THE ACQUISITION MATING DANCE[1]

William F. Griffin, Jr., Esq.
Davis, Malm & D'Agostine, P.C.

The sale of a business usually follows a predicable pattern, with appropriate variations in each case. This article describes the business acquisition process and provides practical guidance for dealing with problems encountered along the way.

The various steps in the dance are described, in chronological order, in each of the parts of this article. Part I identifies some of the factors which may influence a seller's decision to sell its business. Part II describes the preliminary steps which may be taken by a seller preparing to put its business on the market. Part III deals with the ways of finding potential strategic or financial buyers, the fiduciary duties implicated by a decision to sell, and the complications resulting from the seller's usual desire to secrecy. Part IV describes the preliminary disclosure and negotiation with buyers and introduces the critical issue of deal structure. Part V discusses the nature and importance of non-binding letters of intent. Part VI describes the typical due diligence process and the importance of disclosure schedules. Part VII provides an outline of a typical acquisition agreement and discusses the "four horsemen" of the agreement (representations, covenants, conditions and indemnification) and how they interact. Part VIII describes various activities required during the period from the signing to the closing. Part IX describes the mechanics of closing.

I. THE SELLER'S DECISION TO SELL ITS BUSINESS

This business decision may be prompted by numerous factors, including a desire to take advantage of favorable market conditions, external events such as the death or retirement of a founder, stockholders' need or desire to liquidate their investment, or the receipt of an indication of interest or offer from a prospective buyer. This decision is often reached without participation of the company's attorney.

---

[1] This felicitous phrase is borrowed from the title of James C. Freund's *The Acquisition Mating Dance and Other Essays on Negotiating* (Prentice Hall 1987), but is used here to include the complete business acquisition process, rather than preliminary negotiations culminating in a friendly or hostile takeover. Mr. Freund's numerous books on negotiating, particularly *Anatomy of a Merger* (Law Journal Press 1975), are heartily recommended.

II. THE SELLER'S PREPARATIONS TO SELL

This phase includes consideration of the tax consequences of the sale of the business, which often turn on whether the business is organized as a C corporation or as an S corporation, LLC, or other "pass-through" entity. In some cases, decisions may include steps to assure retention of key management employees through incentives or other measures. The company should consider resolving troublesome problem areas, such as outstanding litigation or other disputes, prior to sale. Closely-held companies should review their financial statements to eliminate or manage the typical management perks and benefits which reduce the company's earnings.[2] Audited financial statements are required for most companies being acquired by publicly-held buyers; consideration should be given to engaging accountants to audit the company's financial statements. The company should consider whether to obtain an appraisal of the value of the business or of particular assets, such as real estate. Where appropriate, an environmental assessment of the company's real estate may be obtained.

III. LOCATING PROSPECTIVE BUYERS

The company should also consider whether to engage a business broker or investment banker to assist it in locating strategic buyers or financial buyers for the business.[3] A form of engagement letter with an investment banker is annexed hereto as Exhibit A. The possibility of a management buyout may also be considered.[4]

---

[2] Most buyers employ business valuation models which use multiples of earnings, cash flow or EBITDA (earnings before interest, taxes, depreciation and amortization). Closely-held companies frequently present buyers with adjusted or "normalized" financial statements to reflect the elimination of excess compensation, fringe benefits and other non-recurring or extraordinary expenses that a buyer will not incur.

[3] Strategic buyers are usually companies in the same or complementary businesses who are seeking to expand their business. Strategic buyers, unlike financial buyers, consider the synergistic value of a business combination and may be willing to pay a higher price for the business. Financial buyers, such as private equity funds, seek to purchase a company, expand its business by internal growth or acquisition, and resell it at a higher price. Financial buyers, unlike strategic buyers, usually want to keep the seller's existing management in place.

[4] A management buyout consists of one group of stockholders, usually consisting of management, funded by a financial buyer, purchasing the stock of the remaining stockholders.

There are two principal methods for soliciting offers to purchase a business: (1) an open “auction” process in which multiple bidders are invited to review selected financial and business information regarding the company and to compete in a bidding process, and (2) a more selective and private process in which the company or its representatives contact a few carefully chosen prospective buyers without public disclosure that the company is for sale. There are of course many variations on these two methods.

A. Fiduciary Duties

The fiduciary duties of the company’s directors and stockholders may compel them toward an auction process. For Delaware corporations, the law is clear: in *Revlon v. McAndrews & Forbes Holdings, Inc.*, 506 A. 2d. 173 (Del. 1986), the Delaware Supreme Court held that once a sale of control of a corporation has been approved by the board of directors or becomes “inevitable,” the fiduciary duties of the board focus on one primary objective – securing the highest value for stockholders. The directors become, in the court’s words, “auctioneers charged with getting the best price for the stockholders in the sale of the company.” 506 A. 2d at 182. Although the Delaware courts have held that a post-signing “market check” or similar process may be sufficient to satisfy the board’s *Revlon* duties, it is clear that the directors of a Delaware corporation who deal with only one buyer without inviting competing offers are violating their fiduciary duties.

Massachusetts law is far less clear. There is no Massachusetts precedent confirming or rejecting the *Revlon* doctrine,[5] and the Massachusetts corporate statute is not modeled on the Delaware General Corporation Law. Nonetheless, many prudent corporate lawyers counsel the directors of Massachusetts corporations to avoid a closed sale process.

B. The Seller’s Desire for Secrecy

A practical issue of vital concern to the seller of a business is the impact of the sale process on the business. Business owners are often legitimately concerned that the process for the sale of the business requires secrecy to avoid disruption of employees, suppliers and vendors, to discourage trade rumors and disparagement by competitors and to preserve the

---

[5] A superior court judge in *Gut v. McDonough,* 2007 WL 2410131 (Mass. Super. Ct., Aug. 14, 2007) has ruled that the *Revlon* doctrine does not control in Massachusetts in view of the “other constituencies” provisions of G.L. c. 156D, §8.20(a)(3), applying instead the business purpose test of *Coggins v. N.E. Patriots Football Club*, 397 Mass. 525 (1986).

confidentiality of financial statements, trade secrets, customer lists and other sensitive information.

This provides a powerful incentive to avoid the "auction" process in favor of secretive acquisition negotiations with a single buyer.[6] As discussed above, this approach involves the risk of a violation of fiduciary duties and also forgoes the economic benefits of a competitive process. A potential solution to this dilemma is for the seller to negotiate a "go shop" clause in the acquisition agreement that enables the seller to test the market for superior acquisition proposals for a limited time following the signing of the acquisition agreement. Needless to say, this is not a popular position with potential buyers, who may well feel that they are being used as a "stalking horse" to obtain a better deal from others, but it can be accomplished.

IV. PRELIMINARY DISCLOSURE AND NEGOTIATIONS.

Once a prospective buyer has been identified and has expressed interest in an acquisition, there is usually some preliminary disclosure of information such as financial statements of the seller. Prior to the delivery of any nonpublic information regarding the seller, the buyer will be requested to sign a confidentiality agreement, agreeing to keep such information confidential and to use it solely for the purpose of negotiating an acquisition. A common form of confidentiality agreement is annexed hereto as <u>Exhibit B</u>.

The information disclosed at this preliminary stage is usually very basic: historical financial statements for the past several years, plus the most recent quarterly period, and a brief description of the seller's business. Often a seller or its advisors will prepare a confidential memorandum containing a prospectus–like outline of the seller's business, assets, management team and financial data. This document usually omits detailed and sensitive information to limit the amount of disclosure. In any case, any disclosure materials should be labeled as "confidential," should be carefully reviewed by counsel and should be accompanied by written qualifications that they are incomplete and may not be relied upon as the basis for a decision to purchase the company.

---

[6] Do not underestimate the difficulty of keeping acquisition plans secret or the resourcefulness of employees in ferreting out information relating to supposedly secret acquisition negotiations. After concluding "secret" acquisition negotiations for the sale of a client's business, we discovered much later that in spite of careful planning to disguise the negotiations, the seller's employees had identified the buyer and the purpose of its clandestine site visit within minutes of its representatives' appearance at the seller's offices.

A. The Importance of Deal Structure

> "After three years of law school devoted to elevating substance over form, the realization that in acquisition transactions the form of the deal can have significant substantive impact may come as a rude shock to the beginning practitioner. On behalf of the merger and acquisitions bar, I apologize for this seemingly retrogressive tendency in the law . . ." Freund, *Anatomy of a Merger,* p. 77.

There are three basic ways in which one company may acquire another: a purchase of stock, a purchase of assets, or a merger. Each of these three basic forms has different tax, legal and economic consequences to the parties. Indeed, differences among the three forms are so great that it is fair to say that agreeing upon the structure of a transaction is an essential prerequisite to agreeing on the price.

The following is a very brief and simplified overview of the differences among the three forms, assuming a fully taxable transaction. A more detailed basic summary of the tax issues (including a discussion of tax-free reorganizations) is contained in Griffin and Lev, *Tax Aspects of Corporate Mergers and Acquisitions*, elsewhere in this handbook.

1. *Sale of Stock*

In this transaction, the buyer acquires a controlling interest (normally 100%) of the company's outstanding stock from the company's stockholders.

- No stockholder vote is required; rather, stockholders must individually agree to sell.
- The company becomes a wholly-owned or, less frequently, a partially-owned subsidiary of the buyer.
- The company remains liable on all of its pre-sale debts and obligations to third parties, including unknown and contingent liabilities. The buyer, as the new owner of the company's stock, inherits the burden and risk of these liabilities.
- There is no transfer of the company's leases, contracts or other assets, which typically avoids the

necessity of obtaining consents from landlords and other third parties.[7]

- For Federal income tax purposes, the selling stockholders ordinarily will recognize *capital gain or loss* on the difference between the selling price and their tax basis for their shares; the buyer and the company will not recognize gain or loss; and the company's assets will retain their previous tax bases.

2. *Sale of Assets*

In this transaction, the buyer acquires all or substantially all of the company's assets and assumes specific liabilities of the company.

- The sale requires a vote of the company's stockholders (two-thirds of the issued and outstanding shares in Massachusetts; a majority in Delaware).
- Dissenting stockholders may be entitled to appraisal rights.
- The buyer assumes only those liabilities of the company that are expressly assumed by agreement or imposed on the transferee by operation of law.
- Assignment of leases, contracts or permits may require the consent of landlords and others.
- If the company is a "C corporation," it will recognize gain or loss for Federal income tax purposes on the sale of its assets; its stockholders will recognize a "double tax" (usually at capital gains rates) on the distribution of the net proceeds of sale from the corporation; and the tax basis of the assets of the company will be "stepped up" in the hands of the buyer to equal the purchase price (calculated as the amount of cash paid plus liabilities assumed). The stepped-up basis provides the buyer with larger depreciation deductions, including amortization of good will.
- If the company is an "S corporation" or other pass-through entity, no gain or loss will usually be

[7] The exception to this rule is where a lease or contract expressly provides that a change of control of the company will constitute a breach or require consent.

recognized at the corporate or entity level, and the stockholders will instead incur a "single tax" (usually at capital gains rates); the buyer will obtain a stepped-up basis in the assets as described above.

3. ***Merger***

In a classic forward merger transaction, the company merges with and into the buyer and goes out of existence; the buyer, as the surviving corporation, succeeds to all of the assets and liabilities of the company as a matter of law; and the shares of the company are automatically converted into the merger consideration (which may be stock in the buyer, cash or other consideration).[8]

- Requires board of directors and shareholder approval of the company (two-thirds of the issued and outstanding stock in Massachusetts; a majority in Delaware).
- Dissenting stockholders may have appraisal rights.
- In a forward merger, the surviving company acquires all of the company's assets and assumes all of its liabilities as a matter of law. In a reverse merger, the company retains all of its assets and liabilities.
- In a forward merger, the leases, contracts and permits of the company are assigned as a matter of law to the surviving corporation; no consent of landlords or others is required unless the lease or contract specifically so provides. In a reverse merger, the company retains all of its assets and liabilities, so no assignment is involved.
- In very general terms, the Federal income tax consequences of a taxable forward merger are similar to those of a sale of assets, and the Federal income tax consequences of a reverse subsidiary merger are similar to those of a sale of stock.

Where the company is a C corporation, the seller's and buyer's interests often conflict. A buyer usually prefers a sale of assets or forward merger, which assures them of a step-up in tax basis (resulting in larger

[8] Mergers come in several flavors. In addition to the classic forward merger described above, the company may merge into a subsidiary of the buyer (a "forward subsidiary" merger), with the subsidiary as the surviving corporation, or a subsidiary of the buyer may merge into the company (a "reverse subsidiary" merger), with the company as the surviving corporation.

depreciation deductions) as well as the avoidance of most undisclosed and unknown liabilities. However, a sale of assets may require obtaining consents to the transfer of certain assets. In general, a seller prefers a sale of stock, which assures him of a single level of taxation at capital gains rates.

Where the company is an S Corporation or other pass-through entity, the parties have the best of both worlds. The entity can sell assets to the buyer and pass through the gain to the owners at (primarily) capital gains rates.[9] The buyer can obtain the assets at a stepped-up basis and avoid the assumption of unknown or contingent liabilities. Under §338(h)(10) of the Internal Revenue Code, the parties can agree to treat a sale of stock of an S corporation as a sale of assets for Federal income tax purposes, avoiding the necessity of consents to the transfer of leases and contracts.[10] Organizing a company as an S corporation is thus an excellent way of facilitating an "exit strategy" via a sale of the business.

In the past, some tax advisors have recommended that a new company be organized as a C corporation, because the maximum Federal income tax rate on corporations was slightly less than the maximum tax rate on individuals. (Today, the tax rates are identical.) This advice can be dangerously shortsighted, since the effect of the "double tax" on the later sale of assets of the C corporation will significantly exceed the very slight tax savings on the differences in individual and corporate rates.

V. THE LETTER OF INTENT

Once a buyer has been selected, the parties typically negotiate a letter of intent or term sheet setting forth the basic terms of the deal, including the price, the form of the transaction, and major business terms. Letters of intent should always contain a specific and unequivocal statement that the parties are *not* creating a binding legal contract and intend to be bound only by a later formal agreement to be prepared by counsel and signed by the parties. A specimen form of letter of intent is annexed as Exhibit C.

The letter of intent may contain certain provisions that the parties desire to be binding legal obligations, such as confidentiality provisions (which may merely reconfirm the provisions of the confidentiality agreement), or provisions requiring the seller to refrain from negotiations with other parties for a specified period of time. These provisions should clearly be identified as being legally

[9] The principal exception is recapture of depreciation under §§1245 and 1250 of the Internal Revenue Code.

[10] Since the transaction will be a transfer of stock for state law purposes, the buyer still runs the risk of assuming the corporation's liabilities.

binding on the parties and designated as exceptions to the rule that the letter of intent is non-binding.

A. Beware the Ties that Bind

In numerous cases (including the notorious *Pennzoil* case),[11] letters of intent have been found by courts to constitute binding contractual obligations. *See McCarthy v. Tobin,* 429 Mass. 84 (1999). Compare *Schwanbeck v. Federal-Mogul Corp.*, 412 Mass. 703 (1992); *Goren v. Royal Investments, Inc.*, 25 Mass. App. Ct. 137 (1987); *Blomendale v. Imbrescia*, 25 Mass. App. Ct. 144 (1987); and *Tull v. Mr. Donut Dev. Corp.,* 7 Mass. App. Ct. 626 (1979). For this reason, great care must be taken to explicitly and unequivocally state that the parties do not intend to create a binding contract. This is one instance where overkill in drafting is fully justified.[12]

In *McCarthy v. Tobin*, the supreme judicial court suggested that "If parties do not intend to be bound by a preliminary agreement until the execution of a more formal document, they should employ language such as that suggested by the Appeals Court". 429 Mass. at 88 n. 3 (citations omitted). The suggested language is subjoined below.[13]

B. A Magic Moment

I have found that the letter of intent stage is usually a "magic moment" in the course of the transaction, when the buyer is most eager to make a deal. The negotiation of the formal business acquisition agreement is almost exclusively focused on providing protection for the buyer and is usually controlled by the buyer's attorneys who tend to resist any relaxation of these protective provisions. For this reason, a seller should take advantage of this opportunity to include in the letter of intent any seller-favorable provisions

---

[11] In 1987, a Texas district court found Texaco liable to Pennzoil for interfering with Pennzoil's contract (set forth in a simple "memorandum of agreement") to acquire Getty Oil. The jury awarded Pennzoil $7.5 *billion* in damages, plus $3 *billion* in punitive damages. *See Texaco, Inc. v. Pennzoil Co.,* 729 S.W. 2d 768 (Tex. 1987).

[12] Some lawyers recommend using an unsigned "term sheet" rather than a letter of intent to avoid a binding contract.

[13] "The purpose of this document is to memorialize certain business points. The parties mutually acknowledge that their agreement is qualified and that they, therefore, contemplate the drafting and execution of a more detailed agreement. They intend to be bound only by the execution of such an agreement and not by this preliminary document." 44 Mass. App. Ct. 274, 279 n.10.

which are of particular importance to it. For example, employment agreements, non-competition covenants, escrows and "baskets" and other exceptions to indemnification provisions are best negotiated at this time.

C. Why Use Letters of Intent at All*?*

Although letters of intent are not legally binding, they are taken seriously by the parties and their attorneys for several reasons. First, they serve as a handy agenda and reminder to the parties regarding the principal terms of the deal. Second, there is a psychological aspect to a letter of intent: It is a symbolic "handshake" -- something that the parties feel, as responsible businessmen, that they have a moral obligation to live up to. It is common for a buyer or seller to respond with outrage to a "new" provision in the acquisition agreement: "If you wanted a non-competition covenant, why didn't you put it in the letter of intent."

Finally, the seller usually experiences a substantial change of position as a result of signing a letter of intent and making of a public announcement of the fact that the business is being sold. It must deal with the reactions of its employees, customers, vendors, creditors, banks and competitors. The seller is psychologically committed to proceed with the deal because "if the deal doesn't go through, the suspicion will always exist (no matter what the actual or announced reason) that the purchaser found something wrong with the seller's business."[14] Perhaps this is the reason why very few acquisitions are terminated by sellers, as opposed to buyers.

VI. THE DUE DILIGENCE PROCESS

As discussed above, there is usually a period of preliminary information disclosure as a part of the vetting of prospective buyers and the negotiation of the letter of intent. Following the letter of intent, the buyer's due diligence effort begins in earnest.[15]

Typically, the buyer provides the seller and its counsel with a questionnaire outlining the specific information it seeks regarding the seller's business. Example of due diligence questionnaires are annexed hereto as

---

[14] Freund, *Anatomy of a Merger*, p. 66.

[15] In some auction transactions, the seller may give prospective buyers access to a "data room" or more recently a "virtual data room," containing a complete set of disclosure materials prepared by the seller. A "virtual data room" is an electronic compilation of due diligence materials, usually maintained by a financial printer or other intermediary, to which potential buyers are given password-protected access.

Exhibits D, E and F. Collecting the requested information is a major task, involving the seller, its counsel, accountants and other consultants. Many boxes of documents are usually produced. Since these data form the basis for the various representations and warranties made by the seller, it is important to keep careful records of the documents produced. You do not want to have a dispute after the closing over whether an important contract was or was not disclosed. I have found that preparing and circulating among the parties a CD-ROM disk containing all of the information produced (indexed to the due diligence questionnaire) is an efficient way to keep track of this mass of data.

A. The Timing of the Due Diligence Process

From the buyer's perspective, the due diligence process should be completed prior to the signing of the acquisition agreement, thus assuring that the seller's representations in the agreement and the related disclosure schedules are complete and accurate. Where the parties contemplate a simultaneous signing and closing, this goal is usually accomplished. In practice, however, particularly with a deferred closing, the due diligence process frequently creeps to a conclusion well after the agreement is signed. This can give rise to awkward problems when significant omissions are discovered in the disclosure schedules. *See* Sections VII(E) and VIII(A)(1) *infra*.

Sellers are often reluctant to make full and complete disclosure, particularly to competitors. This is always a bad idea in view of the likely consequences of nondisclosure: Either termination of the agreement (if negative information comes to light prior to the closing) or indemnification claims (when it comes to light after the closing). Clients must be educated at this stage to suppress their instincts to act as salesmen, and instead, to focus on adequately protecting themselves against potential liabilities by full, complete and accurate disclosure.

> "I think the most important single thing a seller's lawyer can do at the outset is to keep his client from getting uptight about full disclosure . . . The proper course is to . . . assure him that this is standard operating procedure in acquisitions; and point out to him that, although there is certainly room for negotiation on specific issues, in general the purchaser is entitled to full disclosure – even if that means a lot of work in dishing up the facts." Freund, *Anatomy of a Merger*, p. 233.

I would add that a seller – particularly one who has never sold a business before – must also be educated that full disclosure is in his own best interests.

This is not to say that the disclosure of sensitive business information should not be carefully managed, but only that it should always be ultimately disclosed. It is sensible for a seller to candidly admit that it is not comfortable providing trade secrets or pricing information to a competitor until it is satisfied that the buyer is committed to the deal. Your client may also want to whet the buyer's appetite to close the deal before introducing some negative information. But in order to protect itself, the seller must ultimately make the leap and completely "open the kimono," to use the non-PC vernacular of the trade.

B. The Disclosure Schedules.

Every acquisition agreement contains representations and warranties regarding the seller's business, which are supplemented by detailed disclosure schedules, which are either physically attached to the agreement or contained in a separate document.[16] For example, a typical representation would state that the seller has no subsidiaries, "except as set forth in Schedule X." Schedule X would contain the names of any subsidiaries, their jurisdiction of incorporation, states in which each is qualified to do business, etc. Of course, if there are no subsidiaries, this particular disclosure schedule would not be needed.

The preparation of disclosure schedules is usually delegated to more junior attorneys working on the project, who prepare the schedules based on the materials produced in the due diligence investigation. There is an unfortunate tendency on the part of clients to regard the preparation of disclosure schedules as purely technical "lawyer's work," like the drafting of the agreement. Because the disclosure schedules are the backbone of the due diligence process, and the basis on which potential indemnification claims may be based, they are too important to be left to attorneys who are often unfamiliar with the client's business. The final disclosure schedules should be reviewed and approved by the senior attorney responsible for the matter, and most importantly, by the client's business and financial people who are, after all, those most knowledgeable about its business. The same observation applies to the senior attorney representing the buyer, and the buyer's business and financial people.

VII. THE ACQUISITION AGREEMENT

A. The Unstated Assumptions of the Acquisition Agreement

The typical business acquisition agreement is based upon a number of unstated assumptions well understood by sophisticated clients and attorneys, but not always shared by those with less M&A experience. It is essential that the

[16] A separate document is often used where the acquisition agreement will become part of a proxy statement or other public document, with a view to avoiding public disclosure of sensitive details about the seller's business.

parties and their counsel understand these basic assumptions up front in order to minimize friction and controversy. Frequently, it will be necessary to educate the seller (who most often is the party with the least M&A experience) and its counsel – usually at the letter of intent stage – to avoid unpleasant surprises.

1. ***The Built-In Purchaser's Bias***

Once the letter of intent has been signed, the predominant purpose of the acquisition agreement is to protect the buyer from overpaying by providing it with assurances that it is actually receiving what it thinks it is purchasing. In Freund's words:

> "In effect, the buyer is saying something along these lines:'I agree to buy your business at the price and upon the other terms we have agreed to, *provided* that: (i) you tell me everything there is to know about your business, because that state of affairs forms the basis on which I am willing pay this price; (ii) you promise not to do anything prior to the closing that would adversely disturb this state of affairs, and in fact everything is the same or better at the time that we actually close; (iii) you let me investigate you to my heart's content; (iv) you deliver me good title to what I am getting; and (v) you stand behind what you tell me in case something negative comes up later on.'" Freund, p. 173.

This point is clearest when the consideration is all cash. In that case, the seller needs only to be comfortable that the buyer is capable of paying the purchase price and is not going to weasel out of the agreement. The rest of the acquisition agreement will reflect the buyer's protections. The seller's interest here is essentially "defensive," *i.e.*, in protecting itself against overreaching by the buyer.

Of course, when the consideration consists of the buyer's stock or securities, the seller's interests extend to assuring that it, too, will be receiving the consideration it bargained for, *i.e.*, stock or securities of a certain quality. In that case, the seller will typically insist on warranties, representations, covenants and conditions from the buyer similar to those given by the seller.

2. ***No Deposit Required***

Another unstated assumption is that the buyer does not typically provide a cash deposit to secure its undertaking. This is the reverse of the assumption underlying most real estate purchase and sale agreements, and is not always understood or acquiesced in by the seller.

The lack of a deposit is usually justified by the buyer's claim that it is investing many thousands of dollars in due diligence and transaction costs, which will not be reimbursed if the deal is unsuccessful.

In some transactions, particularly in the automobile dealership and restaurant businesses, deposits are typically required. In a transaction involving the simultaneous purchase of an operating business and a substantial amount of real estate, a deposit may be provided for the real estate purchase, but not for the purchase of the business.[17]

3. *The Buyer's Counsel Does the First Draft*

Business acquisition "etiquette" dictates that the buyer provides the initial draft of the agreement. This is sensible because, as discussed above, the principal purpose of the agreement is to protect the buyer's expectations as to the quality of the business it is buying. This idea is sometimes resisted, and sellers (particularly in "auction" transactions) sometimes have the leverage to provide a draft or template of the acquisition agreement.[18] If you are unable to do the first draft, you can still assert some control over the drafting by volunteering to draft some of the exhibits (say, the escrow agreement) or by responding to the first draft by extensively rewriting key sections of the agreement.[19]

---

[17] I have found that the simplest contractual format for such transactions is to avoid combining the purchase of the real estate and the corporate stock or assets in a single contract, but rather to draft two contracts – a "standard" real estate purchase agreement and a "standard" business acquisition agreement – and to make the performance of one agreement a condition to the performance of the other.

[18] Sellers in a strong bargaining position sometimes try to dictate a rigid format for the acquisition agreement. In a recent sports franchise deal, the seller provided a 50-page agreement to bidders with instructions to merely fill in the name of the buyer and the purchase price and to leave the balance of the agreement unchanged. My experience in this context is that "money talks louder than words," so that the bidder with the best price always has the opportunity to negotiate the terms and conditions of the agreement. In the sports franchise deal, the winning bidder ended up marking up every page of the agreement with its comments and extensively negotiating the terms of the deal.

[19] Rewriting the agreement entirely from scratch would certainly be considered in bad form, so be selective in those areas which you rewrite.

B. Outline of a Typical Acquisition Agreement

Although business acquisition agreements all vary in important details, the basic structure of acquisition agreements (whether for the sale of stock or assets or a merger) has remained remarkably consistent and durable over time. The following is an outline of the various articles of a typical agreement.

1. Article I Operative Terms of the Transaction

This article will include the identification of the parties, the structure of the deal, a description of the stock or assets to be transferred, the consideration to be paid, and the mechanics of the transaction. It would typically include the formula for computing any contingent consideration or purchase price adjustment, the mechanics for the delivery of stock certificates, the establishment of escrows and the like. If the purchase price is to be payable in stock or securities of the buyer, the seller's investment representations and any registration rights would also be included here.[20]

2. Article II Representations and Warranties of the Seller

These representations typically include those relating to the corporate organization, good standing, foreign qualification, and capitalization of the seller and its subsidiaries, title to the shares of stock or assets being sold, and the taking of appropriate corporation action. These will be followed by representations regarding the financial statements of the seller, including representations that there have been no "material adverse changes" in the business and assets of the seller since the most recent balance sheet date.[21] Many agreements contain specific representations concerning liabilities of the seller (absolute, accrued, contingent or otherwise), taxes, assets (often including specific representations regarding accounts receivable, inventory, machinery and equipment, contracts, real estate, leases and intellectual property), litigation, insurance, employee relations, and compliance with laws and regulations.

---

[20] Many of these provisions in Article I and subsequent articles will refer to ancillary agreements, such as articles of merger, corporate charter amendments, escrow agreements and registration rights agreements attached as exhibits to the basic agreement.

[21] These representations will typically contain a "laundry list" of specific undesirable events (dividends, casualty losses, dispositions of assets, accounting changes, waivers of rights, etc.) warranted not to have occurred since the balance sheet date, and a generic representation that there has been "no material adverse change" in the operations, assets, liabilities or prospects of the business since that date.

Agreements frequently include representations relating to environmental compliance, employee benefit plans (including ERISA compliance), protection of intellectual property, self-dealing transactions, and other matters relevant to the transaction.

3. Article III Representations and Warranties of the Buyer

In a cash transaction, these representations are usually limited to the corporate organization, good standing and corporate authorization of the buyer. Where stock or securities of the buyer are used as consideration, the capitalization of the buyer and the authorization, validity and non-assessability of any shares to be issued are always included. In such cases, the seller may insist upon additional representations regarding the buyer's business, with the result that the buyer's representations are largely a mirror image of the seller's.[22]

4. Article IV Covenants of the Seller and Buyer

The covenants of the seller (and in some cases, the buyer) between the signing of the agreement and the closing are always provided. The extent of these covenants usually depends on whether there is to be a closing simultaneously with or in close proximity to the execution of the agreement, or whether there will be a deferred closing. Typical seller's covenants include agreements to conduct its business in the ordinary course, provide buyer with access to information, notify buyer of material developments, use best efforts to secure regulatory and other approvals, refrain from soliciting competing offers to purchase the seller,[23] non-competition provisions and other appropriate provisions.

5. Article V Conditions Precedent to the Closing

This article identifies the specific conditions to each party's obligation to close the transaction. Typical conditions to the buyer's obligation to close include a "bring down" certificate to the effect that all of the seller's representations and warranties are true and correct at the closing date and that the seller has complied with all of its covenants. Other conditions may include the receipt of stockholder approvals, tax rulings, legal opinions, updated

[22] Where the issuer of stock or securities is a publicly-held corporation, the seller typically requires representations regarding the buyer's compliance with the securities laws and often substitutes for more detailed representations, a representation that the issuer's current filings with the Securities and Exchange Commission are true, correct and complete.

[23] The topic of "deal protection" covenants is beyond the scope of this outline.

financial statements (and perhaps the achievement of certain earning goals), and the delivery of related contracts such as escrow agreements, employment agreements and non-competition agreements. Similar conditions apply to the seller's obligations, and include the payment of the consideration for the acquisition and related matters.

6. Article VI Closing and Termination Procedures

This article typically provides for termination of the agreement (a) at any time, by mutual consent of the parties, (b) prior to the closing, by either party if the other party has breached any representation or covenant in any material respect (and has not cured such breach within a specified period), and (c) on the closing date, by either party if any of the conditions to that party's obligation to close are not satisfied (unless the failure results from that party's own breach).

Less frequently, the buyer may have the right to terminate within a specified period following the signing if it is not satisfied with the results of its continuing due diligence investigation. In some deals (usually involving a publicly-held seller), the seller may have the right to terminate the agreement (often upon the payment of a "break-up fee" to the buyer) if it receives a superior offer from a third party.

7. Article VII Indemnification

This article sets forth the provisions entitling the buyer (and less frequently, the seller) to claim damages post-closing for losses caused by the breach of a representation or covenant by the other party. These are among the most hotly contested provisions of the agreement and tend to be the most complicated.

Typical provisions include an agreement by the seller to indemnify the buyer for any losses resulting from any breach of its representations or covenants, upon receipt of a written demand by buyer. There is usually a time limitation for making indemnification claims, although certain claims (such as those involving taxes and environmental matters) may not have a time limit. The amount of the indemnification claim may be limited by a deductible, threshold or ceiling (discussed *infra*) or by the availability of insurance proceeds or offsetting tax benefits. Procedures for the defense of unresolved third party claims are usually provided. The indemnification rights may or may not be defined as the exclusive remedy under the agreement. The agreement may also provide for security for indemnification claims in the form of an escrow of cash or shares, or by set-off against any promissory note or future contingent payment payable by the buyer.

8. Article VIII Miscellaneous Matters

This is a catchall article which typically deals with such "boilerplate" items as press releases and public announcements, third-party beneficiary rights, integration, succession and assignments, counterparts, the effect of headings and recitals, notice provisions, governing law, amendments and waivers, expenses, construction, incorporation by reference, dispute resolution, specific performance and forum selection.

9. Article IX Exhibits and Disclosure Schedules

The acquisition agreement will contain various exhibits setting forth side agreements relevant to the deal, such as escrow agreements, registration rights agreements, consulting agreements, employment agreements, promissory notes, charter amendments, articles of merger, leases and the like.

Disclosure schedules are discussed in Section VI(B) *supra*. Agreements frequently contain a buyer-favorable clause stating that matters disclosed in one schedule are not deemed to be contained in another schedule. This is intended to protect the buyer from the seller's claims that a contract listed in a schedule of "all contracts involving amounts in excess of $50,000" is automatically included in a schedule of "all contracts in which performance will result in a loss to seller." Compliance with this requirement is often burdensome and complicates the process of preparing the schedules.

A clever seller may find ways to finesse the effect of the seller's representations via drafting of the disclosure schedules. For example, a representation requiring a schedule showing "all contingent liabilities not reflected in the balance sheet" can be diluted by stating in the schedule that the buyer has liabilities for "product warranty claims incurred in the ordinary course of business." Buyer beware!

C. Simultaneous or Deferred Closing

Frequently, an acquisition agreement between two closely-held companies will be executed simultaneously with or in close proximity to the closing of the transaction. This permits the parties to dispense with a good many of the contractual provisions discussed above. For example, covenants pending the closing and conditions to the closing can be eliminated (or at least simplified) and only those representations that are intended to survive the closing need be retained.

In many cases, however, there will be a significant lapse of time between the signing and the closing, as when a stockholder vote or a tax ruling must be obtained, financing must be arranged, or the consents of third parties must be procured. Occasionally, the buyer requires the seller to complete an audit of its most recent fiscal year or interim period. In such cases, shortcut methods of dealing with the acquisition agreement are not available.

D. The Four Horsemen (Representations, Covenants, Conditions and Indemnification)

The representations, covenants, conditions and indemnification provisions of an acquisition agreement each have different purposes and interact with each other in complex ways.

1. *Representations*

The representations and warranties article of the acquisition agreement provide a static “snapshot” or “balance sheet” view of the seller’s business at the time of signing of the agreement. Ordinarily, no representations are made regarding the *future* conduct of the seller’s business – these are normally dealt with by the seller’s covenants and the buyer’s conditions to closing, which normally include a “bring down” certificate certifying that the seller’s representations are true and correct as of the closing date.

The seller’s financial statements are usually warranted as of a certain “balance sheet date,” which may be the end of the most recent fiscal year or a more recent fiscal quarter or some other “stub” period. The seller’s representations ordinarily include a statement to the effect that “since the balance sheet date, the seller has incurred no additional liabilities other than in the ordinary course of business.” This makes the financial statement representations current as of the date of signing the agreement and avoids a “gap” period (from the balance sheet date to the signing date) for which the buyer would be unprotected.

2. *Covenants*

In contrast to the seller’s representations, the seller’s covenants constitute an agreement on its part to behave in certain ways during the period from the date of signing to the closing. These provisions are future-oriented, as opposed to the representations, which are present- or past-oriented. The analogy here is to a “movie” rather than a “snapshot,” or if you prefer an accounting analogy, to an income statement rather than a balance sheet.

The seller’s representations usually include a statement that “since the balance sheet date,” the seller has not taken certain specific actions deemed unfavorable to the buyer (*e.g.*, paid a dividend, amended its charter, issued additional stock, incurred a casualty loss, etc.). This laundry list is usually repeated in a negative covenant to the effect that seller will not take any such actions pending the closing.[24]

3. *Conditions*

The conditions article identifies the conditions precedent to each party's right to close, thus giving a party the right to "walk away" from the deal, or, in more practical terms, to renegotiate the deal, if the conditions are not met.

There are several ubiquitous closing conditions: (i) all representations must be true and correct as of the closing date as if made on that date, (ii) all covenants have been performed by the relevant party by the closing date, and (iii) each party will provide an officer's certificate to that effect. Legal opinions are another nearly ubiquitous condition. Other deal-specific conditions include the execution of certain contracts (employment agreements, covenants not to compete, dispositions of assets, etc.), and the receipt of stockholder approvals, tax rulings, and occasionally accountant's "comfort" letters.

4. *Indemnification*

The indemnification article is always a "hot button" issue for negotiation. Unlike the other "four horsemen," indemnification occurs *after* the closing.[25] In short, this article states the conditions under which one party (usually the buyer) may recover damages or adjust the purchase price if one or more of the other party's representations or covenants are breached.

Indemnification provisions often elaborately constructed and may include "caps," "baskets" or "deductibles",[26] time limits on asserting indemnification claims, control of proceedings for third party claims, and special provisions for insurance, taxes, and environmental claims.

---

[24] Ordinarily, the seller's covenants are prefaced by a qualification such as "except with the written permission of the buyer," which gives the seller some flexibility in operating its business pending the closing.

[25] In contrast, representations speak as of the signing of the agreement, covenants during the pre-closing period, and conditions as of the closing date.

[26] A "cap" is a limit on the total amount of indemnification claims that may be asserted, usually a percentage of the purchase price. A "basket" is a threshold amount (say, $1 million) which aggregate indemnification claims must meet to be enforceable (*i.e.*, claims totaling $999,000 would not be indemnifiable, but claims totaling $1.01 million would be indemnifiable in full). A "deductible" is similar to a basket but reduces the total amount of indemnification (*i.e.*, if a buyer has claims of $1.5 million, it would be indemnified only for $500,000).

A curious feature of most indemnification clauses is that they usually *fail to provide a formula for quantifying the indemnified loss.* Sometimes, determining the loss is simple: An undisclosed $100,000 tax lien is discovered after the closing; the seller's indemnification obligation is $100,000, the amount by which the buyer must pay to discharge the lien. But, suppose a business is purchased at a multiple of six times EBITDA. The buyer discovers a material misstatement of the historical financial statements resulting in a $100,000 reduction in EBITDA in the most recent financial statements. Can the buyer claim a $600,000 loss? Or only $100,000? One could argue that the multiplier only applies to *future* EBITDA and that the lower number should apply. In any case, the multiplier effect is rarely articulated in the agreement, perhaps due to "the fear that the seller will take umbrage at the concept and succeed in specifically negating it in the agreement – thereby foreclosing whatever argument purchaser's lawyer might have been able to make to the judge." Freund p. 369.[27]

Note that there are usually no indemnification provisions where the seller is a public company, primarily due to the impracticability of pursuing claims against a large number of individual stockholders.

E. The Interaction of the Four Horsemen

The interaction among representations, covenants, conditions and indemnification provisions can be illustrated by an example.

Suppose an acquisition agreement is signed on January 2, containing the usual representation that there exists no material litigation against the seller. On February 1, a major lawsuit is commenced against the seller, well before the scheduled closing date of March 1.

The seller may be obligated by a covenant in the agreement to update the disclosure schedules to reflect this event. Even absent this obligation, the seller will in any event have to provide a "bring down" certificate at the closing disclosing this event.

If the seller makes appropriate disclosure, the buyer's remedy under the conditions article will be to terminate the agreement; it cannot seek indemnification since the "no litigation" representation was true and correct when given on January 2. Of course, if the seller does not make the disclosure

---

[27] This is a good example of "creative ambiguity," where a clause is deliberately left ambiguous to preserve a later argument which might be surrendered in negotiations.

and the deal closes, the buyer will be entitled to indemnification under the terms of the agreement (and may indeed have other remedies).

If the seller makes appropriate disclosure, may the buyer still proceed with the closing and seek post-closing indemnification for the alleged breach? This is the problem of "sandbagging," which should always be addressed in the acquisition agreement. A seller should always ask for a clause which makes the representations, *as supplemented by the officer's closing certificate*, the basis for indemnification, in which case the buyer will bear the risk of an adverse outcome of the lawsuit if it proceeds with the closing. In the absence of a clear resolution of this issue in the agreement, the courts may find a waiver of the buyer's right to indemnification.

It is worth noting that representations perform three different functions: They facilitate the disclosure of relevant facts relating to the seller's business and thus complement the due diligence process; they allow the buyer to walk away from the transaction if they are not true and correct at the closing; and they provide the buyer with post-closing indemnification rights. Nervous sellers sometimes worry that even a trivial breach of representation (a $1,000 lawsuit) may enable the buyer to walk away from the deal, and therefore insist that all representations be qualified by materiality. In such cases, there is usually an acceptable compromise position that requires a breach of representation to be "material" in order to justify a termination, but allows the buyer to seek indemnification (subject to any basket or deductible clause) regardless of materiality.

Typical issues which are subject to negotiation are the extent of the seller's representations, whether any of the representations or covenants will be qualified by materiality or the seller's knowledge (and if so, whose knowledge will be relevant), the extent to which representations or covenants will survive the closing, the extent to which indemnification obligations will be subject to a deductible, threshold or ceiling, or limited by insurance or tax benefits, and the manner in which the buyer may recover damages for breaches of representations and covenants. When the seller is a publicly-held corporation, its representations and covenants generally will not survive the closing or be subject to indemnification.

VIII. FROM SIGNING TO CLOSING

As discussed in Section VII (C) *supra*, there often is no significant time period between the signing of the agreement to the closing. When the closing date is deferred, there are several activities important to attorneys that may be ongoing:[28] completion of the due diligence investigation of the seller, monitoring the seller's ongoing activities, calling a stockholders' meeting, obtaining consents from third parties and arranging acquisition financing.

A. Completing the Investigation.

In the final phase of the due diligence investigation, the buyer and its attorneys will review in detail the financial, legal and business aspects of the seller's business. This serves a check on the accuracy of the seller's representations as a necessary part of the business transaction. Coordination and communication between the buyer's attorneys and business people is essential in this phase.

1. *Unearthing a Skeleton*

What happens when the buyer's investigation turns up information inconsistent with or omitted from the seller's disclosure schedules? The first task is to assess the importance of the misrepresentation. Does the client consider this to be material to the business or an insignificant detail? It is important not to create a false crisis which may upset the deal.

If the misrepresentation is indeed material, was it inadvertent or intentional? Although the contractual consequences of either type of misrepresentation are probably identical, an intentional misrepresentation creates serious questions about the reliability of other information given by the seller and the seller's overall trustworthiness.

There are several alternatives available to a buyer in dealing with this situation. The first is to remain silent and to treat the misrepresentation as giving the buyer an "option" to terminate the agreement at or prior to the closing. Of course, if the seller discovers the misrepresentation, it may make disclosure to the buyer, which makes it more difficult for the buyer to invoke termination. The buyer may also choose to remain silent and rely on the indemnification provisions for a post-closing remedy, but this is a dangerous course unless the acquisition agreement is crystal clear on the buyer's right to do so. In any case, this form of "sandbagging" is often regarded as a breach of business ethics and does not make a favorable impression on the courts.

The second alternative, calling the misrepresentation promptly to the seller's attention, but then dropping the subject, is awkward, sends a confusing

[28] Of course, the parties will at this time be preparing for the business transition, which involves a myriad of details from personnel issues to integrating computer systems.

message to the seller, and runs the risk that the buyer will be deemed to have waived the misrepresentation.

The preferred alternative is usually to call the matter to the seller's attention, ask for an explanation, and forthrightly declare the buyer's intentions either to reserve its rights to terminate the agreement, to enforce its indemnification rights or both. This frequently leads to a compromise involving some cash adjustment to the purchase price or other concession on the seller's part. Misrepresentations of this sort are often used as bargaining chips in resolving other outstanding business or legal issues between the parties.

B. Monitoring the Business

The seller's personnel should, of course, be made aware of the various restrictions on the operation of its business contained in the covenants in the acquisition agreement.[29] The buyer's personnel, who will be in almost daily contact with the seller regarding transition matters, should be instructed to report on any problems in this area.

The seller may discover that some unexpected development makes it necessary or desirable to take action which technically violates the covenants. It should in such cases notify the buyer, seek its consent and document the consent in a simple letter or other writing. The problems which arise when some new adverse development (such as a lawsuit) arises between the signing and the closing are discussed in Section VII(D), s*upra*

C. Stockholders Meetings

Where stockholder consent is required to approve a transaction, the parties may have to file a proxy statement with the Securities and Exchange Commission or prepare a similar disclosure document for the stockholders of a private company. The content of proxy statements filed with the SEC is prescribed by Regulation 14A under the Securities Exchange Act of 1934 and is beyond the scope of this article. Disclosure materials for companies not registered with the SEC are usually less formal and less complex, usually consisting of a description of the transaction, a copy of the acquisition agreement, and in some cases, financial statements. Needless to say, early preparation and close cooperation between the parties are essential to making this process work efficiently.

---

[29] There is always a risk that an inattentive client will regard the covenants as mere lawyer's boilerplate and be unaware of their significance.

D. Third Party Consents

Typical consents that may be required include those from seller's mortgagees, landlords, equipment lessors, licensors, contracting parties and regulatory agencies. If the seller's existing bank financing is to be continued after a change of control, transfer of assets or merger, the bank consent is almost always necessary. As a general rule, an assignment of contract rights is permitted unless the contract provides otherwise, and a change of control is not *ipso facto* considered an assignment. Nonetheless, the buyer must carefully analyze the terms of each of the seller's key contracts to ascertain whether the counterparty's consent is required.

Government contracts are a special case. The federal Assignment of Claims acts[30] prohibit assignment of government contracts without formal notification and consent. The government agency will usually require a "novation agreement" under which the seller remains liable as a guarantor of the buyer's performance. Since the process of assigning government contracts is incredibly slow-moving, it is quite common for the parties to consummate the acquisition without prior receipt of approval. The risks of doing so depend on the significance of the contract and the likelihood of government approval.

An assignment of a lease or contract to the buyer does not usually relieve the seller of continuing obligations as a "quasi-surety," *i.e.* a guarantor of the buyer's performance, *even when consent to the assignment is not required.* Of course, a novation agreement cures this problem for the seller, but the consenting party usually has little incentive to release the seller. For this reason, a careful seller may want to include provisions for indemnification by the buyer against obligations assumed by the buyer; although the seller should be entitled to subrogation rights against the buyer as a matter of law.

Third parties may use the consent process to extract some additional concessions from the parties (the burden of which would fall on the buyer). Where possible, try to avoid conveying to the third party the notion that its consent is vital to the deal. Some agreements provide for subcontracting-like arrangements between the buyer and the seller to preserve the benefits of the contract if the third party does not consent to its assignment. To my knowledge, the effectiveness of these arrangements is untested.

Assignment of government permits, licenses and approvals ("permits") is frequently essential. There are few generalizations that can be made about this subject: Some permits, such as zoning permits, "run with the land" and require no approval; others require only notification of assignment; others require notice and hearing before approval is granted; still others (liquor licenses are a good example) are expressly non-assignable and require the buyer to apply

[30] 31 U.S.C. §203 and 41 U.S.C. §15.

for a new permit in its own name. Be aware that government agencies do not always recognize the deal structure in the same way that corporate lawyers do. They may regard a merger as a "change of name" or a reverse merger or sale of stock as an assignment, rather than as a sale of control.

E. Arranging for Buyer's Financing

Most large strategic buyers and private equity firms will have adequate pre-arranged debt or equity financing sufficient to finance the acquisition. The existence of pre-arranged financing gives those firms a major edge in the competition to acquire the company. Experience has shown that sellers tend to be risk-averse and may favor the "bird in the hand" with financing over a competitor that needs a financing contingency. It is always in the buyer's interest to have financing available prior to signing the agreement.

In appropriate cases, the seller may request a copy of the buyer's commitment letter from its lender and appropriate representations from the buyer that the commitment letter is in force and effect. Of course, commitment letters are notorious for containing numerous contingencies allowing the lender to terminate the transaction, so a seller should not expect more than a certain enhanced level of comfort from the existence of a commitment letter.

A buyer without pre-arranged financing may ask for a specific financing contingency in the acquisition agreement, or may choose to run the risk that it can obtain the financing. The number of deals with financing contingencies seem to vary with changes in the credit markets. As this article is being written (April 2008), the pendulum is swinging towards more financing contingencies as the credit market continues to deteriorate. A seller's decision to give the buyer a financing contingency requires a case-by-case analysis and may depends on the relative leverage of the parties. A seller in a strong bargaining position may seek a substantial "reverse termination fee" if the financing contingency is invoked, or may insist on the remedy of specific performance if there is no financing contingency.

IX. THE CLOSING

The best closings are anticlimactic. If all parties and their counsel have done their job and all surprises are identified and dealt with in advance, the closing should involve only the signing of paper and filing of relevant documents. A form of closing agenda for a merger transaction is annexed hereto as Exhibit G.

In mergers and other transactions where the filing of articles of merger or other corporate documents with the secretary of state is required, you should arrange for pre-filing approval by the secretary's office. This will avoid the embarrassment of having a technical defect delay the effectiveness of the entire transaction. The staff of the Corporations Division in the office of the Secretary of The Commonwealth of Massachusetts is particularly helpful in coordinating filings.

Frequently, one or more of the closing documents is unavailable or not in proper form at the closing. Where the problem is entirely technical (a missing good standing certificate, for example), the parties usually waive the requirement against a promise to procure the document as soon as possible.

Where a document of much greater significance (a third party consent, for example) may be unavailable at the closing, the parties usually find a way to close. The buyer may agree to waive the condition, delay the closing until the condition is satisfied, negotiate a financial or other concession by the seller, or escrow a portion of the purchase price.

I agree with the observation that when the parties reach the final stages of a business transaction, there arises a certain psychological gravitational force which pulls the parties together. With the finish line in sight, many clients tend to make concessions they would have rejected a few days earlier, if it gets the deal done.[31]

[31] *See* Freund, *Anatomy of a Merger*, p. 441.

LIST OF EXHIBITS

Exhibit A	Form of Investment Banker Engagement Letter
Exhibit B	Form of Confidentiality Agreement
Exhibit C	Form of Letter of Intent
Exhibit D	Due Diligence Checklist
Exhibit E	Environmental Due Diligence Checklist
Exhibit F	Intellectual Property Due Diligence Checklists
Exhibit G	Form of Closing Agenda

See Massachusetts Continuing Legal Education, Inc. *Representations, Warranties, Indemnification and Termination Clause*" handbook (May 2007) for copies of exhibits.