

**OVERVIEW OF THE DEAL PROCESS:
*A ROADMAP THROUGH THE PAPER JUNGLE***

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A. PRE-TRANSACTION CONSIDERATION – SOCIALIZING THE DEAL

Before the parties to a transaction can consummate any deal, they must start with a deal that is actually “doable.” This requires identifying potential barriers to the deal being a success and confronting those barriers in advance to ensure that the deal can be accomplished while satisfying the critical needs of each party. Not every detail needs to be fully vetted before proceeding with a transaction, but there should be a “meeting of the minds” on the most fundamental aspects of the deal; if there are disconnects between the parties on one or more critical or foundational issues, the relationship and trust between the parties could be damaged and put the deal in serious risk of failure.

As a threshold matter, the parties generally should have cultures and organizational missions that complement one another. More deals fall through because fundamentally the parties did not share the same values and strategic objectives. Unfortunately, some transactions fail for these reasons *after* the acquisition or contractual arrangement has been closed – the earlier in the process that fundamental issues can be identified and addressed, the more likely that the rest of the transaction will progress, and the deal will be a success post-closing. There are different schools of thought on whether to work on the most challenging issues first and let the smaller issues fall into place or whether to start with the non-controversial issues to build trust and momentum that will help the parties work through the more difficult issues. Either approach is fine; however the parties should confront the foundational issues early.

Those foundational issues include, for example, governance, non-profit v. for-profit corporate structures, ethical and religious directives (“ERD”), impact to employees, existing collective bargaining agreements, prospective leadership/management for the organizations, and the local politics of the affected communities including applicable medical staffs. In many cases, these critical issues can be resolved favorably to permit the parties to move forward if they are addressed early. For instance, Catholic ERDs are generally non-negotiable; however, if confronted up front, the ERDs can be “demystified” and handled to the satisfaction of both parties. Other situations that may not be negotiable as a matter of principle might involve non-profit entities that do not want to enter into any acquisitive transaction with a non-exempt party that might jeopardize continued federal or state tax-exempt status. If discussed up front, rather than summarily dismissing any affiliation proposition, alternative structures may be considered that may still accomplish the strategic partnership goals of the parties and not disrupt the tax-exempt status of the exempt party.

B. CONFIDENTIALITY AGREEMENT/NONDISCLOSURE AGREEMENT/ EVALUATION MATERIAL AGREEMENT

1. GENERALLY

Every purchase and sale of a business begins with rudimentary discussions regarding the Company's functions, financial condition and business operations. Given the potential sensitive nature of this information, prior to entering into any meaningful discussion and certainly prior to disclosing any confidential information to a potential purchaser, the seller should insist that the purchaser enter into a confidentiality or nondisclosure agreement or an evaluation material agreement (the "Confidentiality Agreement").

The intangible assets of a Company, which include the Company's list of clients, the list of referral sources and employment information, are often the real value of the Company. By disclosing this information to a potential purchaser without entering into a Confidentiality Agreement, the seller may inadvertently allow the purchaser to acquire the assets (through the disclosure) without paying for them. To protect the Seller from this, it is imperative that the parties enter into a Confidentiality Agreement prior to the disclosure of any confidential information.

Confidential information is not disclosed only through speech and writings, but in electronic form as well. The use of "electronic data rooms" is becoming more commonplace. Electronic data rooms are online websites onto which the Company's due diligence materials are be uploaded. Individuals are given access to the data room via passwords, which allows the individuals to view the posted information.

The basic concept of the Confidentiality Agreement is simple, the seller may disclose certain information to the purchaser and, as a condition of the disclosure of such information, the purchaser agrees to hold the information in confidence and not use it. In many cases there is confidential information going both ways. Confidentiality covenants should be structured to comply both with statutory and case law. Although simple in content, a few items relating to the Confidentiality Agreement should be explored in greater detail.

2. DEFINITION OF CONFIDENTIAL INFORMATION

The first question when drafting a Confidentiality Agreement is what is confidential information? The definition of confidential information is incredibly important. The seller must make it clear that *all* confidential information disclosed by the seller is required to be held in confidence. For example, a seller would want to ensure the definition of confidential information includes all information which the seller deems confidential, *including, without limitation*, information regarding client lists, referral sources, employees, finances, payor information, and any and all other confidential or proprietary information that is provided. It should be clear that no matter what form or medium (oral, written, electronic, data room, or otherwise) the confidential information is provided, it is covered under the agreement, and that the seller need not advise the purchaser when disclosing the information that it should be treated as confidential. Conversely, the purchaser often wants to limit the definition of confidential information and/or wants the seller to notify the purchaser of each item that is to remain confidential.

It should be made clear that the Confidentiality Agreement relates to information disclosed not only by the seller, but by any of its employees and agents (including accountants and attorneys), and that such information will be treated as confidential not only by the specific recipient but by the purchaser's employees and agents as well.

There are customary exclusions to information that must be kept confidential. These exclusions typically relate to information: (i) which was known to the purchaser before the receipt of such information; (ii) which becomes known publicly other than through the purchaser; (iii) which is learned or developed by the purchaser independent of the seller's information; and (iv) which becomes known to the purchaser on a nonconfidential basis from a source that is not prohibited from disclosing such information.

3. PROHIBITED USE

Once the confidential information which is the subject of the Confidentiality Agreement is defined, it is important to decide what activities are acceptable and unacceptable by the purchaser. A Confidentiality Agreement must explicitly set forth the prohibited activities relating to the confidential information. Typically, the purchaser is prohibited from using the information or disclosing the information to third parties or allowing third parties to use such information, other than for the evaluation of the proposed transaction.

Conversely, a seller may wish to include that if the purchaser is compelled to disclose the information because of a legal or governmental proceeding (such as a subpoena), the purchaser must give the seller prior notice before such disclosure so that the seller may attempt to obtain a protective order.

The Confidentiality Agreement should specify the time period for which the confidentiality restrictions apply. It is not unusual that the restrictions apply for years after the execution of the Confidentiality Agreement.

4. BREACH

It is important to include a provision governing the breach of the Confidentiality Agreement by the purchaser. This provision should include the seller's remedies. Typically, such remedies include the right to obtain a temporary injunction without the necessity of showing irreparable harm or posting a bond as well as an agreement on the use of a specific state or county court.

5. RETURN OF INFORMATION

As information is exchanged between the parties, the seller should seek to control the information in the event either party determines not to proceed with the transaction. It is common for Confidentiality Agreements to include provisions whereby the purchaser will either destroy all confidential information in its possession (and certify to that effect in writing) or deliver to the seller all copies of the written information in its possession upon the occurrence of a certain event such as demand by the seller.

6. NON-SOLICITATION

As the discussions evolve, the purchase becomes familiar with the seller's employees and clients. As noted above, in healthcare transaction these assets are often the most valuable assets and need to be protected by the seller. As such, the seller should include a provision restricting the purchaser from hiring key employees or soliciting clients or customers of seller in

the event the deal is not consummated. The parties should recognize that non-solicitation clauses are generally disfavored by antitrust regulators and should tailor the non-solicitation to the facts of the transactions and limit its application to employees directly or indirectly involved in the transaction discussions. The parties may wish to include carve outs for employees who independently apply to general solicitations not targeted to any group or individuals. The joint FTC and DOJ guidance can be found at <https://www.ftc.gov/news-events/press-releases/2016/10/ftc-doj-release-guidance-human-resource-professionals-how>.

7. STANDSTILL

Many purchasers will request that the seller not negotiate with other parties while they are reviewing confidential information for the possible entering into a transaction. We recommend to sellers that they not agree to a standstill until more of the terms to the transaction are reached, and then only for a limited time.

8. SAMPLE – CONFIDENTIALITY AGREEMENT / EVALUATION MATERIAL AGREEMENT – See Exhibit A.

C. LETTER OF INTENT / TERM SHEET

1. GENERALLY

After the initial discussions and exchanges of information relating to the business are completed, the conversations usually develop into more comprehensive negotiations. At this point, the parties often have agreed upon a purchase price or a method or formula to determine the purchase price and the other material terms of the transaction. Once these negotiations have concluded and the material business terms are agreed to, the parties may want to enter into a Letter of Intent or Term Sheet to confirm that they are “on the same page.”

A Letter of Intent, although generally nonbinding, sets forth the material terms of the transaction. Some people may use a Term Sheet in place of a Letter of Intent. Although not done or required in every transaction, it is often very useful. In essence, the Letter of Intent summarizes, early in the transaction, the major business terms of the transaction in a simple form. The Letter of Intent is useful because it makes the parties focus when negotiating the terms of the transaction, instead of merely discussing them in the abstract. Often, the negotiation of the Letter of Intent will help resolve the major business issues of the transaction, such as the purchase price. When the Letter of Intent is prepared, the parties must then focus on and resolve the open material issues.

The Letter of Intent does not address all of the issues as set forth in a Purchase Agreement which makes it easier to negotiate and, therefore, less costly than the Purchase Agreement. If the parties are unable to agree on the major business points of the transaction, they will determine that during the less expensive Letter of Intent phase rather than in the more expensive Purchase Agreement phase of the negotiations. If the parties spend the time and money to enter into a letter of intent or term sheet, the savings in the next stage of the agreement can be profound.

2. BASIC STRUCTURE OF LETTER OF INTENT

The Letter of Intent sets forth the parties to the transaction. It will then set forth exactly what is being purchased and sold; the assets of the business or the ownership interests in the business.

The Letter of Intent will specify the consideration (purchase price) and manner in which it is paid (in full at closing or in installments over a period of time). If the purchase price is paid in installments, the Letter of Intent often will set forth the payment terms (that is, the number of payments and the interest rate) and the collateral, if any, which will secure the purchaser's payment obligations.

The anticipated date of closing and conditions precedent to closing are set forth, for example, whether the closing is contingent upon the purchaser obtaining third-party financing, obtaining a particular license in the state, or entering into a significant agreement with a third party (such as a real estate lease or a managed care contract). The Purchase Agreement will set forth, in greater detail, all conditions precedent and/or closing contingencies. However, it is often useful to set forth the most important conditions in the Letter of Intent.

Often, at this point, the purchaser may not have been given sufficient access to the seller's books and records, the Letter of Intent may specify that the purchaser may conduct a due diligence investigation, and that the business will grant access to the purchaser and assist the purchaser with such due diligence. If a Confidentiality Agreement has not already been entered into, it is now imperative that the seller include in the Letter of Intent a confidentiality provision that includes the terms and conditions that are customarily found in a Confidentiality Agreement (as noted above). Though the Letter of Intent is generally a nonbinding document, the confidentiality provision is binding both during the term of the Letter of Intent and thereafter.

The Letter of Intent usually specifies who is responsible for the expenses associated with the transaction. Specifically, the seller is responsible for the cost and expenses of its attorneys, accountants and representatives and, likewise, the purchaser is responsible for the cost and expenses of its attorneys, accountants and representatives. However, there are transactions in which one party agrees to pay all or a portion of the other party's fees. If so, it is useful to set that forth in the Letter of Intent. If a broker is involved in the transaction then the Letter of Intent should specify who is responsible for the cost of the broker. If the transaction triggers some type of tax or similar payment resulting from the transaction (such as a sales tax, but not income tax), it is recommended to specify which party is responsible for payment.

The Letter of Intent may specify which party will prepare the initial draft of the Purchase Agreement. Although there is no rule setting forth who is required to prepare the initial draft, it is usually for the purchaser's counsel to prepare; although the expense, expertise and timing considerations often play a role in who will prepare the initial draft. A party will often request to prepare the first draft so that he or she can get the "first crack" at the form and language of the Purchase Agreement. However, preparing the initial draft, instead of merely reviewing it after your adversary prepares it, often creates a greater initial legal cost.

The Letter of Intent typically sets forth the timing of the overall transaction. It often identifies a termination date if a definitive Purchase Agreement has not been finalized and

executed. Obviously, the parties are always free to renegotiate the termination date as it approaches.

Although the Letter of Intent is generally a nonbinding document, in addition to the confidentiality provision, it is advisable to include a few binding provisions, specifically a no-shop (or standstill) provision, a non-solicitation and a publicity provision.

3. NO-SHOP (OR STANDSTILL) PROVISION

A no-shop (or standstill) provision prohibits the seller from continuing to “shop” the business for sale to third parties during a specified timeframe. Often, a purchaser will request to add this provision to the term sheet. Potential acquisitions require significant amounts of time and costs. As such, a purchaser does not want to be in a position where they have devoted the resources to assessing the acquisition, only to find that the seller has sold the business to another party resulting from the continued marketing to third parties. Aside from possibly losing the deal to the third party, such an action by the seller could potentially increase the purchase price if a third party offers more money. A no-shop provision prohibits the seller from continuing to market the business for a specified period of time, which typically includes entertaining offers from, and discussing a potential acquisition with, third parties. The provision ensures that the purchaser is the exclusive party negotiating with the seller during a specific timeframe, and that they will not have to compete with a third party for the purchase of the business. It is important that the prohibited activity be drafted broadly enough to cover the potential sale of the business’s assets to a third party as well as the sale of the ownership interest of the business to a third party. Typically, the Seller, if it agrees to such a provision, will request that the purchaser make a deposit to show it is serious.

4. NON-SOLICITATION

During the negotiations, the purchaser often learns the identity and compensation levels of key employees of the business and the identity of the clients of the business. If a non-solicitation provision has not already been included in the Confidentiality Agreement, it should be included in the Letter of Intent.

5. PUBLICITY

Frequently, one or both parties desire to keep confidential the fact that they are considering the proposed transaction. The seller may want to keep the morale of the employees high, especially if the transaction fails to be consummated, or may not want the clients to learn of the possible acquisition. The purchaser may desire to keep the negotiations in confidence so that competitors do not learn of the proposed sale and attempt to make a competing offer. Therefore, the parties often agree to accept a binding no-publicity provision by which each party agrees that it shall not disclose to anyone the fact that negotiations are taking place without the agreement of both parties.

6. NECESSITY OF LETTERS OF INTENT

Often, a party to a transaction may request a Letter of Intent as an initial effort to document core terms and conditions with the intent to carry over those terms into definitive

agreements at closing. It is not a necessity, and often the seller and the purchaser believe that they each have an adequate understanding of the transaction and thus can omit this step and proceed directly to a due diligence review and negotiating a Purchase Agreement.

7. FORM OF LETTER OF INTENT – See Exhibit B.

D. CHOOSING THE APPROPRIATE ACQUISITION MODEL

A number of factors will determine the acquisition structure, such as whether or not (i) one or both of the parties are non-profit organizations, (ii) the buyer intends to assume any or all of the liabilities of the seller, and (iii) how much liability the buyer or investors are willing to assume personally. There may be alternative affiliation models that may accomplish similar strategic partnership objectives, similar to, or as an interim step to, an outright acquisitive transaction.

1. NON-PROFIT/TAX-EXEMPTION ISSUES

The exempt and non-exempt status of the parties may itself dictate the type of acquisition vehicle of the parties. If one or both parties are exempt under I.R.C. §501(c)(3), it may be necessary to set up another tax-exempt holding company or utilize another tax-exempt organization to facilitate the acquisition to preserve and maintain tax-exempt status for the exempt entities. Alternatively, if “non-charitable” purposes will be undertaken post-acquisition, a tax-exempt purchaser will need to organize a for-profit subsidiary (taxed as a corporation) to act as the acquiring entity to insulate the tax-exempt parent from private benefit, private inurement and/or “unrelated business taxable income” (or UBTI).

In the event two exempt organizations wish to merge, the “merger” can occur through a statutory corporate merger of the two non-profit corporations following the appropriate state laws governing such combinations, or simply by membership and board substitution of the acquired non-profit corporation. As such, the parties will enter into either a merger agreement or member substitution agreement. If the parties are pursuing an asset transaction, i.e., the buyer intends to choose what assets and liabilities, if any, that it wishes to acquire or assume, then the non-profit, tax-exempt entity itself can act as the acquisition vehicle or it can use another affiliated non-profit company to carry out the purchase.

2. ASSUMPTION OF LIABILITIES

As a threshold question, a buyer must decide whether to assume all, or some, of the liabilities of the seller. In situations where the buyer wishes to assume the seller’s Medicare and other commercial payor contracts, for instance, the parties can structure the acquisition as a statutory merger or board/member substitution agreement. However, if the buyer does not want to assume all the liabilities of the seller, then they should structure the transaction as an asset purchase arrangement. Under the asset purchase arrangement, the buyer avoids unlimited liability by cherry picking what assets it wishes to acquire and specifically choosing which liabilities it wishes to assume. The buyer and seller should be prepared to address assets and liabilities that neither party desires to assume or maintain post-acquisition, including relatively minor items which can be overlooked in early decision making, to avoid unnecessary last-minute negotiation, adjustments and delays in production of final closing documents. In those transactions where the Medicare and Medicaid provider numbers are not an asset that is transferred, then the buyer will

need to obtain new provider numbers and will need to “cash flow” the business post-acquisition until such numbers are received.

3. **PERSONAL LIABILITY**

If the individual investors desire to insulate themselves from any potential personal liability attributable to the underlying activities of the acquired business, the investors should consider either a corporation or limited liability company (“LLC”), both of which provide limited liability protection to its investors. Unlike a general partnership that results in unlimited liability for all general partners, both corporations and LLCs afford investors limited liability with respect to any of the debts and obligations of the acquired company or business. If the LLC model is the entity of choice, and the investors wish to avoid federal income tax at LLC corporate level, then they should consider electing to be treated as a partnership for federal income tax purposes and all items of income and loss will be attributable to the investors and not the LLC. Conversely, the LLC is to be used as a vehicle to shield and insulate the tax-exempt parent from non-exempt, non-charitable business, the LLC can elect to be treated as a corporation for federal tax purposes by the “check the box” mechanism.

If the investors pursue the corporate model and wish to avoid federal income tax at the active company level, they can elect to treat the entity as a so-called “S-Corporation.” S-Corporations are treated as flow-through entities such that virtually all income, expenses and losses are attributable to the S-Corporation’s shareholders and not the corporation itself. However, beware of this special tax election if the active company is a tax-exempt organization described under I.R.C. §501(c). Any income derived by organization exempt under I.R.C. §501(c) that elects to be treated as an S-Corporation will be per-se treated as taxable income, even if the income would have otherwise been exempt from tax had the corporation not elected S-election. In those cases the LLC option is preferred.

4. **ALTERNATIVE MODELS**

a. **Joint Operating Agreements.** Essentially, “joint operating agreements” (JOA) are contracts between independent organizations that provide for the transfer of control over the assets and activities of the organizations to a central governing authority. The central governing body may be organized as a separate legal entity (e.g., nonprofit corporation, LLC etc.) or simply be a contractual arrangement created pursuant to the terms of the JOA. JOAs have been employed mostly in the healthcare industry between two formerly unrelated hospitals or health systems. In fact, the JOA arrangements publicly addressed by the IRS all involve healthcare institutions.

A JOA achieves many of the same joint venture benefits of integration without a complete merger or transfer of assets. A JOA, also referred to as a “virtual merger,” brings two or more unrelated organizations together to operate jointly certain activities whereby each party of the JOA jointly shares the risks and rewards derived from the shared operations. The key difference between a JOA and a merger or other type of joint venture is that, in a JOA, there is no change in ownership of assets. Each party to the JOA retains ownership in their respective assets and agrees to undertake certain obligations contractually within the purview of the JOA. Also, the governing bodies, and their underlying powers, of the JOA parties do not change. Many

organizations may find a JOA arrangement attractive because it offers many of the advantages of a merger (i.e., economies of scale, access to new markets, a broad service offering) without the complete loss of a separate legal identity and ownership over its assets.

Some JOA arrangements are established as a “Joint Operating Company (JOC),” however, the contract terms may not even require the parties to enter into a corporate relationship, directly or indirectly. Absent a formal corporate structure, the JOC will be treated as a partnership for federal income tax purposes.

b. Clinical Co-Management Arrangements. A middle ground alternative to an acquisition by a hospital or health system is a clinical co-management arrangement. The primary goal of clinical co-management is to integrate the efforts of physicians and a hospital toward improved quality, efficiency and patient satisfaction of services performed in a particular hospital department or surgical sector. This model offers an opportunity for hospital system operators to collaborate with independent physician groups that are considering, but not yet ready, to enter into an acquisition. In its simplest form, the hospital contracts with physicians to manage certain elements of the hospital operations to meet or exceed agreed-upon quality, efficiency and patient satisfaction benchmarks. More complex co-management arrangements are established through formation of a separate co-management company, such as an LLC, co-owned by independent physician groups and a participating hospital. Using either approach, the participating physicians typically are compensated in two ways: (i) through a budgeted, fixed administrative fee, such as an hourly rate with a cap, that is tracked to document and legitimize each participating physician’s time and effort that is devoted to the development, management and oversight of defined benchmarks tied to quantifiable improvements in quality and efficiency of services, patient outcomes and patient satisfaction; and (ii) a predetermined quality bonus, payable to the participating physicians upon successful achievement by the hospital’s targeted department or sector of the quality, efficiency and patient satisfaction goals or benchmarks. The quality bonus may be segmented by achievement of each specific benchmark, or structured as an “all or nothing” payment based on achievement of all defined goals and benchmarks. If a separate co-management company is established, the hospital might also contribute an additional management payment to the company to address certain overhead and operational expenses directly associated with this co-management activity. In general, all of the elements of compensation must be based on an independently established local fair market value for the physician’s administrative services (impacting the applicable elements of the Stark law and Anti-Kickback Statute), and ensure that the payments to participating physicians correspond to goals and benchmarks that are not designed or administered as inducements to reduce or limit medical services provided at the hospital department (impacting the civil monetary penalty elements of the Social Security Act). Typically, clinical co-management arrangements are for a fixed time period, as goals typically are designed to be achieved within one to three years, however, the success of the arrangement, and the working relationships that develop among hospital and physician group participants throughout the process, might lead to a more fully integrated transaction between the hospital and the participating physicians in the future.

c. Professional Services Agreement. An additional alternative model to a direct physician practice acquisition is engagement through a Professional Services Agreement (“PSA”), sometimes referred to as a *synthetic* affiliation, employment or franchise. The PSA model typically enables a hospital, or large group practice, to enter into a professional, management, and

staffing services arrangement with a separate physician group practice, in lieu of direct, permanent acquisition of the practice. The targeted physician practice can participate in the arrangement while preserving its separate legal entity status. The targeted physician practice essentially leases or contracts its professional medical and non-provider medical office staffing services to the acquiring hospital or large group practice while adhering to certain PSA quality and operational guidelines. This approach can successfully be deployed as a bridge to a future acquisition, as it provides independent physician practice owners with an opportunity to remain in place and experience many post-acquisition ownership conditions while preserving their ability to return to independent practice upon expiration of the PSA, i.e., they can affiliate and practice under the PSA without terminating their ownership of hard assets, real estate, and preserve their direct employment of practice physicians and staff throughout the duration of the engagement.

The hospital or larger practice typically bills for all professional and technical services performed by the target practice and in exchange, provides it with pre-set compensation for professional services, and budgeted overhead and back-office expenses that are agreed upon in advance, as material terms of the PSA. The PSA model enables the hospital or large practice to convert the target practice's existing location(s), or other medical office locations, into what may appear to the public to be an extension of the acquiring entity's operations, through a combination of re-branding and operational adjustments to the practice. For some practices, this model provides their physicians and staff with a comprehensive introduction and first opportunity to use sophisticated electronic medical record and scheduling technology, and quality metrics and measures not previously used by the practice due to cost and scalability, that will serve as standard operating requirements if and when the practice ultimately is acquired.

d. Captive Professional Corporation. Because many states still follow the so-called "corporate practice of medicine" doctrine, which prohibits licensed physicians from being employed by a non-licensed individual or entity, the only acquisition or joint venture model that may be available to any business activity that requires physician services is utilizing a captive professional corporation (or "Captive PC") and affiliated management company. The Captive PC is owned by a physician who is friendly with the non-physician business investors. The Captive PC engages all necessary professionals to provide clinical services, and bills and collects for such services in the name of the Captive PC. The non-physician investors typically take equity in a management company that manages the activities of the Captive PC and provides all necessary support services and employs all non-licensed personnel. Revenues derived from the Captive PC are paid to the management company in the form of a management fee, which can be structured to be all patient revenues received by the Captive PC, less physician salaries and other direct and indirect physician costs. In the event that the affiliated management company is itself affiliated with a hospital or hospital system, the parties may desire that the Captive PC's corporate formation documents, and corresponding practice activities, reflect the affiliates' common mission statement(s), particularly if the affiliates are exempt under I.R.C. §501(c)(3) and exempt status also is intended, or may be considered in the future, for the Captive PC.

E. VALUATION AND FAIR MARKET VALUE

a. Anti-Kickback and Stark Requirements.

While fair market value is a question of fact and not law, it has significant legal consequences when structuring a transaction between healthcare providers and potential referral sources. In particular, the federal Anti-Kickback Statute prohibits any knowing and willful offer, payment, solicitation or receipt of any form of remuneration, either directly or indirectly, in return for, or to induce (i) the referral of an individual for a service for which payment may be made by Medicare, Medicaid or another government-sponsored health care program, or (ii) the purchasing, leasing, ordering or arranging for, or recommending the purchase, lease, order or arrangement of, any service or item for which payment may be made by Medicare, Medicaid or another government-sponsored health care program. Violations of the federal Anti-Kickback Statute are punishable by monetary fines, civil and criminal penalties (including imprisonment), and exclusion from participation in the Medicare and Medicaid programs and other government health care programs. Violations of the federal Anti-Kickback Statute also may be separately actionable under the federal False Claims Act.

Given the breadth of the federal Anti-Kickback Statute and the potentially draconian consequences for unintended violation, in an attempt to clarify which arrangements are not subject to prosecution under the federal Anti-Kickback Statute, the OIG has adopted certain “safe harbor” regulations that outline activities and business relationships that are deemed protected from prosecution and other liability. Although the federal Anti-Kickback Statute does not require health care providers or others to meet the requirements of the safe harbor regulations, compliance with all of the conditions set forth in a particular safe harbor regulation assures the parties involved of not being prosecuted or sanctioned for participating in the arrangements qualifying for the safe harbor. Many of the safe harbors contain a requirement that remuneration under the arrangement between the parties must not exceed fair market value and not take into consideration the value or volume of referrals or other business between the parties.

Failure to comply fully with all of the conditions set forth in a particular safe harbor does not, of itself, mean that the arrangement in question is illegal. Rather, arrangements that potentially implicate the federal Anti-Kickback Statute, but that are not fully within a safe harbor regulation, must be analyzed on a case-by-case basis under the general proscriptions of the federal Anti-Kickback Statute.

The Stark Law is violated if a physician makes a referral to an entity that he or she, or any member of his/her immediate family, has a financial interest, directly or indirectly, for certain designated health services, which is reimbursed in whole, or in part, by Medicare. Many of the most applicable exceptions under Stark also require that any remuneration between the parties not exceed fair market value and also be commercially reasonable, such as the ‘hold-over arrangement’ and ‘timeshare arrangement’ exceptions, that each specifically include fair market value as a required element. Unlike the federal Anti-Kickback Statute where a particular transaction may fail to satisfy a statutory exception or safe harbor, failure to meet ALL of the required criteria of a particular Stark exception will cause the arrangement to be illegal.

Therefore, the general permissibility of the contemplated arrangements between and among the Company and the Hospital under both the federal Anti-Kickback Statute and the federal Stark Law turns generally on whether the remuneration that is payable between the parties is consistent with fair market value for the items and/or services rendered, as well as commercially reasonable.

b. Fair Market Value - Definition.

There is no one definition of “fair market value” but two sources most often cited by valuation consultants have been articulated by the Internal Revenue Service (“IRS”) and the Stark Law.

The IRS generally defines “fair market value” as the price of which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts. The hypothetical buyer and seller are assumed to be able, as well as willing, to trade and to be well informed about the property and concerning the market for such property.

The Anti-kickback Statute does not specifically define “fair market value” or identify particular elements or standards necessary to produce an acceptable valuation. However, the Office of the Inspector General (“OIG”) has provided guidance, through advisory opinions and compliance publications, that aligns with elements of the IRS and Stark law requirements (described below), and supported the use of independent appraisals to establish fair market value (OIG Advisory Opinion 03-15 and Supplemental Compliance Guide for Hospitals, Jan. 2005).

The Stark Law definition of “fair market value” was substantially revised by CMS in its Stark “Final Rule”, effective January 19, 2021 (88 Fed. Reg. 77492, Dec. 2, 2020). The Final Rule separates the definition into three (3) parts: a general definition; a definition related to equipment rental arrangements; and third definition concerning office space rental arrangement. The basic definition is reflected as the value of an arm's-length transaction, consistent with the general market value of the subject transaction. While the fair market value applied to equipment rental arrangements is now defined as that occurring via an arm's-length transaction of rental property for general commercial purposes not taking into account its intended use, consistent with the general market value of the subject transaction. Finally, the definition applicable to office rental arrangements is deemed to be the value in an arm's length transaction of rental property for general commercial purposes not taking into account its intended use, without adjustment to reflect the additional value the prospective lessee or lessor would attribute to the proximity or convenience to the lessor where the lessor is a potential source of patient referrals to the lessee, and (similar to the other categories described above) consistent with the general market value of the subject transaction. (42 C.F.R. 411.351). CMS also included in the Final Rule a revised, truncated definition of “general market value” applicable to three subject areas: asset acquisitions; compensation for services rendered; and office space rental arrangements. (42 C.F.R. 411.351).

An important element of a fair market value analysis is whether the proposed compensation takes into account the volume or value of referrals or other business generated between the parties.

This volume or value standard has been the subject of at least two recent court decisions¹ interpreting the Stark Law that have called into question industry-standard compensation arrangements. The ambiguity caused by the judicial interpretations may be resolved administratively with the issuance of revised regulations, and arguably led to the changes that now appear in the Stark Final Rule that effectively eliminates certain correlations to the prior volume or value standards. (42 C.F.R. 411.354(d).

Likewise, the Stark Final Rule updated the definition of commercial reasonableness in order to address certain financial realities affecting health care providers in the current age of health reform and the shift from volume to value of services provided. The Stark Final Rule defines commercial reasonableness as a “particular arrangement furthers a legitimate business purpose of the parties to the arrangement and is sensible, considering the characteristics of the parties, including their size, type, scope, and specialty. An arrangement may be commercially reasonable even if it does not result in profit for one or more of the parties.” (42 C.F.R. 411.351)

The changes reflected in the Stark Final Rule reinforce the concept of fair market value as a core component of many Stark exceptions. Attorneys should consider obtaining an independent appraisal to help ensure that any consideration paid in connection with a transaction does not exceed fair market value. It is particularly important in healthcare transactions to ensure that the appraisal firm is experienced in healthcare transactions of the type under consideration. In cases where the government can establish that the remuneration paid exceeds fair market value, it may infer that any excess paid is an illegal payment to induce referrals.

State laws should also be considered in a healthcare transaction, as some states have: “mini” fraud and abuse laws. Some state laws mirror the Stark Law and/or the federal Anti-Kickback Statute, but others do not. Therefore, it is important to carefully analyze the transaction under applicable state law as well.

c. Approaches to Fair Market Value Appraisals.

The IRS accepts the following methods as reflecting fair market value: the cost, market and net-present value, and produced a set of guidelines (the Internal Revenue Service Business Valuation Guidelines) that are generally accepted by independent valuation consultants, including those that specialize in healthcare transactions. The approach generally used by independent valuation consultants to value an on-going business may include a combination of three methods: the market approach, the ‘asset based’ approach and the income approach.

The market approach typically utilizes comparison of the value of existing businesses that are similar in function, location and structure to the proposed transaction. The ‘asset based’ approach is designed to produce an estimated value of current, existing assets and liabilities of a business, and may involve general accounting protocols impacting assessment of present asset values, replacement costs and depreciation of existing assets and property, to produce a current business value.

¹ United States ex. rel. Drakeford v. Tuomey 792 F.3d 364 (2015) and United States ex. rel. Bookwalter v. UPMC 938 F.3d 397 (2019).

The income approach involves establishing a present value based upon reasonably anticipated future business income, and may involve related assessments to identify ‘discounted cash flow’ or the value of an entity’s cash flow and certain assets, and ‘discounted earnings’ or the value of debt-free earnings over time, to establish a present value of a business. A challenge in deploying the income approach within the context of a healthcare transaction occurs in transactions between a buyer and seller with existing or potential post-closing referrals of services funded by government payors, in that the valuation consultants must attempt to address future business income without improperly taking into account the volume or value of current or anticipated Medicare or Medicaid referrals between the parties. This can be accomplished by the fair market value appraiser identifying and then excluding the value of the anticipated referrals from the analysis, and essentially “not” taking that volume and value into account.

F. DUE DILIGENCE AND RELATED ACTIVITIES

1. GENERALLY

Due diligence of a sale and acquisition is the process by which a potential purchaser reviews the books and records and operations of a business to determine more about the business and whether to proceed with the transaction based on the proposed terms or whether to go forward, changes to the proposed terms are necessary. Sometimes this process is done concurrently to the discussion of business terms, but is often done after the parties have a formal agreement in place.

Due diligence activities, and the time to complete them, depends on the size of the business and its operations. A business that has one office and one employee may have limited items to be reviewed. However, a business that operates multiple facilities with many employees may have numerous items to review. The more organized a business is, the easier and quicker the due diligence process can be accomplished.

Initially, the seller should determine if there is information that will be disclosed to the purchaser during the due diligence process that the seller does not want the purchaser to disclose to third parties or use outside of the evaluation of the transaction. If confidentiality concerns exist, the seller must ensure that a Confidentiality Agreement or Letter of Intent containing a confidentiality provision be negotiated and executed prior to the disclosure of any such information by the business.

Before beginning its due diligence investigation, the purchaser should ensure that it has the best “team” to assist it during the process. Often, a purchaser will conduct a due diligence investigation on its own without relying on the assistance of other professionals. Although this method is less expensive than engaging the services of other professionals, such as an attorney, accountant and/or a consultant, it may ultimately cost the purchaser more if the purchaser does not know what to look for during the due diligence investigation. The accountant can review the financial aspects of the business, including the tax returns and financial statements, to (hopefully) ensure that the purchase price and other considerations that are being paid by the purchaser are not excessive given the business’s revenue, expenses and profits. The attorney can assist with the legal aspects of the business, such as the relevant contracts and regulatory issues. The consultant often can either initially supplement the need for an accountant and/or an attorney or assist these professionals with the “leg work” of the due diligence investigation. Before embarking on what

can be a time consuming process, the purchaser should be aware of what it must accomplish during the due diligence phase.

The activities conducted during the due diligence process are not necessarily limited to the purchaser. The seller should conduct a due diligence investigation of its own business and the purchaser to confirm that the purchaser has the financial wherewithal to pay the purchase price, and, whether the purchase will be able to sufficiently operate the business after the transaction is consummated if there are post-closing obligations.

2. IDENTIFICATION OF ASSETS

The assets that the business owns must be identified. This is the first step in determining the true value of the business. The assets of a business may include some of the following:

a. **Fixtures, Furniture, and Equipment.** An inventory of the hard tangible assets should be procured. In addition to the equipment being identified its condition and usefulness must be assessed. Outdated equipment or equipment that is in poor condition may be of little value.

b. **Goodwill, Office Name, Telephone Number, and Website.** Often the value of a business is derived more from intangible items, such as the goodwill of the business associated with its trade name, telephone number, website and email addresses, and not with hard assets. It is difficult to assess the value of intangible assets associated with the business. However, in many circumstances, these intangibles could be the real value of the business.

c. **Cash and Accounts Receivable.** If the transaction is structured as the acquisition of the assets of the business, the cash and accounts receivable are often excluded from the purchase and retained by the seller. When the transaction is structured as the acquisition of the ownership interests, the cash and accounts automatically remain with the business of which the purchaser will be the new owner. Sellers frequently will distribute all available cash just prior to the closing, and the value of the accounts receivable is built into the purchase price or a mechanism is used to pay the accounts receivable as collected to the seller. If the accounts receivable are incorporated into the purchase price, it is important that the value of the “good” accounts receivable is calculated and the collection period is known.

d. **Prepaid Expenses and Deposits.** Any items that have been prepaid by the seller prior to the closing will often be recouped at closing or included in the purchase price. For example, if the seller has prepaid the rent for the office for the month following the closing or has a security deposit with the landlord, such a prepayment or deposit normally will be adjusted to the seller at closing.

e. **Property, Equipment, and Software Leases.** The assets that are not owned outright but are leased by the business must be identified. A purchaser does not want to find after closing that the assets it just acquired, such as a computed tomography scanner, copy machine or even a postage machine, was not owned but leased and the purchaser now must continue making payments on such equipment after the closing.

f. **Real Estate.** The business or the individual owners of the business may own the building in which the business resides. If so, it must be determined whether this asset will be acquired by the purchaser. If it is being acquired, an appraisal should be done on the building. In these cases, if title to the office space is not being acquired and the purchaser intends to lease the space from the seller, the terms of the lease must be agreed upon by both parties. If the seller does not own the space and the purchaser is assuming the existing lease, the terms of the lease must be analyzed to determine if it is fair market value.

g. **Inventory.** All inventories must be identified. In the event the purchaser expects a certain level of inventory to be transferred, it must be made clear in the definitive agreement. Also, if the inventory has an expiration date, it needs to be determined if the inventory is excessive or will be obsolete.

h. **Office Supplies.** Again, the extent of the office supplies must be identified.

There are countless other assets that a business may own that may be of value to a purchaser. All of these items must be identified. Ultimately, the purchaser must thoroughly review the assets of the business and attribute a value to the business when conducting its due diligence investigation.

4. **IDENTIFICATION OF LIABILITIES**

Simultaneously with the identification of the assets of a business, the liabilities of the business must be identified and analyzed. Will the purchaser assume some or all of the liabilities? The extent to which the purchaser assumes liabilities will dictate if a downward adjustment in the value of the business is warranted.

There are countless liabilities to which a business may be exposed. Some of the more common liabilities are as follows.

a. **Lines of Credit, Loans, and Other Debt-Related Obligations.** Often, a business maintains a line of credit to meet its capital needs or has borrowed from a lending institution to finance construction or other costs. The extent to which the purchaser will assume financial liabilities must be identified.

b. **Equipment Leases.** The purchaser must understand whether it is acquiring title to an asset outright or whether it must continue to make installment payments on such assets after the closing. Further, it must be determined whether at the end of the applicable lease, title to the asset will be transferred to the business or whether the asset must be returned to the leasing company.

c. **Accounts Payable.** The purchaser must carefully review the payables to ascertain potential liability and relationship with vendors. After the closing, often the purchaser will continue to obtain goods and services from the same vendors, and, although the purchaser may not legally be liable to the vendor, the vendor may require that the purchaser pay the seller's accounts payable prior to selling goods and services to the purchaser.

d. **Compliance Audit.** The purchaser should confirm that the business has all required compliance programs in place, that such programs conform to applicable laws and that the business follows such programs. Also, the purchaser should consider engaging an independent consultant to perform a billing and coding audit and/or utilization review if the target is a provider. In addition to determining compliance levels, it establishes a baseline for future compliance reviews.

e. **Environmental Issues.** The purchaser should confirm that all waste has been properly disposed of, and that the business has otherwise complied with all applicable environmental laws. Some states' environmental laws are comprehensive and require notification and/or approval of state agencies prior to closing. Furthermore, some states' environmental laws hold the purchaser accountable for violations of environmental laws prior to closing, whether the transaction is structured as an asset or ownership interest acquisition. It is recommended that the purchaser engage an environmental attorney to analyze the operations of the business and the applicable state and federal environmental laws.

f. **Employment Issues.** The purchaser must confirm that the business is in compliance with all applicable employment laws. Furthermore, if the purchaser intends to retain some or all of the employees, it is important to make sure those salaries and benefits (including unused vacation time) have been paid and provided through the closing. All employment agreements should be reviewed. If some or all of the employees are to be terminated, the parties must ensure that such termination complies with all federal and state laws.

Similar to the assets of a business, the liabilities of a business must be identified, and the extent to which the purchaser will assume the liabilities will ultimately affect the value of the business.

5. **IDENTIFICATION OF AGREEMENTS**

All material agreements to which the business is a party must be identified as these agreements can have substantial consequences to the purchaser.

a. **Real Estate Leases.** The location of the office(s) is an important component of some business value. Therefore a complete review of all real estate leases is appropriate, including term, right to renew, rent increases and restrictions.

b. **Equipment Leases.** The lease agreements concerning the equipment must be identified and the terms reviewed. The monthly payments and remaining payment balance must be understood and incorporated into the value of the business.

c. **Consulting, Employment, and Other Service-Related Agreements.** If there are key personnel at the business that must be retained by the business after the closing for the business to have value, it is imperative that such personnel be bound by a written agreement that survives the closing. Absent an agreement with such personnel, they are employees at-will and have the right to terminate their employment at any time and work at a competing business. In fact, this may occur if such employees are fearful of, or are not comfortable with, the new ownership. Alternatively, if there are long-term, binding agreements with personnel that the purchaser does not wish to retain and, which the purchaser believes may be a detriment to the

business, it may nonetheless be obligated to honor these long-term agreements. Restrictive covenants may be appropriate.

d. Payer and Hospital Agreements. If agreements with certain insurance companies, hospitals or other facilities are key to the acquisition, it is important that the purchaser confirm that an acceptable, compliant agreement is in place relating to these services and facilities and that such agreement is assignable by the seller for the purchaser.

e. Assignability, Personal Guarantees, and Provider Numbers. After analyzing the liabilities and agreements affecting the business and determining which will be acquired (and assumed) by the purchaser, it must be determined whether the liabilities and agreements can, in fact, be assigned to the purchaser and whether the consent of the other party is required. For example, almost all real estate leases require the consent of the landlord before the lease can be transferred to a third party. Therefore, if the acquisition includes the transfer of the lease from the business to the purchaser, and such an assignment clause exists in the lease, then the consent of the landlord would be necessary prior to the closing of the transaction.

Transactions are often structured as the acquisition of the ownership interest in the business, rather than the acquisition of specified assets, so that the named party to the agreement (*i.e.*, the business) does not change. In those instances, only the owners change, and thus, the agreement are technically not being “assigned.” However, certain assignment clauses state that a change of ownership is deemed an assignment requiring the consent of the other party. This is often the case in managed care contracts and real estate leases. A party to an agreement frequently will require documentation from the purchaser, including its financial statements, before consenting to a proposed assignment. It is not unusual for a party to an agreement to “hold up” a deal by requiring something in return before granting its consent. For instance, a landlord may require a rental increase, additional security deposit, personal guarantees of the purchaser, or other financial “kicker” prior to granting its consent.

The seller will also want to make sure it identifies all agreements and liabilities that have been personally guaranteed by the owners of the business. As a condition to closing, the seller should require that all such personal guarantees are discharged and terminated, or an acceptable indemnification is obtained from the purchaser. By having the guarantee discharged, third parties cannot look to the seller in the event of a default after the closing.

f. Financial Due Diligence. During the due diligence investigation period, it is important that a thorough financial due diligence investigation is conducted by the purchaser. This investigation may include the review of financial statements, profit and loss statements and tax returns for the preceding years. (A purchaser should obtain at least three years.) Collections, expenses and accounts receivable must all be reviewed carefully to determine whether the business is expanding or contracting. It is important that an accountant or other individual with financial expertise conduct or at a minimum assist, with such an investigation. Often, the true financial condition of the business is hidden in the financial documentation and only a trained financial professional can detect this. Do not allow your client to include in their valuation of the business revenue that is not listed on tax returns.

g. **Determination of Purchase Price.** The most common questions attorneys will be asked at the beginning of their representation of the seller or purchaser of a business are about the purchase price. Am I paying too much for the business? Am I selling the business at too low of a figure? What is a fair value of the business? Although most attorneys attempt to answer these questions, they are not qualified to do so, either because they have not reviewed the books and records of the business or because they are not accountants and do not possess the financial background to answer these financial questions. It is extremely important that the purchase price is analyzed by someone who is qualified to do so.

Many will say that they heard that the value of the business is “two times revenue” or “six times profit” or some other multiple of another figure. In reality, there is only one formula to determine the value - the price at which a seller is willing to sell and a purchaser is willing to purchase. However, a purchase price that is contingent or adjusted based on the revenue or profit of the business after the closing must be carefully reviewed with federal and state fraud and abuse laws because contingency or adjustment on this basis is generally prohibited.

The value of a business comprises a few basic components. The first component is the value of the hard (tangible) assets, which includes all of the physical assets of the business such as the equipment, desks, tables, computers, supplies and inventory, cash in bank accounts and accounts receivable. The value of these assets (except for accounts receivable and work in process for a cash basis taxpayer) is often identified in the balance sheet of the business, although this figure will often be the depreciated value and not necessarily the replacement value or market value, all of which will be different figures.

The second component of value is the “goodwill” of the business. This is a nebulous term that reflects the value of the business as an ongoing concern and takes into account many items that are not quantifiable. Such items may include the value of the business’s intangibles, including the trade name of the business, its location, and the reputation of business and its employees. The goodwill component may also include the potential profitability of the business in the future.

The value of each component that comprises the purchase price is subjective; therefore, it is common for a seller and a purchaser to assess the value of the business very differently. Because of the subjective-ness in assessing the purchase price, it is often the most hotly negotiated term of the transaction.

h. **Regulatory Issues.** It is important that the seller and the purchaser recognize the regulatory landscape governing the business. It is advisable that purchasers consult with an attorney with an expertise in the regulatory arena to determine the regulations within which they must operate and licenses that must be obtained.

i. **Hart-Scott-Rodino Act.** The Hart-Scott-Rodino Act (the “HSR Act”) requires parties to file notifications with the Federal Trade Commission and Department of Justice when a proposed transaction—such as a merger, joint venture, stock or asset acquisition, or exclusive license—meets specified thresholds and no exemptions apply. If a notification is required, the transaction cannot close while the statutory waiting period runs and the agencies review the transaction for violations of antitrust law. Traditionally, a filing is required if the parties

meet both the *current* "size of person" and "size of transaction" thresholds, which were effective February 19, 2025:

Size-of-Person Threshold: This threshold is met if one party to the transaction has \$252.9 million or more in annual sales *or* total assets and the other has \$25.3 million or more in annual sales *or* total assets. If the acquired party is not engaged in manufacturing, the test is slightly different as to the acquired party's resources: if the acquired party meets the \$25.3 million threshold, the test measures *only* the total assets of the acquired party and *not* its annual sales/revenue.

Size-of-Transaction Threshold: This threshold is met if, as a result of the transaction, the buyer will acquire or hold voting securities or assets of the seller, valued in excess of \$126.4 million.

Provided these threshold tests are met, the HSR Act requires the parties to submit a filing fee based on the value of the transaction. For transactions valued at less than \$179.4 million the filing fee is \$30,000. For transactions valued \$179.4 million or greater but less than \$555.5 million, the filing fee is \$105,000. For transactions at \$555.5 million or greater but less than \$1,111 billion, the filing fee is \$265,000. For transactions valued at more than \$1.111 billion or greater but less than \$2.222 billion, the filing fee is \$425,000. For transactions valued at more than \$2.222 billion or greater but less than \$5.555 billion, the filing fee is \$850,000. For transactions valued at more than \$5.555 billion or more, the filing fee is \$2,390,000. It is important for the parties to contact an attorney with anti-trust and regulatory experience to assist in this process as there are significant fines imposed against the parties if the regulations are not strictly abided by.

6. FORM OF DUE DILIGENCE INFORMATION REQUEST. See Exhibit C.

G. PURCHASE AGREEMENT

The binding document that describes the acquisition, whether it is the acquisition of the assets of the business or the acquisition of the ownership interest of the business, is referred to herein as the "Purchase Agreement." Regardless of whether the seller and the purchaser enter into the Confidentiality Agreement, the Letter of Intent, or conduct a due diligence investigation, the acquisition is evidenced by the Purchase Agreement. Most Purchase Agreements contain the same basic principles, as described in this section.

1. IDENTIFICATION OF ASSETS OR OWNERSHIP INTEREST

As a threshold matter, the Purchase Agreement must identify the item(s) being purchased and sold. If the item being sold is the ownership interest in the business, the Purchase Agreement will identify such ownership interest; alternatively, if the acquisition is of certain assets of a business, the Purchase Agreement should clearly set forth the exact assets that are being acquired. A seller will often only list the assets being acquired, as opposed to stating that *all* assets are being acquired. That way, if an asset is left off of the list, it will be retained by the seller.

Purchasers will want to specify that they are buying *all* of the assets of the business (except for certain assets that may be listed in a schedule of excluded assets) instead of attempting to list all of the assets and risking assets that are inadvertently not acquired. In either scenario, such lists may include the following:

a. **Contracts.** Certain contracts and agreements may be acquired, while others may be excluded and not acquired. Identifying which contracts and agreements will be acquired and those that will not is a time consuming but critical part of due diligence, but it is essential. The Purchase Agreement should be clear about what is and is not being acquired to avoid future problems. In an asset purchase, the parties must also confirm that all contracts identified for acquisition are properly assigned (and where necessary, that consent from the contracting party is obtained).

b. **Licenses and Permits.** Often licenses and other regulatory approvals that are necessary for, or incident to, the operation of the business, and which can be transferred or assigned to the purchaser, are part of the acquired assets. These should be identified and listed. (Note, though, that many licenses and regulatory approvals cannot be assigned or transferred, and in such cases, the purchaser will be required to obtain such licenses and/or approvals prior to, or within a specified time period, after closing.)

c. **Name.** The name of the business often is acquired by the purchaser and may be associated with a certain monetary or reputational value. If the purchaser wishes to conduct business under such name, it should be made clear that the purchaser is acquiring the name and that the seller cannot use the name after the closing.

d. **Phone Numbers and Website.** Telephone numbers, facsimile numbers, email addresses, and websites also may have a value associated with them and often are acquired by the purchaser. If a seller is retaining certain office locations, such offices will likely have their own telephone and facsimile numbers that should be excluded from any asset lists in the Purchase Agreement.

e. **Inventory and Supplies.** All inventory to be included in the acquisition must be identified. In the event the purchaser expects a certain level of inventory to be transferred, it must be made clear in the Purchase Agreement. The Purchase Agreement should specify when the inventory will occur, who will conduct the inventory, what happens to old or obsolete inventory, and how the value will be determined (at cost or some other method).

f. **Manuals.** It may be appropriate to specify the administrative policy and procedure manuals, trade secrets, market and promotional materials and related items that are included in the acquisition.

g. **Prepaid Expenses and Deposits.** If prepaid expenses and deposits are included in the acquired assets, they should be specified in the Purchase Agreement. Furthermore, if the purchaser must reimburse the seller for such prepaid expenses at closing, this too must be specified. As examples, it is customary for the purchaser to reimburse the seller at the closing if

the seller has prepaid the office rent for the month(s) after the closing or has a security deposit with the landlord.

h. Books and Records. Typically, the seller's books and records that relate to the assets that are being acquired will be part of the transaction. For example, the records and documentation relating to each item of purchased equipment (such as instructions, warranties and maintenance logs) will be useful to the purchaser after the closing, so the purchase may want to include such documents within the description of acquired assets.

The seller may want to exclude certain other specific assets from the transaction. Items that often are excluded by sellers are specified items of personal property, such as pictures and plaques; cash and cash equivalents; accounts receivable; the consideration paid by the purchaser; and the corporate books and records of the business pre-sale.

Assuming the transaction is structured as the acquisition of the assets, although not required, the purchaser may want to specify that the liabilities of the seller – such as accounts payable, pre-closing employment-related matters and all liabilities arising before the closing date – are specifically excluded from the transaction and retained by the seller.

2. PURCHASE PRICE

The terms and manner of the payment of the purchase price should be set forth in the Purchase Agreement. Any adjustments to the purchase price must also be specified in the Purchase Agreement. Examples include (but are not limited to) adjustments to the seller for any inventory and supplies on-hand, for prepaid expenses (*i.e.*, rent, security deposits and utilities), or resulting from the increase or decrease of the business's accounts receivable.

The purchase price can be paid in full at closing, in installments, or as a combination of the two methods. a seller typically will want to be paid in full at closing, which will eliminate the risk to the seller of a default on any payment (especially if the installment method is used). On the other hand, a purchaser may want to pay the purchase price over the longest period possible, as this may allow purchaser to avoid borrowing money from a bank or other third party, which typically entails additional fees. Also, this allows the purchaser to free up cash that, instead of paying it to the seller at closing, can be used as working capital. Finally, by withholding money from the seller, the purchaser will not have to chase the seller to make good on its indemnification obligations; instead the purchaser can set off the indemnification amount against the owed installment(s).

If the installment method is used, the Purchase Agreement should identify the number of installments and the frequency of installments (monthly, quarterly, etc.), as well as the applicable interest rate relating to the installment payments. The installment obligations should be evidenced by a promissory note that sets forth the payment terms and the seller's rights upon default, notably its right to accelerate all installments and demand that the entire principal balance be paid immediately, as well as a requirement that the purchaser pay all collection costs.

The seller should insist on some form of collateral to secure the payment obligations, and there are several methods to collateralize. The appropriateness of any collateral will ultimately turn on the exact amount of the initial loan and what the parties can negotiate.

If the purchaser is a newly formed entity, the purchaser will have no real assets upon which a court could levy should the purchaser default in its payment obligations. In such cases, the seller should request as collateral, at a minimum, a personal guaranty of the purchaser owners (and their spouses so that there is no asset shifting) and a security interest in the assets of the purchaser's business, each evidenced by a security agreement with appropriately filed Uniform Commercial Code (UCC) Financing Statements. These security interests will give the seller the right to reacquire the assets of the business (in the case of the security agreement) or acquire the ownership interest (in the case of a pledge agreement) if the purchaser defaults on its payment obligations. It should be noted that by granting a security interest to the seller, the purchaser may not be able to borrow money in the future unless the seller agrees to subordinate such interest to the bank. If the purchaser owners have equity in their residence(s), the seller could request a mortgage on such residence(s). However, most purchaser owners already have a first mortgage on their residences, which may prohibit further mortgages without the consent of the lender. Another option is for the seller to insist that the purchaser maintain life insurance policies on the purchaser owners' lives, designating the seller as the beneficiary to receive the proceeds from the insurance company upon the insured's death. These proceeds would then be applied to the outstanding payment obligations set forth under the Purchase Agreement.

In the event the transaction is structured as the acquisition of the assets of the business, the Purchase Agreement should specify how the purchase price is allocated among the purchased assets. Assets are depreciated over various periods of time. It should therefore be clear how much is being paid for each purchased asset.

3. REPRESENTATIONS AND WARRANTIES

The representations and warranties of the seller are typically the most extensive provisions in the Purchase Agreement. The representations and warranties are statements made by the seller regarding the business that help the purchaser learn more about the business. Although the purchaser (presumably) has conducted a thorough due diligence investigation of the business, should (i) the purchaser fail to uncover a material fact during the due diligence period, (ii) the seller fail to disclose a material fact during the due diligence period, or (iii) the seller misrepresent a fact during the due diligence period, the purchaser cannot make a claim against the seller unless the condition at issue is incorporated into the Purchase Agreement. The representations and warranties identify such conditions of the business, and the purchaser may only look to the representations and warranties for damages if facts are not disclosed or are inaccurate during the process. Therefore, the representations and warranties of the seller must thoroughly describe the nature of the business and will likely reiterate many of the concepts discovered during the due diligence phase of the transaction. Note that if the business is selling its assets, the purchaser should request that such representations and warranties be made not only by the business, but also by the individual owners of the business. Common representations and warranties include, but are not limited to, the following:

a. **Corporate Existence.** The seller should represent that its business is a professional corporation or LLC, as applicable, duly organized and in good standing in its state of incorporation and has the power to enter into the transactions described in the Purchase Agreement. It is important that the seller is an entity in good standing, and, if the purchaser is acquiring the ownership interest, he or she should ensure that the business does not have “problems” on the state level.

b. **Approval.** The seller should be authorized to enter into the transaction without any other necessary approvals or authorizations. Alternatively, if approvals or authorizations are necessary, they should be set forth (typically on a schedule to the Purchase Agreement). If the seller represents that no approval is necessary, but the approval of a third party is necessary for the purchaser to, for example, assume an agreement, the purchaser will have recourse against the seller in the event the third party makes any claims relating to the lack of approval.

c. **Conflicts.** Entering into the Purchase Agreement (and the consummation of all transactions contemplated by the seller) must not conflict with or breach any law or agreement to which the seller is bound. Similar to the approval and authorization representation, if the seller misrepresents conflicts or the nature of its agreements, or if the transaction violates a law, the purchaser will have recourse against the seller.

d. **Capitalization.** The ownership of the business must be as disclosed by the seller, and there should be no other ownership interests in the business. Particularly where the purchaser believes that he or she is purchasing 100% of the outstanding ownership interest from the seller, and a third party claims it has an ownership interest after the closing, the purchaser will have a claim against the seller.

e. **Tax Returns and Financial Statements.** The seller’s business should have filed all necessary tax returns, and all tax returns must be true and accurate for each stated period. The financial statements of the business also must be true and accurate and adequately represent the business’s income and expenses for the stated period. The purchaser often relies heavily on the financial statements and tax returns when calculating the purchase price. If the seller “cooked the books” to show stronger financial operations, the purchaser can rely on this representation when making post-closing claims against the seller.

f. **Liabilities.** The business must have paid all liabilities arising through the date of the Purchase Agreement and will pay the same through the date of closing, whether such liabilities are known or unknown and regardless of whether or not they are due. If the purchaser believes it is acquiring a “clean” entity, and in fact, the business owes money to creditors and others, which are asserted after closing, the purchaser can rely on this representation when making a claim against the seller.

g. **Assets.** The seller’s business should have a good and marketable title to all of its assets free and clear of all liens, pledges, security interests and other encumbrances. In addition, all equipment and other items of property to be included in the sale must be in good operating condition and in conformity with all applicable laws. If any such assets or equipment are

leased, the same requirements should be set forth. An encumbrance placed upon an asset will be transferred with the asset absent an agreement with the third party. The closing, therefore, will not automatically terminate the encumbrance. Thus, the purchaser will want to ensure that there are no encumbrances on the purchased assets after the closing, except those to which the purchaser has specifically consented.

h. Ownership Interests. The ownership interest possessed by the selling owner should be free and clear of all liens, pledges, security interests and other encumbrances. Similar to encumbrances on assets, if the purchaser is acquiring the ownership interest owned by the seller, and there is an encumbrance placed on the ownership interest, it will be transferred to the purchaser unless it is discharged by the encumbrance holder. Again, the purchaser will want to ensure that there are no encumbrances on the ownership interests, unless the purchase has specifically consented to such encumbrances.

i. Licenses. All licenses, permits, and authorizations necessary to conduct the business must have been disclosed and should be in good standing and, if necessary and legally permissible, transferable to the purchaser. Disclosing all licenses is useful because the purchaser will likely need the same licenses to operate the business post-closing. If certain licenses or other regulatory approvals are not transferrable, the purchaser must apply for such licenses; accordingly, it is pertinent for the purchaser to know exactly what is required.

j. Employees. The seller must attest that the business is and has been in compliance with all employee-related laws and regulations, all employment taxes have been withheld, and all employee salaries, vacations, and benefits have been paid when due. The purchaser will not, for example, want to learn after the closing that employees are owed compensation, bonuses or vacations from a pre-closing period. Although purchasers may not be legally obligated to pay for such pre-closing liabilities, they will have unhappy employees if they refuse to do so.

k. Litigation and Administrative Matters. There should be no pending or threatened litigation against the seller, the assets, or the business. Any pending or threatened litigation must be disclosed (typically on a schedule to the Purchase Agreement).

l. Contracts. All contracts to which the business is a party must be disclosed, and there should exist no default under any such contract. If contracts are being assumed, the purchaser will want to make sure there are no defaults. For example, if the purchaser assumes a real estate lease, and the landlord claims a rental payment was not made for a pre-closing month, the purchaser must remedy such default and will have no recourse against the seller without this representation.

m. Accounts Receivable. All accounts receivable must be fully collectible. If they are not fully collectible, the extent to which they are collectible should be identified. There should be no set-offs against any accounts receivable. If the purchaser is acquiring the accounts receivable and is expecting to collect \$100,000 from such accounts, but subsequently collects only \$50,000, the purchaser will have recourse against the seller for a breach of its representation.

n. **Environmental.** The business should be in compliance with all environmental and related laws. Many states have very strict environmental laws that hold all owners liable for discharges and contamination to the environment, even if such discharges and contamination were done by a prior owner.

o. **Affiliated Contracts.** There should be no agreements between the business and any owner or relative of such owner that have not been disclosed to the seller. If the seller, for example, owns the building in which the business operates or if a key employee is a relative of the seller, these facts should be clearly set forth.

p. **Compliance with Laws.** The seller should also represent that the business is in compliance with all laws applicable to such business. When drafting the compliance of laws section, consider the following:

- a promise of compliance with all laws at signing;
- a promise of continued compliance with all laws during the term;
- a promise of compliance with specific laws and regulatory regimes known to exist and apply at the time of signing (*i.e.*, healthcare fraud and abuse regulatory schemes, HIPAA requirements, etc.);
- a promise of compliance with unknown future laws and regulations as they later become known and applicable;
- adjustment of price for changes in costs to comply in future; and
- indications of any standard of compliance if other than 100% compliance is possible.

4. **INDEMNIFICATION**

A purchaser will seek indemnification from the seller if damages result from, among other things, a breach of any of the seller's representations and warranties, pre-closing claims that are asserted against the purchaser, and claims made by vendors relating to goods and services provided to the seller before closing. A seller will also seek indemnification from the purchaser if damages result from, among other things, a breach of any of the purchaser's representations and warranties, claims that are asserted against the seller for post-closing activities and a breach of any of the purchaser's obligations under the Purchase Agreement (such as its obligation to make installment payments).

Should the seller or the purchaser be an entity and not possess any real assets or any significant liquid assets, it may be appropriate to request that the indemnification come from both the entity and the individual owners. Furthermore, a purchaser will often request to pay the purchase price in installments, or may request that a portion of the purchase price be held in escrow for a period after the closing, to ensure that there are funds available to enforce the seller's indemnification obligations. The Purchase Agreement should state that the purchaser may set-off indemnification claims against such installments or escrow.

While there are many aspects to indemnification provisions, certain areas to which the drafter should pay special attention include: (i) the scope of indemnification; (ii) baskets to indemnification (*i.e.*, a threshold amount of losses and damages that one party must incur before it is entitled to any indemnification from the other); (iii) if there is a basket, then once the basket is reached, whether the party may make claims from the first dollar or only above the basket amount; (iv) caps on indemnification (*i.e.*, an upper dollar limit on a party's indemnification obligations to the other); (v) if there is a cap, whether there are exceptions to the cap; (vi) limitations on consequential and other damages; (vii) impact of insurance proceeds on indemnification claims; and (viii) who has the ability to handle third party claims and settle such claims.

5. CLOSING CONDITIONS

In the event the consummation of the sale and purchase occurs after the signing of the Purchase Agreement, then the Purchase Agreement should also identify the conditions which must be satisfied after the signing but before the parties are obligated to close. Customary closing conditions include the continuing accuracy of each party's representations and warranties and satisfaction of each party's pre-closing covenants. Sometimes closing conditions also include the completion of the purchaser's due diligence (including the purchaser's satisfaction with the findings), as well as obtaining third party financing.

6. TRANSITION

a. Transition Services of Owners. It may be necessary for some or all of the selling owners to continue performing services for the purchaser after the closing. This may be for a variety of reasons, such as if the purchaser does not have enough directors or managers to transition without the selling owners. The purchaser may need the selling owners to introduce the clients to the new owners, to assist in collecting the accounts receivable or to provide transitional assistance, such as showing the new owners how to operate the information technology system and the general operation of the business. Issues that arise in an employer-employee relationship must be discussed and agreed upon, such as the terms employment, compensation, benefits, and restrictive covenants for the selling owners.

b. Client Introduction. The purchaser may want a formal introduction to the clients who use the business. This can be done by the selling owners if they are employed by the business after the closing. Alternatively, a letter can be sent to a specified group of clients or to all clients of the business introducing the new owner or notifying them of the change of ownership. When such notification is made, and who pays for such notification, should be discussed and incorporated into the Purchase Agreement.

c. Accounts Receivable. Numerous issues must be considered relating to the accounts receivable of the selling business. The primary issue is whether the accounts receivable are being retained by the seller or being sold to the purchaser.

If the accounts receivable are to be retained by the seller, an important question is whether the seller or the purchaser will collect the accounts receivable after the closing?

If it is the purchaser, it may be appropriate for the seller to pay the purchaser a collection fee to perform the collection services. If it is the seller, the seller may need access to the premises post-closing to use the computers and/or the billing staff, and again, a fee may be appropriate. It is also important to remember that all checks will likely continue to be sent to the office that will be occupied by the purchaser.

If the accounts receivable are to be acquired by the purchaser, the purchaser will want to understand the normal collection period and, in the event the full (or other specified) amount of the accounts receivable are not collected during such period, if a payment of such shortfall from the selling business to the purchaser appropriate. Typically, if such a shortfall payment is made, then it may be appropriate for the purchaser to transfer the then uncollected accounts receivable to the selling business.

Note that with respect to federal or state healthcare reimbursement, there may be specific laws or regulations dictating where accounts receivable are deposited post-closing and how the parties can or cannot redistribute such funds.

7. RESTRICTIVE COVENANTS

Another significant topic addressed in the Purchase Agreement is the post-closing restrictive covenants to which the seller and its owners are bound. The purchaser does not want to pay for the business only to have the sellers open a new office next door and solicit the clients, employees and referral sources with which they previously dealt.

The purchaser will request that after the closing, the selling owners must be bound by restrictive covenants, pursuant to which they agree not to engage in the specific type of business within a certain geographic radius of the office or where the selling business operates for a specified period of time. They also will not solicit clients or their former employees for a specified timeframe.

The courts generally impose a “reasonableness” standard when examining the enforceability of a restrictive covenant. Is the restriction reasonable in the light of the interests of the business to be protected? The extent to which states will enforce a restrictive covenant (if at all) varies, so it is important that the state laws in which the transaction occurs are reviewed to determine if, and the extent to which, a restrictive covenant will be enforced.

In addition, be mindful of whether restrictive covenants appear in more than one transaction document (such as the Purchase Agreement and a related Professional Services Agreement), and the potential for ambiguity, confusion and difficulty in enforcement of one covenant over the other if there is an unintended conflict in each covenant’s scope and duration. Both covenants could be construed as applicable to a contracting party’s actions post-closing.

8. BOILERPLATE PROVISIONS

a. **Hidden Risks of Boilerplate Provisions.** All too often, when drafting contracts or reviewing contracts, attorneys tend to brush over certain sections at the end of the contract and buried under the heading, “Miscellaneous.” These standard provisions are skimmed through and attended to less carefully than the rest of the Purchase Agreement because they are casually considered “boilerplate,” or a standardized clause that addresses general contract provisions, as opposed to the substantive aspects of the transaction. There is a tendency to ease up the intensity of focus upon reaching these provisions and assume that they are less consequential to the Purchase Agreement. It is also not unusual for young lawyers to copy and paste standard boilerplate language out of haste to complete a draft, without fully understanding the impact of the language with respect to their client’s intentions or nature of the proposed arrangement.

Many of these so-called “boilerplate” provisions are paid far less attention than otherwise might be warranted. Courts uniformly enforce boilerplate provisions so long as the language is clear and unambiguous. Thus, *every* provision of a contract should be carefully reviewed and vetted to make sure it is tailored to suit the arrangement. Indeed, not to do so can lead to some adverse and undesired consequences in the future, leaving the responsible attorney in a very uncomfortable position.

Another reason to be careful when drafting the contract and avoid haphazardly inserting boilerplate provisions is that *the drafter* could unintentionally create ambiguity with other sections of the agreement. Courts will usually take the position that ambiguities in a contract are to be construed *against* the drafter – so drafters, beware!

b. **Common Boilerplate Provisions.** Some of the more common boilerplate provisions include the following:

1. **Assignment:** Unless a contract specifically prohibits or restricts assignability, all contractual rights are otherwise assignable under common law principles of unhampered transferability of property rights.

2. **Survival of Representations and Warranties.** There is a hard and fast rule that “[u]nless the parties agree to a survival clause extending the representations and warranties in the agreement past the closing date, the breaching party cannot be sued for damages post-closing for their later discovered breach.” Further, courts will treat the indefinite survival of representations and warranties as establishing that the ordinarily applicable statute of limitations governs the time period in which actions for breach can be brought. Accordingly, it is important to be thoughtful and specific regarding survival clauses.

3. **Choice of Law.** The written words of a contract are given their ordinary meaning by courts, so contract drafters need to be specific regarding the governing law and consider its potential consequences if a dispute were ever to arise under the contract. When a contract is silent regarding the choice of governing law, the courts will apply a set of procedural rules that determines which legal system and which jurisdiction apply to a given dispute. The rules are typically referred to as “Conflict of Laws.” The term “conflict of laws” itself originates from situations where the ultimate outcome of a legal dispute depended upon which law applied and the manner of resolving the conflict between those laws by the common law courts. Generally, a court will examine which state has the most “significant contacts” with the parties and the dispute. The significant contacts test evaluates the contacts between the states and each party to the case and determines which state has the most significant contacts with the litigation. This test has been criticized for failing to respect the sovereignty of the state in which the cause of action arose and because courts can tip the balance in one way or another in deciding which contacts are significant. Therefore, if a certain state’s laws are more favorable to the client, the contract drafter should intentionally choose that state. At a minimum, the individual who drafted the contract should ensure the chosen governing law is not detrimental to the client.

4. **Forum.** If a contract is silent with regard to choice of forum, the courts will apply the state’s conflicts-of-laws rules described above. For the same reasons set forth above, it is important to consider if a specific forum is more favorable to the client at issue.

5. **Amendment.** If the parties anticipate that there may be occasions throughout the term of the contract that may require the parties to update the agreement (for example, if schedules are to be updated at various times over the term), then the amendment provision should take that anticipated situation into consideration in advance.

6. **Waiver.** A waiver, or perhaps more accurately, “non-waiver” clause should address the party’s silence, inaction or certain types of conduct.

7. **Notice.** Blanket notice provisions should be reviewed to make sure that the mode of communication is practical and not obsolete (*i.e.*, “Telex”). Also, consider using titles in the Notice provision so that the agreement does not have to be amended when a particular person who has been listed under the Notice section leaves the company.

8. **Assets and Liabilities.** Similar to the treatment of accounts receivable, contractual provisions addressing the treatment of each the parties’ respective assets and liabilities within the “boilerplate” provisions of an acquisition agreement are in the *wrong place*, and the drafter should recognize that the provision likely did not receive the initial attention that it deserved. The assets and liabilities to be included, or expressly excluded, from the transaction are core elements of an acquisition and support the established fair market value of the deal. References to assets and liabilities within the body of the Purchase Agreement will often correspond to schedules and exhibits that provide additional detail on what is or is not included in a transaction, from commercial real estate, workforce benefit plans and sophisticated diagnostic medical equipment, to accounts receivable, medical office supplies and assignable service contracts. A boilerplate assets and liabilities clause likely will in some way conflict and/or create

ambiguity with respect to the list of assets and liabilities identified elsewhere in the Purchase Agreement.

9. Entire Agreement. There are a number of issues that the drafter needs to consider when drafting or reviewing an entire agreement clause. First, entire agreement clauses often fail to include language limiting the scope of the entire agreement to the subject matter of the subject agreement. Often, parties have entered into more than one type of agreement – for example, a lease, a services agreement, and perhaps a purchase and sale agreement. Failing to limit an entire agreement clause to the subject matter of a specific agreement could nullify other agreements between the parties.

Second, the parties often fail to include other necessary agreements into an entire agreement clause. For example, the parties may have entered into a confidentiality agreement with respect a certain transaction. In such case, the parties have a few options with respect to how to address the confidentiality agreement. The parties could: (i) repeat the confidentiality provisions in the later agreement; (ii) include specific language in the body of the agreement indicating that the terms of the confidentiality agreement are incorporated by reference into the subsequent agreement; or (iii) refer to the confidentiality agreement in the entire agreement clause of the later agreement.

Third, the parties should address specific agreements that are superseded by the subsequent agreement. For example, if the subsequent agreement is an amended and restated agreement or an agreement that is intended to replace a prior agreement, the drafter should specifically name the prior agreement in the entire agreement clause and specifically state that such prior agreement is superseded.

Finally, the parties should not rely on a generic entire agreement clause to terminate a prior agreement (or assume that it would not apply to any other prior agreements) between the parties, particularly if there are related agreements that were contemporaneously prepared with the prior agreement that are intended to survive and co-exist with the current agreement (such as the aforementioned lease, services agreement, and/or purchase and sale agreement). If the parties intend for a subsequent agreement to specifically replace a prior agreement between the parties, the parties should include specific language in the agreement indicating the intent of the parties. This intent could be spelled out in the “Recitals” of the agreement and then referenced in the entire agreement clause.

10. Third Party Rights. It is important to understand the difference between an “assignment” provision and a “successors and assigns” provision. Assignment provisions (also discussed above) address the conditions that govern a potential assignment of the Purchase Agreement and often includes provisions outlining who has the right to assign, what constitutes an assignment, who is required to give consent to an assignment, and whether that consent may be conditioned, delayed or withheld. On the other hand, a successors and assigns provision addresses the rights of those parties who rightfully are permitted to take over the rights of an original party to the Purchase Agreement.

11. Arbitration. There are a number of issues that the drafter must consider when utilizing arbitration provisions. First, what is the scope for arbitration? A court will read language such as “all disputes” or “all claims” to require *all* matters, whether arising in tort or in contract, to be heard by binding arbitration. This could also include matters involving non-competes and other subjects typically falling under equitable remedies, unless specifically carved out by the parties from the “all disputes” and “all claims” language.

Second, the drafters should specify the location for the arbitration, especially if the contract parties reside in different locations. If the parties are silent as to location, the arbitrators will determine the location, with the decision often based on factors including the subject of the dispute, the convenience of the parties and witnesses, and the relative resources of the parties.

Third, the drafters may desire to indicate not only the number of arbitrators, but also how the arbitrators are selected. With respect to the number of arbitrators, the parties should carefully consider whether three (3) (a common number selected) are actually required or whether a single arbitrator would suffice, as the cost differential could be significant. Additionally, the parties should determine whether they require the arbitrator(s) to have any specific expertise, such as healthcare experience. Another common selection criterion is legal experience, with many parties agreeing to require arbitrators to be, for example, retired judges or practicing attorneys with a minimum number of years in practice.

Fourth, when the parties are deciding whether to utilize arbitration as the means to handle disputes and claims arising under an agreement, the parties should identify how the costs of arbitration will be shared among the parties (such as the arbitrator’s fees, and related expenses associated with arbitration hearings, including transcripts and travel, etc.) and carefully consider the potential costs that may be incurred in arbitration as opposed to in a lawsuit. For example, in a lawsuit, there is a relatively inexpensive filing, but in an arbitration, there are hourly fees for the arbitrators, initial filing fees which could be in the thousands of dollars, and later processing fees, which could also be in the thousands of dollars depending on the claim amounts.

Finally, if the parties desire specific discovery rights, certain evidentiary rules in arbitration hearings, judicial review of the arbitration decision and/or a requirement that the nature of the award will include certain factors (such as a reasoned award or facts and conclusions of law), then the boilerplate arbitration provisions should be modified to include such requirements. Moreover, the choice of an applicable organization’s Arbitration Rules (such as Commercial Arbitration vs. Labor Arbitration procedures, or AAA vs. AHLA) can be as important to the participants as choice of law in terms of procedural and evidentiary rights. The failure to address these elements in the arbitration boilerplate provisions could put these decisions in the hands of the arbitrators or effectively tie their hands if the designated arbitration organization’s rules exclude a desired approach or outcome.

12. Time is of the Essence. Drafters should understand the significance of these clauses before agreeing to include them in transactional documents. These types of clauses are typically found in agreements where there are specific timeframes for performance that must

be met, and failure to meet such timeframes constitutes a material breach of the agreements. Purchase Agreements are not typically the types of agreements where “Time is of the Essence” clauses are included. However, if such a clause is included, then the timeframes specified within the agreement must be stringently followed. Courts have invalidated a party’s rights under an arrangement where the party has failed to follow the carefully proscribed time requirements applicable to such party under the agreement.

H. CONTROLLING THE PROCESS AND MANAGING EXPECTATIONS

It is critical when advising clients in an acquisitive transaction to control the process so that the parties can close the transaction as smoothly as possible and any last minute surprises are avoided or at least mitigated. The “Deal Team” should be identified as soon as practical and lines of communications and responsibilities developed between and among the team. The Deal Team will consist of both in house personnel and outside counsel on both sides of the transaction. Management of the numerous tasks and documents that will be handled simultaneously requires solid organizational skills and attention to detail. Outside consulting firms are sometimes utilized to assist with managing the process.

The inside team should consist of in-house counsel, the CFO and finance individuals, compliance personnel, human resource personnel, information technology experts, and public relations staff. In addition, the board should establish a special committee, or utilize its audit committee, to coordinate and communicate with the Deal Team, including necessary board approvals. Finally, the inside team should include physicians to make sure that there will be integration of services and special attention to improved quality outcomes as a result of the consolidated and integrated clinical services.

The outside counsel team should also be comprised of a number of attorneys from different specialties. Some of the multi-disciplinary legal expertise that may be necessary in any particular transaction includes, corporate, healthcare regulatory, tax, ERISA, labor and employment, anti-trust, environmental, public finance, intellectual property and real estate.

How well the Deal Team can operate as one unified group will dictate the success of closing the transaction timely and efficiently. The Deal Team will need to identify long-lead items and establish reasonable milestones. Each team member should be assigned certain tasks necessary to close the deal and be accountable for completing their assigned tasks. To keep all the team members on tract, periodic and frequent meetings should be held where each team member can provide an update as to the status of his/her progress or any impediments they have experienced in completing their assigned tasks.

I. POST-CLOSING TRANSACTION ISSUES

It is not unusual for post-closing transitional issues to arise that are intentionally deferred during the course of the transaction. Provisions for these post-closing issues should be addressed within the definitive transaction agreement. For example, if the seller is going out of the business that it just sold to the buyer, the seller may need assistance to wind up business affairs,

such as billing and collecting its accounts receivable. If the buyer agrees to provide the requested assistance, this needs to be memorialized in a services or transition agreement. Similarly, there are many integration matters that may not be completed by closing, like connectivity of information systems and implementation of quality standards and clinical protocols. These matters must be addressed before closing and the necessary individuals to assist with completing them should be assembled as part of a post-closing team. Finally, there are representations, warranties and covenants that survive closing, including capital commitments, restrictive covenants, governance, charity care commitments and continuation of specific services. The definitive agreement may include indemnification or other remedies for failure to fulfill post-closing commitments. State attorneys general, foundations established as part of a transaction, designated boards or other entities or may have enforcement rights either as part of the transaction documents or by law.

EXHIBIT A

SAMPLE: OF CONFIDENTIALITY AGREEMENT / EVALUATION MATERIAL AGREEMENT

THIS AGREEMENT (“Agreement”) effective the _ day of _____, 202_, by and between [_____] a corporation / limited liability company organized under the laws of the State of [_____] with its principle place of business at _____ (the “**Company**”), and [_____] a corporation / limited liability company organized under the laws of the State of [_____] with its principle place of business at [_____] (“**Recipient**”).

WHEREAS, Recipient is interested in reviewing evaluation material and information of the Company solely for the purpose of evaluating the possibility of one or more business transactions between the parties (“**Purpose**”); and

WHEREAS, the Company is willing to make such evaluation material and information available to Recipient in confidence to permit it to make such evaluation and to proceed with the transactions, if it wishes.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained in this Agreement and other good and valuable consideration exchanged between the parties, the receipt and sufficiency of which are hereby acknowledged by both parties, each party agrees as follows:

1. Definitions. The following terms used in this Agreement shall have the following meanings:

“**Affiliate**” means any person, partnership, joint venture, corporation or other form of enterprise which directly or indirectly Controls, or is Controlled by, or is under common Control with, a party.

“**Consultants**” means the lawyers, accountants and investment bankers who participate in Recipient’s evaluation of the Evaluation Material.

“**Control**” means possession, directly or indirectly, of the power to direct or cause direction of management and policies through ownership of voting securities, contract, voting trust or otherwise.

“**Evaluation Material**” means any and all information of the Company, including, without limitation, any and all confidential or proprietary technical, product, engineering, financial, environmental, economic, legal, regulatory, market, commercial and business information, data, know-how, concepts, processes, source codes, records and material furnished by the Company

(irrespective of the form of communication) to Recipient, or which becomes available to Recipient, in writing, orally, electronically or in any other way, all of which is confidential and proprietary to the Company. The term includes, but is not limited to, any and all information received verbally, in writing, visual, or on computer readable media, or otherwise about such matters disclosed in connection with this Agreement, and includes, but is not limited to, information provided in the course of visits and inspections of properties and operations. Evaluation Material shall also include any and all information described as proprietary or designated as confidential information, whether or not owned or developed by the Company, or information disclosed to the Company by any third party, which the Company is obligated to treat as confidential or proprietary information.

“Recipient Analyses” means any and all analyses, compilations, studies or other documents prepared by or on behalf of Recipient to the extent they contain or are based on Evaluation Material.

2. Confidentiality. In consideration for the Company providing Evaluation Material to Recipient, and in order to induce the Company to disclose Evaluation Material, Recipient agrees that Recipient shall:

- a. keep confidential and disclose the Evaluation Material received from the Company only to those of its officers, directors, employees, Consultants or Affiliates who have a need to know such Evaluation Material for the Purpose contemplated herein;
- b. not communicate, reproduce, disclose, divulge or make use of, directly or indirectly, any Evaluation Material;
- c. provide the Company with a written list of officers, directors, employees, Consultants or Affiliates which are provided access to the Evaluation Material at least five (5) business days prior to Recipient providing such access to such officers, directors, employees, Consultants or Affiliates. In the event the Company objects to any individual having access to the Evaluation Material, Recipient shall not disclose any Evaluation Material to any such person;
- d. advise all such directors, officers, employees, Consultants and Affiliates who may receive Evaluation Material of the obligations of Recipient under this Agreement, and shall cause all such parties to agree to be bound by the obligations of Recipient contained in this Agreement, and shall indemnify, defend and hold the Company harmless from and against any claims or damages of the Company arising out of the failure of Recipient to obtain and enforce such agreements and/or arising out of a breach of the other parties to such agreements of their obligations thereunder;
- e. not use the Evaluation Material for any purpose other than in connection with the Purpose set out above; and

- f. upon demand by the Company, return any and all of the Evaluation Material, including any copies thereof (in whatever form) in its possession and in the possession of its Consultants or Affiliates, and destroy all Recipient Analyses, with such destruction to be certified to the Company in writing by an officer of Recipient.

3. No Rights Transferred. Recipient agrees that Evaluation Material delivered by the Company will remain the property of the Company and that delivery of Evaluation Material to Recipient will give Recipient no right or interest therein. The Evaluation Material shall be deemed valuable trade secret information which is the exclusive property of the Company. Recipient agrees that the Evaluation Material shall not be copied or reproduced without the express written permission of the Company. In addition, Recipient shall not, and shall not permit anyone else to, (i) duplicate any physical embodiment of any Evaluation Material, (ii) remove any copyright notice, trademark notice and/or other proprietary legend set forth on or contained within any Evaluation Material, (iii) create or attempt to create the source programs or object programs of any software included within the Evaluation Material, or (iv) reverse engineer, decompile, disassemble, translate or convert any computer program embodied in any Evaluation Material to human readable (source code) form. In receiving Evaluation Material, Recipient acknowledges and agrees that it receives no right to a license, implied or otherwise, or any rights of any kind under any patent, copyright, trademark, know-how or other rights now or hereafter owned or controlled by the Company. Recipient agrees that Recipient will not utilize the Evaluation Material to develop any product, design or process (“**Inventions**”), whether or not patentable or registerable under copyright or similar statutes, nor shall Recipient incorporate any Evaluation Material into any work or product. Recipient agrees that all such Inventions are the Company’s sole and exclusive property and that Recipient shall assign any and all of Recipient’s rights, titles and interests in any Inventions to the Company and sign any and all documents the Company decides are necessary to vest title in the Inventions in the Company.

4. Representations of Recipient. Recipient represents and warrants that the acceptance of Evaluation Material from the Company, the entering into a relationship with the Company and the execution of and compliance with the terms of this Agreement will not conflict with, violate the terms of, or constitute a breach of any agreement or understanding to which Recipient is a party or to which it may otherwise be bound.

5. Term. Recipient’s obligations set out herein shall continue until replaced, combined or subsumed into a further agreement, or the fifth (5th) anniversary of the date of this Agreement, whichever occurs first, and shall not extend to any portion of the Evaluation Material disclosed under this Agreement which:

- a. at the time of disclosure is in the public domain or which, subsequent to disclosure, enters the public domain except by breach of this Agreement by Recipient, or its directors, officers, employees, Affiliates or Consultants;
- b. Recipient can show by written proof was in its possession at the time of disclosure by the Company;

- c. is thereafter received by Recipient from any third party having the right to disclose such information; or
- d. is independently developed by Recipient without reference to the Evaluation Material of the Company.

6. Limit of Liability. Recipient acknowledges and agrees that the Evaluation Material provided by the Company is provided without warranty of any kind, including, but not limited to, the implied warranties of merchantability and fitness for a particular use. The Company does not warrant, guarantee, or make any representations regarding the use, or the results of the use, of the Evaluation Material in terms of correctness, accuracy, reliability, currentness, or otherwise. The Company shall not be liable for any direct, indirect, consequential, or incidental damages arising out of the use or inability to use the Evaluation Material, whether based in contract, tort (including negligence) or otherwise, even if the Company has been advised of the possibility of such damages.

7. Use of Evaluation Material. Notwithstanding any other provision of this Agreement, Recipient may under the following circumstances disclose Evaluation Material, or the existence or status of this Agreement, discussions or negotiations between the parties relating to any possible transaction:

- a. If, in the written opinion of its legal counsel, Recipient is required by applicable securities or other laws, legal process or stock exchange rules or regulations to make any disclosure of Evaluation Material, Recipient will, if reasonably practicable and permitted by applicable law, consult with the Company in advance of any such disclosure and provide to the Company a copy of any proposed written disclosure. If advance consultation is not reasonably practicable or legally permitted, to the extent permitted under applicable law, Recipient shall advise the Company of any such disclosure and provide the Company with a copy of any written disclosure as soon as practicable thereafter.
- b. Recipient may disclose Evaluation Material in connection with any legal proceeding arising in connection with this Agreement, but any such disclosure shall be subject to confidentiality procedures as may reasonably be requested by the Company and approved by the court.
- c. Recipient shall give the Company reasonable prior notice of the required disclosure of any such Evaluation Material such that the Company may contest such disclosure or seek an appropriate protective order. Recipient shall assist the Company in seeking a protective order to preserve the confidential nature of the Evaluation Material.

8. Employees. Without the consent of the Company, Recipient will not employ or contract with any employee of the Company whom Recipient had contact (or was disclosed to Recipient) in the course of evaluating the Purpose, for a period of three (3) years after the date hereof.

9. Non-solicitation of Clients. Recipient shall not, for a period of three (3) years contact or solicit clients of the Company.

10. Confidentiality of this Agreement. Recipient shall not, without the prior approval of the Company, disclose or make known to any third party the identity or contents of this Agreement, or the existence or status of discussions or negotiations between the parties relating to any possible transaction, or any of the terms or conditions of any of such discussions or negotiations.

11. No Obligation to Enter Into Transaction. Nothing in this Agreement shall impose any obligation on any party to negotiate or execute any agreement for any transaction. Each party shall have the right to execute and consummate any transaction with others without first notifying the other party or affording the other party any right of first refusal or other opportunity to participate in such a transaction. Each party assumes the risk that no transaction contemplated by this Agreement will be consummated.

12. Breach. Recipient acknowledges that the Company will suffer irreparable harm if Recipient fails to comply with the obligations set forth herein and agrees that monetary damages will be inadequate to compensate the Company for any such breach. Recipient expressly agrees that, in addition to any other rights or remedies that the Company may possess, the Company shall be entitled to injunctive and other equitable relief to prevent a breach of this Agreement by Recipient and to enforce the provisions hereof without the requirement of posting a bond or other security. Recipient agrees that if it fails to comply with the obligations set forth herein, then the Company shall be entitled to an accounting and repayment of all profits, compensation, commissions or benefits which Recipient directly or indirectly has realized and/or may realize as a result of such breach. In addition, the Company shall be entitled to attorneys' fees and expenses in association with the enforcement of this Agreement. No remedy conferred by this or any other provision of this Agreement is intended to be exclusive of any other remedy. The existence of any claim or cause of action which Recipient may have against the Company shall not constitute a defense or bar to the enforcement of the covenants or remedies set forth in this Agreement. In all events, Recipient agrees to indemnify, defend and hold the Company harmless from and against any loss or damages arising out of (i) any use or disclosure of Evaluation Material which is not in strict compliance with the terms of this Agreement and (ii) any breach by Recipient of any term, condition, representation, warranty or obligation contained herein.

13. Entire Agreement. This Agreement constitutes the entire understanding between the parties relating to Evaluation Material and supersedes all previous understandings, agreements, communications and representations, whether written or oral, concerning the treatment of Evaluation Material to which this Agreement relates.

14. Counterparts. The parties agree that this Agreement may be executed in counterparts by facsimile transmission, which together shall constitute one complete document.

15. Law. This Agreement shall be governed by and construed in accordance with the laws of the State of [____], without reference to its conflict of laws or choice of law principles, and the parties hereby submit exclusively to the jurisdiction of the [____] Courts and all courts of appeal therefrom.

16. Validity. If any provision of this Agreement shall be or be held to be illegal, invalid or unenforceable, such provision shall be deemed to be severed from the Agreement and of no force or effect, and the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

17. Acceptance of Terms. Acceptance by Recipient of any Evaluation Material after receipt of this Agreement shall be deemed acceptance of the terms of this Agreement and Recipient shall be bound by the provisions of this Agreement with respect to such Evaluation Material.

18. No Obligations. Nothing herein shall obligate the Company to disclose any Evaluation Material to Recipient.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date and year first written above.

THE COMPANY

By: _____
Name:
Title:

RECIPIENT

By: _____
Name:
Title:

EXHIBIT B

SAMPLE LETTER OF INTENT

[DATE]

[SELLER'S ADDRESS]

Re:

Dear CEO/PRESIDENT:

This letter (referred to hereinafter as this "Letter of Intent") expresses the intentions of [PURCHASER], on the one hand, and [SELLER], on the other hand, with respect to the transactions described herein. This Letter of Intent supersedes any prior communications between us regarding the proposed transaction described herein (the "Transactions"). Seller and Purchaser are each a "Party" and collectively the "Parties".

Except as provided in paragraph 12 hereof, this Letter of Intent is not intended to be (and the Parties specifically acknowledge that it is not) a legally binding obligation of any Party. The Parties expect that a legally binding definitive agreement or agreements (collectively, the "Definitive Agreement") based on the proposal described in this Letter of Intent will be drafted, negotiated and executed by the Parties as soon hereafter as possible. The proposal includes the following key elements:

1. Purchaser shall acquire the business of Seller. The exact structure of the acquisition shall be discussed and determined during due diligence. One option that exists is the acquisition by Purchaser of all outstanding shares of stock of Seller. The Parties understand that Purchaser possesses little knowledge of the business structure of Seller and therefore, the terms of the acquisition will need to be further developed during due diligence and during subsequent discussions among the Parties.
2. In consideration for the business, Purchaser shall pay to Seller, a purchase price of \$ _____ or pursuant to the following formula: _____
3. The Parties intend that the Transaction will be consummated on or about _____, 202_, but not later than _____, 202_ unless both parties agree as soon as possible, subject to the closing contingences set forth in paragraph 4 below.
4. Purchaser's obligation to consummate the Transaction will be subject to satisfaction of customary closing conditions and the following additional conditions to closing:
 - (a) Purchaser shall be satisfied with the results of its due diligence review of Seller and any of its subsidiaries; and

(b) all governmental consents, approvals, registrations and permits required in order to consummate the Transaction shall have been obtained and all required waiting periods shall have expired; and

(c) all non-governmental consents and approvals required in order to consummate the Transaction shall have been obtained; and

(d) no litigation shall have been threatened or instituted against any Party challenging the legality of the Transaction and no order or decree prohibiting the consummation of the Transaction shall be in effect; and

(e) Purchaser shall have obtained third Party financing upon terms and conditions which are acceptable to it.

The Definitive Agreement will provide that all Parties shall use reasonable best efforts to bring about the satisfaction of the above conditions.

5. The Transaction will be accomplished pursuant to the terms of the Definitive Agreement, which would be in form and content mutually satisfactory to all Parties. The first draft of the Definitive Agreement shall be drafted by counsel for purchaser and provided to Seller no later than _____, 202_. The terms and conditions of the Definitive Agreement will include, without limitation, the following:

(a) customary representations, warranties and covenants about Seller made by such entity and certain owners thereof (which shall be discussed and negotiated during due diligence), including, without limitation, representations, warranties and covenants regarding intellectual property and other assets, liabilities, financial condition, regulatory condition, taxes, operating results, contracts, properties, commitments, products, businesses and affairs of Seller; and

(b) Seller and certain owners thereof (which shall be discussed and negotiated during due diligence) shall indemnify Purchaser for, among other things, any breach of the representations, warranties or covenants and for the operations of the business prior to the closing date; and

6. Certain owners and employees of Seller shall enter into an employment agreement upon terms acceptable to Purchaser and such employee. Seller understands that the continued employment of certain key individuals may be a necessary component of the Transaction.

7. Certain owners and employees of Seller shall enter into a restrictive covenant pursuant to which they will agree to refrain from engaging in a competitive business and from soliciting clients and employees during such person's employment and for a specified period thereafter. Such persons are identified on Schedule 6 attached hereto. Such persons are identified on Schedule 7 attached hereto.

8. Since a critical component to the Transaction will be the due diligence investigation on the business of Seller by Purchaser, Seller will provide Purchaser and its

accountants, counsel and other representatives with reasonable access to all of its business operations, properties, books, files and records and will do everything reasonably necessary to enable Purchaser to make a complete examination of the business, finances, assets, liabilities, properties, commitments and affairs of Seller and its facilities and the conditions thereof.

9. For the [_____] (____) day period from the date that this Letter of Intent is fully executed, Seller agrees that it will not directly or indirectly (a) offer or agree to sell its assets, in whole or in part to any person or entity, or otherwise encourage, solicit or initiate discussions or negotiations relating thereto; (b) offer or agree to sell any shares of stock or other securities, in whole or in part to any person or entity, or otherwise encourage, solicit or initiate discussions or negotiations relating thereto; and (c) provide any information to any person or entity concerning any merger, consolidation, sale of assets, sale of securities or acquisition of beneficial ownership of any stock of Seller made by such entity and certain owners thereof (which shall be discussed and negotiated during due diligence). In the event Seller is contacted by any person or entity or group relating to any of the foregoing, Seller shall immediately provide written notice to the undersigned of the foregoing, identifying, with specificity, the nature of such contact.

10. Each Party (the “Recipient”) agrees to maintain in strict confidence all Confidential Information of the other party (the “Discloser”) and, for the one year period from the date hereof, agrees not to use the Confidential Information for any purpose, indirectly or directly, other than for the purpose of evaluating the Transaction. The Recipient agrees to return to the Discloser, immediately upon request, all Confidential Information that is in written, typed, printed or other tangible form in the possession of the Recipient. “Confidential Information” shall mean information provided by the Discloser or its agents, representatives (including attorneys, accountants and financial advisors) or employees to the Recipient, or the Recipient’s agents, representatives (including attorneys, accountants and financial advisors) or employees, including, but not limited to, information pertaining to the Discloser’s services, analyses, computations, forecasts, studies, processes, research, technology, financial condition, and other information, with the exception only of the following: (a) information that is now in the public domain or subsequently enters the public domain other than as a result of a disclosure by the Recipient; (b) information that was available to the Recipient on a non-confidential basis prior to receipt from the Discloser; and (c) information that becomes available to the Recipient on a non-confidential basis from a person or entity, other than the Discloser, who is not otherwise bound by a confidentiality agreement with the Discloser or is not otherwise prohibited from transmitting the information to the Recipient.

11. Each of the Parties hereto, and the Definitive Agreement shall provide that each Party thereto, shall bear its own legal, accounting and other expenses in connection with the proposed Transaction.

12. The Parties agree that the provisions set forth in paragraphs 9 and 10 (the “Binding Provisions”) shall constitute legally binding obligations of the respective Parties. The Parties agree that the provisions set forth in this Letter of Intent, other than the Binding Provisions, are an expression of intent only, and do not set forth all of the matters upon which the Parties must reach agreement in order for the Transaction to be consummated. The respective

rights and obligations of the Parties remain to be defined in the Definitive Agreement and related documents, the terms and conditions of which will be subject to approval by the Parties.

Accordingly, except as set forth in the first sentence of this paragraph, this Letter of Intent does not and will not constitute a legally binding document and does not create any legal obligations on the part of, or any rights in favor of, any Party or any other person.

[Remainder of page left intentionally blank]

If the foregoing correctly reflects the Parties' understanding of our mutual intentions (and, as set forth in paragraph 12 hereof, agreements), please so indicate by signing and returning the enclosed copy of this Letter of Intent.

Very truly yours,

[ATTORNEY]

ACKNOWLEDGED AND AGREED TO:

[PURCHASER]

By: _____

Name:

Title:

Date:

[SELLER]

By: _____

Name:

Title:

Date:

EXHIBIT C
DUE DILIGENCE INVESTIGATION
OF
XXXXX
INFORMATION REQUEST

We are sending you this Information Request to assist us in our due diligence investigation in connection with our proposed acquisition of all outstanding shares of stock of XXXXX (the “Company”).

This Information Request covers the Company, any subsidiaries or affiliates and any predecessor(s) (and your responses herein should be responsive to each of the foregoing), and has been divided into ten (10) Sections (Sections A through J). Under each Section are numbered questions, information requests and document requests. Where not otherwise indicated, documents requested should be furnished (or made available) for the last five (5) years.

We would appreciate receiving your response to this Information Request as soon as possible. While we would, in general, prefer to receive copies of all requested documents, in the limited instances where appropriate, in lieu of being furnished a copy of a document, you may indicate that such document will be made available for our review.

A copy of each items furnished and each response should be forwarded to each of:

and

WE ASK THAT YOU FOLLOW THESE 6 INSTRUCTIONS IN RESPONDING:

- (1) Prepare a written response to each request made.
- (2) The written response should separately respond to each Section Heading and question number, *preceded* by that Section Heading and question number.
- (3) For inapplicable questions, please respond, “INAPPLICABLE.” Likewise, if a question requests documents that do not exist, please respond, “NO DOCUMENTS.”

(4) If, as part of a response to a question, one or more documents are going to be furnished, list the document(s) and indicate that it is (they are) being furnished.

(5) The transmittal of documents requested and produced by the Company should be “tagged” with a “post-it note” or other label, indicating the applicable Section and question number to which the document pertains.

(6) When transmitting documents, always include an inventory listing the documents enclosed (and cross-referencing the applicable Section Heading and question number).

SECTION A: CORPORATE RECORDS

1. *Corporate Charter Documents.* List authorized capital structure and outstanding securities of the Company, and furnish Articles or Certificate of Incorporation and By-laws of the Company, as amended to date.

2. *Minutes.* Furnish Minute books of the Company, including unanimous consents and minutes of any meetings of the stockholders, Board of Directors, or any committees of the Boards of Directors.

3. *Jurisdictions Qualified to do Business.* List all jurisdictions in which the Company and any affiliates is/are qualified to do business, and furnish copies of most current Certificates of Authority to transact business.

4. *Taxing Jurisdictions.* List all jurisdictions in which the Company is obligated to pay taxes and furnish copies of tax status certificates.

5. *Ownership of the Company.* List the owners of the Company and the number of shares of the Company owned by each owner and furnish copies of all agreements relating to such ownership (including, without limitation, shareholder agreements, partnership agreement and limited liability company agreements).

6. *Directors and Officers.* Furnish a list of the current directors and officers of the Company and any subsidiaries.

7. *Affiliate Relationships With the Company.* Furnish a summary of business and personal relationships and affiliations among directors, officers, shareholders, creditors, customers, suppliers and other business affiliates of the Company in any way affecting the Company’s business.

8. *Agreements Pertaining to Equity Ownership of the Company.* List and furnish copies of all agreements relating to the sale, purchase, transfer, registration, repurchase, redemption or voting of any stock or other securities of the Company, or granting rights to acquire stock or other securities of the Company or granting or effecting any preemptive right to acquire any securities of the Company.

9. *Subsidiaries.* List of all subsidiaries of the Company.

10. *Organizational Chart.* Furnish a current organizational chart for the Company.

SECTION B: CONTRACTS AND COMMITMENTS

Please provide the following information as it relates to or as it may affect the Company:

1. *Loan and Finance Agreements.* List and furnish copies of all loan, line of credit and other financing agreements to which the Company is a party.

2. *Evidences of Indebtedness.* List and furnish copies of all evidences of indebtedness, mortgages and indentures to which the Company is a party.

3. *Debt Schedule.* Furnish a debt schedule summarizing short-term and long-term debt and capital lease obligations with original principal amounts, interest rates, outstanding balances and maturity dates.

4. *Customers.* Furnish a list of the top 20 customers of the Company based on gross sales for 200__ and year to date for 200__, copies of any sales agreements in force with each such customer, and a schedule indicating as to each: (i) names, addresses, telephone numbers and contact persons, (ii) a general description of the products sold to those customers, and (iii) the dollar amount of gross sales.

5. *Suppliers.* Furnish a list of the top 20 suppliers of the Company based on gross purchases for 202__ and year to date for 202__, copies of any purchase or other agreements in force with each such supplier, and a schedule indicating as to each: (i) names, addresses, telephone numbers and contact persons, (ii) a general description of the products purchased from such supplier, and (iii) the dollar amount of gross purchases.

6. *Sales and Marketing Agreements.* List and furnish copies of all marketing, advertising, sales, agency, broker, producer and other commission agreements, and a list of all such individuals or entities who have worked for the Company at any time during the preceding 5 years.

7. *License and Royalty Agreements.* List and furnish copies of all licensing and royalty agreements.

8. *Management Agreements.* List and furnish copies of all management agreements.

9. *Consulting Agreements.* List and furnish copies of all consulting agreements and other agreements with vendors and independent contractors.

10. *Non-Competition, Non-Solicitation Agreements and Confidentiality Agreements.* List and furnish copies of all non-competition, non-solicitation and confidentiality

agreements to which the Company is or was (within the last five years) a party or is or was subject to.

11. *Purchase, Sale and Other Forms.* List and furnish samples of standard form purchase orders, sales agreements, credit procedures, invoices, warranties and other standard form agreements used by the Company.

12. *Agreements with Affiliates and Associates.* List and furnish copies of all agreements currently in effect between the Company and any affiliate or associate or any present or former officer, director or employee not covered by Section D.1 hereof.

13. *Extraordinary Transactions.* List and furnish copies of all agreements of the Company entered into outside the ordinary course of business, including cross-marketing, partnership and joint venture agreements.

14. *Mergers, Consolidations, Etc.* List and furnish copies of all agreements or plans for mergers, consolidations, reorganizations, acquisitions or the purchase or sale of assets or stock involving the Company, or agreements in principle, currently in effect, with respect to mergers, consolidations, reorganizations, acquisitions or the purchase or sale of assets or stock involving the Company.

15. *Insurance.* List and furnish copies of all insurance policies, including key-man, errors and omissions and product liability, casualty, liability, title, and workers' compensation insurance of the Company, and insurance summaries thereof.

16. *Loss Summaries.* Furnish loss summaries for the last five years for general, products and automobile liability insurance and for workers' compensation insurance and all reservations of rights and denials of coverage received from any insurance carrier relating to pending claims.

17. *Material Transactions.* List and furnish copies of all closing documents, agreements, correspondence, and any other documents pertaining to any material transactions of the Company in the last five years.

18. *Leases, Etc.* List and furnish copies of all leases with respect to real estate, equipment or other personal property, nondisturbance agreements, sale and leaseback agreements, installment purchase contracts, consignment agreements, financing leases, licensing and franchise agreements.

19. *Other Agreements.* List and furnish copies of all other material contracts not otherwise described herein (including guarantees, confidentiality agreements, development agreements, agreements with competitors and any agreements containing termination or other provisions triggered by a change in control).

SECTION C: LITIGATION

Please provide the following information as it relates to or as it may affect the Company:

1. *Pending or Threatened Litigation.* Furnish a schedule of all pending or threatened legal proceedings (including any arbitration proceedings) to which the Company is a party, providing a brief description of the following information:

- (a) parties;
- (b) nature of the proceeding;
- (c) date and method commenced; and
- (d) amount of damages or other relief sought.

2. *Pleadings.* List and furnish copies of all pleadings and correspondence relating to all pending or threatened litigation or claims involving the Company as plaintiff or defendant.

3. *Orders, Judgments and Decrees.* List and furnish copies of any orders, judgments or decrees of any court or governmental body applicable to the Company, and all consent decrees, judgments, injunctions, other decrees, orders, settlement agreements, other agreements, arbitrations and arbitration findings to which the Company is subject or by which it is bound or that prohibit or require future activities.

4. *Files Pertaining to Pending or Threatened Litigation.* List and furnish copies of all files concerning pending or threatened litigation or administrative proceedings, inquiries, or investigations involving the Company, or its agents, including copies of pleadings, briefs, depositions, correspondence, etc.

5. *Litigation Counsel.* List the names and addresses of all legal counsel who are currently acting, or in the last three years have acted, on behalf of the Company and related to the Company in connection with any litigation.

6. *Opinions of Counsel Pertaining to Litigation.* List and furnish copies of all opinions by counsel to the Company as to any pending litigation against the Company (including letters to auditors).

SECTION D: EMPLOYEE MATTERS

Please provide the following information as it relates to or as it may affect the Company:

1. *Employees.* List of all employees of the Company presently and in the past twelve months, listing as to each such employee, the date employment commenced, current rate of compensation and position/job (functional description) and, as to terminated employees, date of termination and reason therefore.

2. *Employment Agreements.* List and furnish copies of all employment contracts with management and former senior employees, deferred compensation and similar agreements.

3. *Union Contracts.* List and furnish copies of all general employment or collective bargaining agreements with employees of the Company, as well as any other agreement and historical background of negotiations with labor unions (including (a) a list detailing all fringe benefits and prerequisites of each officer and director, with information on the cost thereof to the Company and the value thereof to the recipient, for the last and current fiscal years and (b) a schedule listing all collective bargaining agreements to which employees of the Company are subject, together with a list of the expiration dates of such agreements and the number of employees covered by each respective agreement; and all waivers or amendments to any collective bargaining agreement, if any).

4. *Compensation Plans.* List and furnish copies of all management compensation plans and incentive plans and documentation of actual payments made or accrued under such plans in the last three years.

5. *Bonus, Severance, Employee Benefit Plans, Etc.* List and furnish copies of all bonus, severance, savings, stock purchase, stock option, stock appreciation right, pension, profit sharing, deferred compensation, medical reimbursement and other similar plans currently in effect and drafts of any similar proposed plans.

6. *Arrangements with Officers, Etc.* List and furnish summaries of all material transactions or arrangements (including loans, guarantees and contracts) involving the Company and any officer, director or key employee of the Company, and copies of any agreements or other documents respecting the foregoing.

7. *Employee Insurance Benefits.* List and furnish copies of all life, health and disability insurance plans; and, where applicable, a summary of annualized cost to the Company of any insurance provided to retired or former employees.

8. *Termination Benefits.* Furnish a summary of liability for termination payments to employees.

9. *Employee Manuals.* Furnish copies of brochures, information, booklets, policies and procedures manuals or other written material given to employees or potential employees of the Company to acquaint them with the Company's business and with services, compensation and benefits offered to employees.

10. *Labor Issues.* Furnish a list of labor concerns, including whether any strikes are threatened or pending, all current disputes and negotiations and all Occupational Safety and Health Administration (OSHA) issues and complaints, and furnish copies of any written documentation in connection therewith.

11. *Pension Matters.* List and furnish copies of all notices to the Pension Benefit Guaranty Corporation (PBGC) concerning reportable events under ERISA and all documentation of any audits, investigations or reviews being conducted by the IRS, Department of Labor or PBOC with respect to any plan and any administrative proceedings in connection therewith.

12. *Communications Concerning Pension Liabilities.* List and furnish copies of all communications regarding withdrawal liabilities under multi-employer pension plans.

13. *DOL Filings.* List and furnish copies of all forms 5500 filed with the Department of Labor for each employee benefit plan (i.e., pension plans and welfare plans) for the last three years.

14. *OSHA and EEOC Matters.* All material documents pertaining to OSHA and the Equal Employment Opportunity Commission (EEOC).

SECTION E: GOVERNMENTAL REGULATIONS AND FILINGS

Please provide the following information as it relates to or as it may affect the Company:

1. *Licenses and Permits.* List and furnish copies of all licenses, permits, consents, approvals, authorizations, registrations, and filings from, with, or to any federal, state, or local governmental authority (including, without limitation, equal employment agencies, environmental protection agencies, labor relations agencies, and trade practice agencies) relating to the Company. Please indicate which of those items expire, require a new application, consent or notification upon change of control.

2. *Reporting to Regulatory Organizations.* List and furnish copies of all reports filed and significant correspondence with any local, state, or national regulatory agencies by the Company during the past four years.

3. *Correspondence with Governmental Organizations.* List and furnish copies of all material correspondence, if any, with federal, state, provincial or similar regulatory authorities or agencies by which the Company is regulated.

4. *Materials Pertaining to Violations.* List and furnish copies of any reports, notices or correspondence relating to any violation or infringement by the Company of federal, provincial or local government regulations, including, but not limited to, the areas of fair trade, products liability, environmental regulation, import administration, equal employment opportunity, and occupational safety and health, and copies of all other material correspondence with federal or provincial regulatory agencies.

SECTION F: ENVIRONMENTAL ISSUES

Please provide the following information as it relates to or as it may affect the Company:

1. *Permits.* List and furnish copies of all environmental permits, if any, under which the Company's facilities operate.

2. *Notices and Demands.* List and furnish copies of all notices and demands of any federal, state or local environmental agencies relating to the operations or property of the Company, or to off-site waste treatment, waste storage or waste disposal facilities utilized by the Company.

3. *Investigations.* List and describe all assets or property of the Company that have ever been or are now being investigated by any federal, state or local environmental agency for the generation, manufacture, storage, treatment, disposal, release or threatened release of any hazardous substance, as those terms are defined in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. Section 9601 *et seq.* ("CERCLA"), or investigated with respect to compliance with any other federal, state or local environmental statute, regulation or ordinance.

4. *Environmental Testing.* List and summarize all environmental testing done at any location involved in the business of the Company. Provide copies of all written reports, prepared during the last ten years regarding such testing, or regarding other environmental matters affecting the business of the Company.

5. *Records of Compliance History.* List and make available all records regarding compliance history with federal, state or local environmental requirements (including environmental permits) under federal, state and local statutes, ordinances or regulations. Set forth any known events of noncompliance with any such requirements.

6. *Changes in Permit Compliance Levels.* List and summarize any anticipated changes in permit compliance levels (that is, state whether you know that a regulatory body or licensing agency intends to require levels of control or standards that differ from those under current environmental permits).

7. *MSDS.* MSDS's for all formulations and raw materials.

SECTION G: TAXES

Please provide the following information as it relates to or as it may affect the Company:

1. *Tax Returns and Balance Sheet.* List and furnish copies of all federal, state, local and other tax returns and reports filed by or on behalf of the Company, or copies of extensions of time within which to file such reports as have been obtained, for the last three fiscal years, and any years prior thereto that remain open and subject to adjustment, audit, or review by the IRS or any state or local taxing authority, and copies of all audit, determination, and other correspondence pertaining thereto, and list and furnish copies of all balance sheets (with accountants' notes) with respect to such period.

2. *Tax Agreements.* List and furnish copies of all tax sharing and other tax-related agreements.

3. *Audits.* List and furnish copies of all information related to any audit of any return or report filed by or on behalf of the Company for the last three fiscal years and pending audits for any prior periods that could affect the tax liability, credits, or other tax attributes of the Company.

4. *Franchise Taxes.* Furnish for state franchise or similar tax liabilities of the Company, a schedule setting forth the payments due in each state, the most recent period for which

a franchise tax or similar tax payment was made and the date on which such payment is due and payable each year.

5. *Property Taxes.* Furnish for personal and real property taxes, a schedule setting forth, for each location in which such payments were made, the most recent period for which such a tax payment was made and the date on which such payment is due and payable each year.

6. *Tax Disputes.* Furnish a schedule describing any ongoing tax disputes, together with copies of revenue agents' reports, correspondence, etc. with respect to any pending federal, state, provincial or similar tax proceedings, with regard to open years or items relating to the Company, and furnish copies of relevant documentation pertaining thereto.

SECTION H: PROPERTIES, ASSETS AND INVENTORY

Please provide the following information as it relates to or as it may affect the Company:

1. *List of Tangible Assets.* Furnish a schedule of machinery, equipment and other fixed assets owned or used by the Company. The schedule should describe and age each item listed, indicate its depreciation reserve, depreciation rates and methods, present book value, and all liens and encumbrances applicable to each, and indicate where the said asset is physically located.

2. *List of Intangible Assets.* Furnish a list of all intangible assets of the Company, including all third party software owned or used by the Company. The schedule should describe and age each item listed, indicate its depreciation reserve, depreciation rates and methods, present book value, and all liens and encumbrances applicable to each, and indicate where the said asset is physically located.

3. *Ownership of Subsidiaries.* Furnish copies of evidence of ownership of all subsidiaries.

4. *Real Property.* List and identify all real property owned or leased by the Company. With respect to each real property owned, list and furnish a copy of the deed, mortgage and date acquired. With respect to each real property leased, list and furnish a copy of the lease.

5. *Inventory and Raw Materials.* List and identify all inventory and raw materials in the possession of the Company. The schedule should describe and age each item listed and the acquisition cost or fair market value, as applicable.

6. *Other Assets.* Furnish a schedule of other material assets owned or used by the Company not otherwise set forth herein.

SECTION I: TECHNOLOGY; PATENTS, COPYRIGHTS AND TRADEMARKS

Please provide the following information as it relates to or as it may affect the Company:

1. *Patents, Trademarks, Software, Etc.* Furnish a schedule of all patents, patent applications, software, trademarks, service marks, trade names, brands and copyrights of the Company owned or used in the Company's business, together with copies of relevant documentation evidencing the existence of same and/or related to the registration of same.

2. *License Agreements, etc.* Furnish a list of all license agreements or other agreements pertaining to any patents, copyrights, trademarks, service marks, trade names, know-how, software or other intellectual property rights owned or used in the conduct of the Company's business, together with copies of relevant documentation of same.

3. *Infringement.* Furnish a schedule of patent, copyright, trademark, service mark or trade name claims of infringement by or against the Company.

SECTION J: MISCELLANEOUS

Please provide the following information as it relates to or as it may affect the Company:

1. *Warranty Policy.* Furnish a summary of warranty policy.

2. *Complaints.* Furnish copies of all customer and independent contractor complaints or demands received within the last twelve months with respect to the Company or the products and services thereof.

3. *Directors' Materials.* Furnish copies of all other documents viewed by the officers and directors of the Company as material to the business, financial condition, or operations of the Company.

4. *Internal Reports.* Furnish copies of internal reports and studies concerning matters which are material to the ongoing business of the Company.