the purchased assets after the Closing. See the Comments to Sections 3.32 and 5.10. By requiring payment, or provision for payment, the Model Agreement sets a standard that reflects what many business corporation statutes require before permitting a corporation to dissolve. *See, e.g.,* TEX. BUS. CORP. ACT arts. 2.38 (a corporation may not make any distribution to its shareholders if, afterward, it would not have surplus or be able to pay its debts as they come due in the usual course of its business) and 6.04 (before dissolution, a corporation must discharge, or make adequate provision for the discharge, of all of its liabilities or apply all of its assets so far as they will go to the discharge of its liabilities). Depending upon the length of the applicable statute of limitations for actions against a dissolved corporation's shareholders compared to the period of limitations for contractual obligations, the incorporation of this standard in the agreement between the parties may also extend the time during which a buyer could bring an action, particularly in the case where one or more principal shareholders are parties to the agreement (as is the case under the Model Agreement). See Section 11.7 regarding contractual time limits for claims for indemnification.

A buyer may desire to restrict distribution of the promissory note to the seller's shareholders, particularly if some of the shareholders are not "accredited investors"

(as defined in SEC Regulation D), in order to facilitate compliance with applicable securities laws. See Section 3.31 and the related Comment.

The seller may resist the requirement for payment, or provision for payment, of its obligations because it interferes with its ability to control its own affairs and to wind them up promptly after the completion of the sale of its assets. There may also be matters in dispute that may practically eliminate the seller's ability to make distributions because of the difficulty of determining what provision should be made. The seller may also point to the escrow, if substantial, as providing adequate protection for the buyer.

On the other hand, if the buyer has reason to be concerned about the financial ability or resolve of the seller to pay its creditors, the buyer may want to insist on a provision more stringent than that contained in the Model Agreement. As an example, Section 10.4(c) prohibits Buyer from making any distributions for a period of time, perhaps, as a minimum, the period in which creditors can bring actions under an applicable bulk sales statute. In the extreme case, the buyer may want to insist that the seller's obligations be paid as a part of the closing.

10.5 REMOVING EXCLUDED ASSETS

On or before the Closing Date, Seller shall remove all Excluded Assets from all Facilities and other Real Property to be occupied by Buyer. Such removal shall be done in such manner as to avoid any damage to the Facilities and other properties to be occupied by Buyer and any disruption of the business operations to be conducted by Buyer after the Closing. Any damage to the Assets or to the Facilities resulting from such removal shall be paid by Seller at the Closing. Should Seller fail to remove the Excluded Assets as required by this Section, Buyer shall have the right, but not the obligation, (a) to remove the Excluded Assets at Seller's sole cost and expense; (b) to store the Excluded Assets and to charge Seller all storage costs associated therewith; (c) to treat the Excluded Assets as unclaimed and to proceed to dispose of the same under the laws governing unclaimed property; or (d) to exercise any other right or remedy conferred by this Agreement or otherwise available at law or in equity. Seller shall promptly reimburse Buyer for all costs and expenses incurred by Buyer in connection with any Excluded Assets not removed by Seller on or before the Closing Date.

COMMENT

This section protects the interest of Buyer in having any Excluded Assets removed from Buyer's place of business before Closing in order to avoid any disruption to Buyer's business operations and imposes on Seller any costs and expenses associated with the Excluded Assets. If the Excluded Assets cannot be removed prior to the closing, a buyer may want to provide a timetable for removal and include assurances that removal will not disrupt its business operations.

10.6 REPORTS AND RETURNS

Seller shall promptly after the Closing prepare and file all reports and returns required by Legal Requirements relating to the business of Seller as conducted using the Assets, to and including the Effective Time.

10.7 ASSISTANCE IN PROCEEDINGS

Seller will cooperate with Buyer and its counsel in the contest or defense of, and make available its personnel and provide any testimony and access to its books and Records in connection with, any Proceeding involving or relating to (a) any Contemplated Transaction or (b) any action, activity, circumstance, condition, conduct, event, fact, failure to act, incident, occurrence, plan, practice, situation, status or transaction on or before the Closing Date involving Seller or its business or either Shareholder.

COMMENT

This section sets forth Seller's obligation to cooperate with Buyer in defending any actions relating to the business to be conveyed and related transactions. As a practical matter, many of the employees needed for such actions either will be employed by the buyer after closing or will be beyond the control of either the buyer or the seller after closing so that this clause will be of little value. The obligation to consult with the buyer on operational issues is not specifically set forth in this Agreement but may be included in a transitional-services agreement or similar undertaking by the seller to assist the buyer in its operations after closing. See Exhibit 2 to Appendix C for a form of Transitional Services Agreement that imposes on Seller the obligation to furnish specified services to Buyer after Closing in the areas of human resources, information services and sales-support services.

10.8 NONCOMPETITION, NONSOLICITATION AND NONDISPARAGEMENT

(a) ***Noncompetition.*** **For a period of _____ (_____) years after the Closing Date, Seller shall not, anywhere in _____, directly or indirectly invest in, own, manage, operate, finance, control, advise, render services to or guarantee the obligations of any Person engaged in or planning to become engaged in the _____ business ("Competing Business"), provided, however, that Seller may purchase or otherwise acquire up to (but not more than) _____ percent (____%) of any class of the securities of any Person (but may not otherwise participate in the activities of such Person) if such securities are listed on any national or regional securities exchange or have been registered under Section 12(g) of the Exchange Act.**

(b) ***Nonsolicitation.*** **For a period of _____ (_____) years after the Closing Date, Seller shall not, directly or indirectly:**

- **(i) solicit the business of any Person who is a customer of Buyer;**
- **(ii) cause, induce or attempt to cause or induce any customer, supplier, licensee, licensor, franchisee, employee, consultant or other business relation of Buyer to cease doing business with Buyer, to deal with any competitor of Buyer or in any way interfere with its relationship with Buyer;**
- **(iii) cause, induce or attempt to cause or induce any customer, supplier, licensee, licensor, franchisee, employee, consultant or other business relation of Seller on the Closing Date or within the year preceding the Closing Date to cease doing business with Buyer, to deal with any competitor of Buyer or in any way interfere with its relationship with Buyer; or**

(iv) hire, retain or attempt to hire or retain any employee or independent contractor of Buyer or in any way interfere with the relationship between Buyer and any of its employees or independent contractors.

(c) ***Nondisparagement.*** **After the Closing Date, Seller will not disparage Buyer or any of Buyer's shareholders, directors, officers, employees or agents.**

(d) ***Modification of Covenant.*** **If a final judgment of a court or tribunal of competent jurisdiction determines that any term or provision contained in Section 10.8(a) through (c) is invalid or unenforceable, then the parties agree that the court or tribunal will have the power to reduce the scope, duration or geographic area of the term or provision, to delete specific words or phrases or to replace any invalid or unenforceable term or provision with a term or provision that is valid and enforceable and that comes closest to expressing the intention of the invalid or unenforceable term or provision. This Section 10.8 will be enforceable as so modified after the expiration of the time within which the judgment may be appealed. This Section 10.8 is reasonable and necessary to protect and preserve Buyer's legitimate business interests and the value of the Assets and to prevent any unfair advantage conferred on Seller.**

COMMENT

Certain information must be provided to complete Section 10.8, including (a) the duration of the restrictive covenants, (b) the geographic scope of the noncompetition provisions, (c) a description of the Competing Business and (d) the percentage of securities that the seller may own of a publicly traded company that is engaged in a Competing Business. Before designating the temporal and geographic scope of the restrictive covenants, counsel should review applicable state law to determine if there is a statute that dictates or affects the scope of noncompetition provisions in the sale of a business context and, if not, examine state case law to determine the scope of restrictive covenants that state courts are likely to uphold as reasonable.

Care must be taken in drafting language that relates to the scope of noncompetition provisions. If the duration of the noncompetition covenant is excessive, the geographic scope is greater than the scope of the seller's market, or the definition of "Competing Business" is broader than the seller's product markets, product lines and technology, then the covenant is more likely to be stricken by a court as an unreasonable restraint on competition. The buyer's counsel should be alert to the fact that, in some jurisdictions, courts will not revise overreaching restrictive covenants but will strike them completely. From the buyer's perspective, the objective is to draft a provision that fully protects the goodwill the buyer is purchasing but that also has a high likelihood of enforcement. Sometimes this means abandoning a geographic restriction and replacing it with a prohibition on soliciting customers or suppliers.

The activities that constitute a competing business are usually crafted to prohibit the seller from competing in each of the existing lines of business and in areas of business into which, as of the date of the agreement, the seller has plans to expand. Drafting this language often requires a thorough understanding of the seller's business, including, in some cases, an in-depth understanding of its product lines, markets, technology and business plans. As a result, drafting this language is frequently a collaborative effort between buyer and its counsel. In some cases, a buyer also will want the seller to covenant that it will not compete with certain of the buyer's business lines, regardless of whether, on or before the closing date, the seller conducted or planned to conduct business in those areas. This construction is likely to be strongly resisted

by a seller, who will argue that it is selling goodwill associated only with its business, not other lines of business.

Noncompetition provisions should not be intended to prohibit a seller from nonmaterial, passive ownership in an entity that competes with the buyer. As a result, most restrictive covenants provide an exception that permits the seller to own up to a certain percentage of a publicly traded company. A buyer's first draft often will permit the seller to own up to one percent of a public company. In any case, a buyer should resist the seller's attempts to increase the percentage over five percent, the threshold at which beneficial owners of public company stock must file a Schedule 13D or 13G with the SEC. Ownership of more than five percent of a public company's stock increases the likelihood that a party may control the company or be able to change or influence its management, a situation anathema to the intention of the noncompetition covenant. The exception to the noncompetition provision for stock ownership in a public company usually does not include ownership of stock in closely held entities because such entities are not SEC reporting entities, and therefore it may be difficult to determine whether an investor in such an entity is controlling or influencing the management of such entities.

For a detailed discussion of substantive legal issues involving noncompetition, nonsolicitation and nondisparagement provisions, see the commentary to Section 4 of the Noncompetition, Nondisclosure and Nonsolicitation Agreement.

10.9 CUSTOMER AND OTHER BUSINESS RELATIONSHIPS

After the Closing, Seller will cooperate with Buyer in its efforts to continue and maintain for the benefit of Buyer those business relationships of Seller existing prior to the Closing and relating to the business to be operated by Buyer after the Closing, including relationships with lessors, employees, regulatory authorities, licensors, customers, suppliers and others, and Seller will satisfy the Retained Liabilities in a manner that is not detrimental to any of such relationships. Seller will refer to Buyer all inquiries relating to such business. Neither Seller nor any of its officers, employees, agents or shareholders shall take any action that would tend to diminish the value of the Assets after the Closing or that would interfere with the business of Buyer to be engaged in after the Closing, including disparaging the name or business of Buyer.

COMMENT

This section imposes a general obligation, similar to that imposed in Section 10.7 for litigation and other Proceedings, for Seller to assist Buyer in maintaining its various business relations after Closing. The obligation on the part of Seller to refer inquiries regarding the business to Buyer can be critical in any number of cases and acts as a supplement to those provisions of this Agreement that convey to Buyer the telephone numbers, e-mail addresses and other addresses of Seller. The liability of Seller under this section to refrain from taking actions damaging to Buyer's business is similar to that imposed by civil law for interference with contractual relationships and defamation, but this section imposes such liability without any requirement of intent and without the strong burden of proof usually borne by a plaintiff in such actions. In some cases, the antidisparagement language contained in the third sentence will be duplicated in noncompetition agreements, where it may have greater impact because those agreements are not mere obligations of the seller but act to bind specific individuals whose comments could have a particularly detrimental effect on the buyer's business.

10.10 RETENTION OF AND ACCESS TO RECORDS

After the Closing Date, Buyer shall retain for a period consistent with Buyer's record-retention policies and practices those Records of Seller delivered to Buyer. Buyer also shall provide Seller and Shareholders and their Representatives reasonable access thereto, during normal business hours and on at least three days' prior written notice, to enable them to prepare financial statements or tax returns or deal with tax audits. After the Closing Date, Seller shall provide Buyer and its Representatives reasonable access to Records that are Excluded Assets, during normal business hours and on at least three days' prior written notice, for any reasonable business purpose specified by Buyer in such notice.

COMMENT

Section 10.10 enables Seller and Shareholders to continue to have access to the Records of Seller for a reasonable period subsequent to the Closing Date to enable them to prepare financial statements and tax returns. Without this section, Seller would have to copy all Seller's Records before Closing, which could be a daunting and expensive task, or thereafter depend upon Buyer's cooperation for access to those Records. A seller and its shareholders must decide what particular records they want to keep and can elect to copy those records. The seller may want to require the buyer to identify the records that the buyer will destroy in accordance with the buyer's policies and practices and to give notice if the buyer intends to destroy any records. The seller may desire to further provide that the seller and the shareholders may take possession of any such records. Section 10.10 enables Buyer's access to retained Records of Seller but does not require that specific books and Records be retained. A buyer may want to consider adding such a requirement. The parties should take account of the possibility that access to records stored in electronic form may present special problems of access and interpretation.

10.11 FURTHER ASSURANCES

Subject to the proviso in Section 6.1, the parties shall cooperate reasonably with each other and with their respective Representatives in connection with any steps required to be taken as part of their respective obligations under this Agreement, and shall (a) furnish upon request to each other such further information; (b) execute and deliver to each other such other documents; and (c) do such other acts and things, all as the other party may reasonably request for the purpose of carrying out the intent of this Agreement and the Contemplated Transactions.

COMMENT

This section reflects the obligation, implicit in other areas of the Model Agreement, for the parties to cooperate to fulfill their respective obligations under the agreement and to satisfy the conditions precedent to their respective obligations. This section would be invoked if one party were, for example, to intentionally fail to undertake actions necessary to fulfill its own conditions to closing and use the failure of those conditions as a pretext for refusing to close.

A further-assurances provision is common in acquisition agreements. Often there are permits, licenses and consents that can be obtained as a routine matter after the

execution of the acquisition agreement or after the closing. The further-assurances provision assures each party that routine matters will be accomplished and that the other party will not withhold signatures required for transferring assets or consenting to transfers of business licenses in an attempt to extract additional consideration.

In addition to the covenants in Section 10.11, the acquisition agreement may contain covenants that involve matters that cannot be conditions precedent to the closing because of time or other considerations but that the buyer views as an important part of the acquisition. These additional covenants may arise out of exceptions to the seller's representations noted in the disclosure letter. For example, the seller may covenant to remove a title encumbrance, finalize a legal proceeding or resolve an environmental problem. Ordinarily, there is a value placed upon each post-closing covenant so that if the seller does not perform, the buyer is compensated by an escrow or hold-back arrangement. Post-closing covenants may also include a covenant by the seller to pay certain debts and obligations of the seller to third parties not assumed by the buyer or deliver promptly to the buyer any cash or other property that the seller may receive after the closing that the acquisition agreement requires it to transfer to the buyer.

Finally, the buyer may want either to include provisions in the acquisition agreement or to enter into a separate agreement with the seller requiring the seller to perform certain services during the transition of ownership of the assets. Such provisions (or such an agreement) typically describe the nature of the seller's services, the amount of time (in hours per week and number of days or weeks) the seller must devote to such services and the compensation, if any, it will receive for performing such services. Because such arrangements are highly dependent upon the circumstances of each acquisition, these provisions are not included in the Model Agreement. See the Comment to Section 10.7.