Tax Due Diligence

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THE TAX DUE DILIGENCE PROCESS AND NEGOTIATING AND DRAFTING TAX PROVISIONS IN ACQUISITION AGREEMENTS

I. INTRODUCTION

The purpose of this outline is to identify and analyze the principal tax considerations which must be taken into account at each of the critical junctures in the acquisition process: structuring the transaction, conducting due diligence and negotiating and drafting the acquisition documents. In today's corporate environment, acquisition transactions often occur on an aggressive time schedule or not at all. In addition, tax practitioners are often not consulted with respect to the tax sensitive aspects of the transaction until the final stages of the transaction, i.e. at the closing. For these reasons, familiarity with the basic tax framework for analyzing acquisition documents is essential. This outline is intended to provide that framework.

At the outset, a couple of cautionary notes are in order. First, this outline does not, nor is it intended to, provide a detailed discussion of the various tax issues which the parties must consider in determining whether to enter into a transaction, and if so, the optimal structure for consummating the transaction (e.g. sale of stock versus sale of assets). That is, the following material assumes that the parties have determined to pursue a particular form of transaction and outlines the principal tax considerations which go into investigating and documenting the agreed upon structure. Second, as is customary with any outline which includes sample clauses and agreements, the reader should understand that these sample materials are intended only as a starting point. They are not intended to be automatically inserted into an acquisition document. The sample provisions will need to be modified to account for the specifics of the particular deal, including the size of the transaction, the parties' relative bargaining power, whether the agreement is negotiated or part of an auction process, the presence or absence of foreign operations, particular industry concerns, and the like.

II. THE TAX PURCHASE INVESTIGATION

A. Overview

In the typically highly charged environment of corporate takeovers, an essential element of an acquiring company's analysis of the target is the purchase investigation. This section deals with the tax portion of the purchase investigation. A tax purchase investigation generally focuses on the tax returns and tax examinations of the acquisition candidate. This serves the purpose of satisfying the buyer that the tax liabilities of the business being acquired are properly stated on the seller's books. In addition, the tax review should focus on the buyer's ability to amortize a portion of its investment through proper tax planning strategies, utilization of the seller's tax attributes and similar tax opportunities. In conducting the tax portion of the purchase investigation, as well as the overall purchase investigation, consideration should be given not only to the hidden "liabilities" of the target, but also to the
hidden assets or planning opportunities of which the target and other competitive bidders may not be aware.

The tax review essentially begins with the following question: "Has the seller paid all its tax liabilities on a current basis, and has a reasonable reserve been accrued for known and anticipated adjustments likely to arise in current and future audits by various taxing authorities?" Although the procedures used to examine these questions will vary depending on the size of the deal and the complexity of the target's particular tax situation, these inquiries will generally entail a review and analysis of tax returns for all open years with special emphasis on the reconciliation between financial statement and taxable income and analysis of book and tax basis balance sheets, together with a review of the most recent revenue agent's reports made by relevant taxing authorities. Once completed, these results are then compared to reserves for taxes, or the so-called "cushion," to determine whether the seller has adequately provided for any tax exposures. When representing financial buyers, another analysis that will often need to be done is a determination of contingent tax liabilities may become due and payable. This obviously can tie into determining whether the buyer's cash flow projections with respect to the target are correct.

Historically, tax purchase investigations focused primarily on federal income tax issues that could result in a permanent tax cost. Recent developments and changes in interest rates indicate that an expansion of scope is warranted in many “timing” situations given the related interest cost. This is particularly true if the target company's returns are open for a number of years. For example, although timing differences such as capitalization of repairs or allowance of financial statement reserves will generally result in no additional tax over time, the shifting of deductions to later years or acceleration of income to earlier years can result in a very substantial interest cost. State and local income, franchise, sales and use, and ad valorem taxes should also be reviewed in this process. In this regard, certain companies have historically been aggressive in their state tax positions, particularly as it relates to nexus and the requirements to file state and local returns. Most states have become more vigilant in attempting to tax multi-state enterprises.

If the target company has international operations, information should be obtained during the purchase investigation concerning the structure of the target's multinational operations, the E & P history with respect to such operations and similar items. The level of detail required will depend on the size and complexity of the international operations at issue. In addition, consideration should be given, particularly in the case of large foreign subsidiaries, to a separate review of the local tax situation and related exposure with respect to the foreign subsidiaries.

Succession to the seller's tax attributes is also an important area to review. Many companies today have net operating loss carryforwards and unutilized investment tax, foreign tax and other credits. Depending on the type of acquisition structure, these tax attributes can represent significant cash savings to the buyer after the acquisition, (this will be a function, in part, of the value of the target and the limitations of Code § 382). Quantifying these attributes is thus an important step in the review process. However, quantification must go beyond merely copying numbers from the tax return. The buyer must
get behind the numbers and adjust the attributes for potential softness due to aggressive tax positions that may be challenged in the future by tax authorities.

If the buyer is purchasing a company's stock from an existing consolidated return group, an important part of this phase of the review is advising the buyer on how to obtain benefits associated with possible post-acquisition net operating losses or excess credits that can be carried back to pre-acquisition income earned by the target company while a member of the seller's consolidated return group. This involves arranging the proper tax sharing agreement with the seller, tailored to the specifics of the transaction.

Finally, in looking to obtain tax benefits in acquisitions, information should be obtained as to how the purchase price might be allocated in the case of a taxable step up transaction, or as to items such as covenants not to compete and employment contracts.

The following material in this Section is intended as a guide to enable the user to focus on the purchase investigation in an organized and logical manner. It is not all inclusive. Because each acquisition candidate has a unique history and tax profile, the tax practitioner needs to approach the due diligence process with a healthy amount of skepticism and inquiry.

B. General Items To Review

1. Corporate Structure. During the purchase investigation, a copy of the target company's corporate structure (in diagram form) should be obtained. In addition, information should be obtained concerning the relative fair market value, the stock basis, and inside asset basis of each corporation in the seller's group, as well as the jurisdictions in which each such corporation does business. This can be critical for disposition planning after the acquisition and for integrating the target and acquiring company's operations. Further, if the target company has international operations, information on the target company's overall foreign tax credit position, and the E & P and tax history of each foreign subsidiary, should also be obtained.

2. Federal Tax Returns and Workpapers. A review should be made of the target company's federal income tax returns (and related workpapers) for all open years. In addition, during this portion of the tax purchase investigation, the company's outside accountants' workpapers with respect to tax cushion items should be reviewed. In performing the tax return and workpaper review, a determination should be made as to the quality of the support for the tax return as well as any and all aggressive positions taken in the return. In many cases, the accounting firm's checklist for the preparation of corporate tax returns can be useful in examining the target company's open federal income tax returns. The target company's alternative minimum tax position should also be reviewed.

3. Revenue Agents Review (RAR) Reports. Inquiries should be made as to the status of all revenue agent's reviews in the current audit cycle, if any, as well as the results of reviews in prior audits. In addition, the results of those reports should be
compared with the level of cushion that has been established in the audited financial statements with respect to any open years. This will often give the practitioner a sense for whether the target company is aggressive or conservative with respect to income tax accounting matters.

4. **Target As A Subsidiary.** If the target is a subsidiary of a selling parent corporation, the nature of due diligence will depend on the method of structuring the transaction. Set forth below are some basic points to consider:

a. **Asset purchase.** In the case of an asset acquisition, there is generally less detailed due diligence required, although an allocation of purchase price should be considered. In addition, an appraisal may be needed, and the filing of Form 8594 should be reviewed. As discussed infra, the parties will have to consider which party has primary responsibility for preparation of the purchase price allocation and how disputes with respect to purchase price allocation are to be adjudicated.

b. **Stock purchase.** In the case of a stock acquisition, where the purchaser will generally inherit the tax attributes (as well as the potential tax problems) of the target company, detailed due diligence will need to be done. In addition, it should be remembered that if the target company is a member of a selling consolidated return group, the target company will have joint and several liability for all federal tax deficiencies (and certain state and foreign tax deficiencies) of the selling consolidated return group during the years it was a member of that group, in addition to its own tax liabilities. This can be a significant consideration when the selling group is highly leveraged. Further, if the target company has a net operating loss (NOL) after the transaction, it is possible that the NOL may be carried back to a consolidated return year when the target company was a member of the seller's group. It is customary for the acquisition agreement (or a separate tax sharing agreement) to deal with these points. (Samples of tax allocation provisions are attached as Appendices to this outline).

c. **Stock purchase treated as an asset purchase (Sec. 338(h)(10)).** Generally the considerations in subparagraph (a) above will apply where a Code § 338(h)(10) election is involved. However, it is important to note that the target company will have joint and several liability with respect to open years of the selling consolidated return group. See Code § Treas. Reg. § 1.338(h)(10)-1(e)(5) (providing that where a Section 338(h)(10) election is made, the new target corporation remains liable for the tax liabilities of the members of any consolidated group that are attributable to taxable years in which these corporations and the old target corporation joined in the same consolidated return).

5. **State and Local Taxes.** An area of increasing importance in the purchase investigation/due diligence area and acquisition planning is the state and local tax area. This is particularly so because in recent years states have more aggressively
pursued corporate taxpayers, in particular, non-filers. Indeed, our firm has encountered situations where potential state and local tax liabilities have constituted a more significant exposure to a purchaser than contingent federal income tax liabilities.

a. **State franchise and income taxes.** The target company's overall state income tax position should be reviewed as well as open returns from major years and revenue agent's reports. Inquiries should be made as to those states in which the target company may have exposure due to non-filing of state income tax returns because of aggressive positions with respect to the nexus issue. In addition, a review should be made of how income taxes are apportioned between the states. If the acquisition is leveraged, consideration should be given to techniques to push debt down to the target group to increase interest expense at that level and reduce state income taxes. Finally, an analysis should be made as to whether a target's state tax position may affect the purchaser's state tax burden because of a change in apportionment factors, and the like.

b. **Sales and use tax.** The target company's compliance with sales and use taxes in the applicable states in which it does business should be reviewed. If the target company is claiming an exemption because the buyer of the product is reselling it at retail, inquiries should be made as to whether the company is obtaining and retaining required resale certificates. Also, if the current transaction is structured as an asset purchase (with the buyer assuming any incremental tax liability), certain states have bulk sales exceptions for inventory from sales tax which will need to be considered.

c. **Ad valorem (or personal property) taxes.** The target company's position with respect to ad valorem (or personal property) taxes should also be reviewed. An inquiry should be made about any disputes with local tax authorities or potential major property tax increases. In certain states, taxing authorities are attempting to value property, not on the value of the land itself, but rather on the income stream that the land could generate, which may not be related to the land's inherent value. Examples of when this might create a problem include a landfill in the waste disposal business or an amusement park. In addition, certain taxing jurisdictions (such as New York) consider a change in control of the stock of a parent corporation to result in a deemed sale of the underlying real estate.

6. **International.** If the target has international operations, an international tax specialist should generally be consulted during the due diligence process. This can also be beneficial in obtaining information to help structure the transaction. In today's environment, many purchasers seek to structure acquisitions so that part of the debt financing for the acquisition can be placed offshore to lower the effect of tax rates in foreign jurisdictions in an effort to avoid part of the interest expense allocation rules under Reg. Sec. 1.861-9T through -13T. At a minimum, the following information should be obtained.
a. **Structure.** Similar to obtaining a corporate structure for the domestic operations, a corporate structure diagram should be put together for the international operations. In this regard, information concerning the stock basis and inside asset basis (both for foreign purposes and U.S. E&P purposes) should be obtained.

b. **IRS Forms.** Copies of IRS Forms 5471 and 5472 and boycott reports for open years should be reviewed.

c. **Restructurings.** Information should be obtained as to whether the foreign entities of the target company have undergone prior reorganizations or restructurings. In this regard, the rules of Code § 367, and if rulings are obtained, copies of those rulings and any closing agreements thereunder, should be reviewed. This is necessary because, pursuant to the § 367 regulations, prior letter rulings and closing agreements may limit certain planning opportunities which the acquiring corporation might otherwise have.

d. **Local tax purchase investigation.** In the case of significant operations offshore, consideration should be given to contacting a local office and having them perform a separate tax purchase investigation with respect to the local tax posture of the target company's foreign affiliates.

7. **Accounting Periods and Methods and General Tax Elections**

a. **Accounting periods.** Any changes in the tax accounting period of the target company in prior years should be reviewed. In addition, the practitioner needs to consider the consequences that flow from a target company's short tax year due to the acquisition. Particularly if the target company has a cyclical business or is on LIFO inventory or has prior Code § 481 adjustments, the short tax year can create unanticipated levels of taxable income or loss. In addition, if post acquisition losses are likely, consideration should be given to accelerating or delaying the closing process because of the carryback rules.

b. **Accounting methods.** Once again the target company's general accounting methods should be reviewed, particularly with regard to such items as the economic performance rules, inventory capitalization and LIFO matters, as well as tax "conventions" that the target may have adopted or may be using. In addition, if the target company is currently using, or had used, an industry specific accounting method, such as the long term contract method of accounting, the accrual acceptance method, or the installment method for reporting on dealer sales, these items should be reviewed in detail. In addition, items such as accruals for state income taxes and vacation accruals should be reviewed. Finally, there may be exposure on items such as
research and development tax credits and investment tax credits which need to be reviewed.

In addition, in closely held companies, close scrutiny should be given to the target company’s accounting methods and particularly their inventory accounting. We have encountered situations where small, particularly non-audited, target companies routinely understated their inventory to reduce their taxable income. In these situations, either the purchaser must agree to step into what may be a major contingent liability (including penalties) or attempt to force a purchase of the assets of the target corporation.

c General elections. Any elections which the target company has made with respect to current or open years should be reviewed. In this connection, the target company’s accounting firm's corporate tax return review checklist should be useful.

8 Prior Acquisitions, Reorganizations, Dispositions and Restructuring. All major prior acquisitions and dispositions of the target company should be reviewed for tax exposures. Exposure can arise either from issues concerning the structure of the acquisition or disposition, or with respect to purchase price allocation issues. In this regard, prior rulings and opinions should be reviewed, as well as appraisal reports, to determine the level of risk in these transactions as well as opportunities that may arise. For instance, in some purchase investigations we have discovered that the target companies in earlier acquisitions did not consider the possibility of the application of Code § 1253 to franchises, trademarks and tradenames.

9 Compensation

a Closely Held Companies. With respect to closely held target companies, compensation matters involving shareholders, as well as all other transactions between the target company and the shareholders, should be reviewed to determine whether certain items such as salary, which were deducted by the target company, may in fact constitute constructive dividends for federal or state income tax purposes.

b Public Companies. In the case of publicly held target companies, a review of termination payments, particularly as to executives, needs to be made in view of the golden parachute tax rules of Code § 280G. Given the number of issues that can arise in this process, consultation with a compensation tax specialist is recommended.

10 Customs. If the target company is importing or exporting goods, a review of compliance with the applicable customs rules as well as a comparison between the price of the goods for customs purposes and federal income tax purposes needs to be made. Penalties and risk in this area can be substantial.
C. Conclusion

In a completed acquisition, the purchase investigation is the beginning of the tax practitioner’s opportunity to perform services for his or her clients. Once the acquisition is closed, two important initial areas of further service involve obtaining appraisals required as a result of the acquisition, and assisting in the preparation of the target company's final tax returns.

III TAX REPRESENTATIONS, COVENANTS AND INDEMNITY PROVISIONS IN THE ACQUISITION AGREEMENT

A. Overview. The basic contractual provisions in the acquisition document which the tax practitioner must focus on include (i) representations and warranties (ii) pre- and post-closing covenants relating to taxes, and (iii) indemnification provisions. In addition, purchase price determinations and readjustments, dispute resolution clauses and other provisions in the acquisition agreement (including for example, the definitions sections) may have a significant impact on the manner in which the specific tax provisions operate. As discussed further below, the specific content of these provisions will depend on whether the acquisition is structured as a stock or asset deal. In the case of a stock acquisition, the primary purpose of the tax provisions in the acquisition document is to identify the potential tax liabilities of the target company and allocate these liabilities between the seller and the purchaser. In contrast, in the case of an asset acquisition, where the seller retains the liabilities of the target company (unless the purchaser expressly assumes such liabilities) the primary function of the tax provisions, as least from the purchaser's perspective, is to ensure that the purchaser obtains the seller's assets free and clear of any tax liens.

In the case of the acquisition of a member of a consolidated return group, because the tax attributes of the target company generally survive the acquisition (subject to the various limitations and disallowance rules contained in the Code), and because the target company will have joint and several liability for all federal tax deficiencies (and certain foreign and local tax deficiencies) of the selling consolidated group during the years it was a member of that group (see first comment to section III.B.4., below), the purchaser and seller must consider several additional issues, including:

(i) the extent of the target company's liability for pre-closing taxes of other members in the seller's consolidated group (and the target company's ability, if any, to participate in dealings with tax authorities with respect to these liabilities);
(ii) carrybacks and carryforwards of losses or credits between pre-closing and post-closing periods (and the effect of audit adjustments for pre-closing periods which affect post-closing tax attributes of the target company); and

(iii) issues arising from the fact that the purchaser may be receiving the economic returns for the period between the pricing date (e.g., the date on which the price was fixed) and the closing date, while the seller is legally required to pay taxes for this interim period.

The foregoing issues, and many others, may be addressed in the main body of the acquisition agreement or in a separate tax sharing agreement attached as an exhibit to the acquisition agreement. It is often customary for purchaser’s counsel to prepare the initial draft of the acquisition agreement. The party with initial drafting responsibility will have a certain advantage in how key issues are approached in the agreement, in effect placing the burden on the other party’s counsel to identify any hidden assumptions that may benefit the drafting party. Of course, the party who takes primary drafting responsibility may incur greater legal costs in connection with the transaction.

B. Tax Representations and Warranties.

12 From the purchaser's perspective, the principal purpose of representations and warranties relating to taxes, is to identify, and to the extent possible, eliminate, potential tax problems which otherwise will be inherited by the purchaser in the transaction. It is no mystery that purchasers will seek inclusion of the broadest possible tax disclosure language in the acquisition document, while sellers will argue for provisions narrow in scope.

13 The tax provisions incorporated in the acquisition document work hand-in-hand with the purchaser's due diligence investigation. That is, the tax representations and warranties in the acquisition document are designed primarily to "smoke out" potential tax problems. If the representations and warranties are carefully structured, the seller has a clear incentive to fully disclose any problems, since the failure to do so may (i) result in the purchaser's ability to walk away from the deal, or (ii) if the breach occurs subsequent to the closing, provide the purchaser with an economic right to recover from the seller (provided the representations and warranties survive beyond the closing).

14 The standard representations and warranties relating to taxes differ depending on whether the transaction is structured as an asset or stock acquisition.

15 In a stock acquisition, detailed representations and warranties are typically required. The scope of coverage in the tax representations will likely depend in large part on the scope of coverage agreed to by the parties with respect to representations in the deal generally. That is, while either party may argue that taxes are unique and need not be covered by the general approach taken in the agreement, consistent treatment will often dictate a similar approach with respect to taxes. Below are
sample representations and warranties (and definitions) for inclusion in a stock purchase agreement.

Following the sample definitions, and certain of the sample representations and warranties set forth below, are comments regarding the sample language.

**Definitions.** For purposes of this Agreement,

(i) the term "Tax" or "Taxes" means any income, corporation, gross receipts, profits, gains, capital stock, capital duty, franchise, withholding social security, unemployment, disability, property, wealth, welfare, stamp, excise, occupation, sales, use, value added, alternative minimum, estimated or other similar tax (including any fee, assessment or other charge in the nature of or in lieu of any tax) imposed by any governmental entity (whether national, local, municipal or otherwise) or political subdivision thereof, and any interest, penalties, additions to tax or additional amounts in respect of the foregoing, and including any transferee or secondary liability in respect of any tax (whether imposed by law, contractual agreement or otherwise) and any liability in respect of any tax as a result of being a member of any affiliated, consolidated, combined, unitary or similar group.

(ii) the term "Returns" means all returns, declarations, reports, statements and other documents required to be filed in respect of Taxes, and any claims for refunds of Taxes, including and any amendments or supplements to any of the foregoing. The term "Return" means any one of the foregoing Returns.

(iii) the term "Code" means the Internal Revenue Code of 1986, as amended. All citations to the Code, or to the Treasury Regulations promulgated thereunder, shall include any amendments or any substitute or successor provisions thereto.

(iv) the term "Company" means [name of the target company] and all of its direct and indirect subsidiaries.

Comment: (1) A target company that is a member of a consolidated group has potential joint and several liability with respect to taxes owed by the consolidated group for tax periods during which the target was a member of the group. See Treas. Reg. § 1.1502-6. Technically, Treasury Regulation §1.1502-6 provides that the common parent and each subsidiary that joined in the consolidated return are severally liable for the consolidated tax. Nevertheless, the Treasury generally attempts to collect part or all of the consolidated tax liability from the common parent or any other member with the financial means to pay the tax liability. Neither the separation of a member from the group nor agreements made between members
of the group will extinguish such a consolidated tax liability. *Globe Prods. Corp. v. United States*, 386 F. Supp. 319 (D. Md. 1974). As a result, the possibility that a subsidiary may be liable for more than its share of the consolidated tax should be considered in any contract of sale of the subsidiary. The last three lines of the "Taxes" definition picks up this type of liability for federal consolidated filings and state and foreign group filings to the extent applicable. Alternatively, the “Taxes” definition may include a reference to “any liability for taxes under Treas. Reg. § 1.1502-6 (or any similar provision of state, local or foreign law).”

(2) Sellers may object to the inclusion of any "transferee or secondary liability in respect of any tax" in the definition of "Taxes." If the definition is not intended to cover contractual gross-up obligations (e.g. the target may have contractually agreed to reimburse bondholders in the event interest income on a particular issuance was determined not to qualify for tax-exemption), this type of liability should be carved out of the definition.

(3) The definition of "Returns" includes claims for refund and amended returns. If the acquisition agreement includes provisions setting forth which party has responsibility for filing Returns, it may be necessary to address amended returns separately (and not as part of the general definition of Returns). For example, although the seller may have responsibility for filing the target's returns for pre-closing periods, the purchaser may object to permitting the seller free reign to amend such returns without the consent of the purchaser (at least to the extent such amendment might affect purchaser’s liability for taxes in a post-closing period).

**Tax Representations and Warranties.**

Except as otherwise set forth in the attached disclosure schedule ("Disclosure Schedule"), the Seller hereby represents and warrants the following with respect to the Company:

(i) **Filing of Returns.** There have been properly completed and filed on a timely basis and in correct form all Returns required to be filed on or prior to the date hereof. As of the time of filing, the foregoing Returns correctly reflected the facts regarding the income, business, assets, operations, activities, status or other matters of the Company or any other information required to be shown thereon. In particular, and without in any manner limiting the foregoing, none of the foregoing Returns contains any position which is or would be subject to penalties under section 6662 of the Code (or any corresponding provision of state, local or foreign Tax law). An extension of time within which to
file any Return which has not been filed has not been requested or granted.

Comment. (1) The above representation language is decidedly pro-buyer. Sellers may object to this language on one or more of the following points: (a) the scope of the provision should cover all "Material" Returns rather than all Returns, (b) the second sentence pertaining to the correctness of the Returns is unnecessary if the agreement contains a provision that all Taxes (or Material Taxes) have been paid (see representation (ii) below), and (c) the representation as to Code Section 6662 is also unnecessary if the agreement contains the representation that all Taxes (or Material Taxes) have been paid.

The buyer may want to expand the foregoing representation to include a statement that true and complete Returns of the Company for a specified number of prior years have been delivered to buyer. If the target company is a member of a consolidated group, the seller may be reluctant to tender portions of the consolidated return that do not directly relate to buyer. The buyer’s agreement to hold such return information in confidence may satisfy the seller’s concerns. If not, the seller may agree to provide the information to buyer’s independent tax counsel.

(2) From the buyer's perspective, the buyer may desire to add specific language designed to elicit information regarding jurisdictions in which the target may be required to file but has not done so to date. A typical provision would add: "To the knowledge of sellers, (A) there is no investigation or other proceeding pending, threatened or expected to be commenced by any taxing authority for any jurisdiction in which the target does not file tax returns that may lead to an assertion that the target is or may be subject to a given Tax liability in such jurisdiction, and (B) there is no meritorious basis for such an investigation or other proceeding that would result in such an assessment."

(ii) Payment of Taxes. With respect to all amounts in respect of Taxes imposed upon the Company, or for which the Company is or could be liable, whether to taxing authorities (as, for example, under law) or to other persons or entities (as, for example, under tax allocation agreements), with respect to all taxable periods (or portions thereof) ending on or before the Closing Date, all applicable tax laws and agreements have been fully complied with, and all such amounts required to be paid by the Company to taxing authorities or others on or before the date hereof have been paid.

Comment. The seller is likely to insist upon limiting the representation regarding taxes paid to those taxes that are shown as owing on a return or that are subsequently assessed. The seller may also seek to limit the representation to “material” taxes. The buyer, on the other hand, will want some assurances that even though all taxes shown on the return were paid, prior years returns do not incorporate aggressive positions likely to result in subsequent exposures. Limitation of the scope of the representation by means of disclosure may not be acceptable to the seller since a full
and meaningful disclosure tends to increase audit risks and ultimate economic exposure to seller.

(iii) **Audit History.** No issues have been raised (and are currently pending) by any taxing authority in connection with any Returns of the Company. No waivers of statutes of limitation with respect to such Returns have been given by or requested from the Company. The Disclosure Schedule sets forth (1) the taxable years of the Company as to which the respective statutes of limitations with respect to Taxes have not expired, and (2) with respect to such taxable years, sets forth those years for which examinations have been completed, those years for which examinations are presently being conducted, those years for which examinations have not been initiated, and those years for which required Returns have not yet been filed. Except to the extent shown on the Disclosure Schedule, all deficiencies asserted or assessments made as a result of any examinations have been fully paid, or are fully reflected as a liability in the financial statements of the Company, or are being contested and an adequate reserve therefor has been established and is fully reflected in the financial statements of the Company.

**Comment.** The seller will typically insist on limiting the foregoing representation to the "seller's knowledge." As with any knowledge limitation, this will require identifying the scope of those persons (directors, officers and employees of seller) whose knowledge will be deemed to constitute knowledge of the seller for these purposes. The seller may also seek to incorporate a "materiality" threshold.

(iv) **Liens.** There are no liens for Taxes (other than for current Taxes not yet due and payable) upon the assets of the Company.

(v) **Tax Sharing or Allocation Agreements.** The Company is not a party to or bound by (nor will the Company, prior to the Closing, become a party to or bound by) any tax indemnity, tax sharing or tax allocation agreement or arrangement.

(vi) **Prior Affiliated Groups.** Except for the group of which Seller is presently a member, the Company has never been a member of an affiliated group of corporations, within the meaning of section 1504 of the Code, other than as a common parent corporation, and each of the subsidiaries of the Company has never been a member of an affiliated group of corporations, within the meaning of section 1504 of the Code, except where the Company was the common parent corporation of such affiliated group.
Comment. This representation does not address the company’s liability for taxes as a result of membership in pass-through entities. If a separate representation is not included with respect to partnerships (see sample clause (xvi) below) this representation should be modified to pick up potential tax liability of the company with respect to membership in pass-through entities.

(vii) **Tax Elections.** All material elections with respect to Taxes affecting the Company as of the date hereof are set forth in the Disclosure Schedule. After the date hereof, no election with respect to Taxes will be made without the written consent of Buyer.

Comment. The last sentence of the representation is often included in the covenants (and not the representations) section of the acquisition agreement.

(viii) **Safe Harbor Lease Property.** None of the assets of the Company is property which the Company is required to treat as being owned by any other person pursuant to the so-called "safe harbor lease" provisions of former section 168(f)(8) of the Code.

(ix) **Security for Tax Exempt Obligations.** None of the assets of the Company directly or indirectly secures any debt the interest on which is tax exempt under section 103(a) of the Code.

(x) **Tax Exempt Use Property.** None of the assets of the Company is "tax-exempt use property" within the meaning of section 168(h) of the Code.

(xi) **Parachute Payment.** The Company is not a party to any agreement, contract, arrangement or plan that has resulted or would result, separately or in the aggregate, in the payment of any "excess parachute payments" within the meaning of section 280G of the Code or any similar provision of foreign, state or local law.

(xii) **U.S. Real Property Holding Corporation.** The Company is not, and has not been, a United States real property holding corporation (as defined in section 897(c)(2) of the Code) during the applicable period specified in section 897(c)(1)(A)(ii) of the Code.

(xiii) **Foreign Person.** The Seller is not a person other than a United States person within the meaning of the Code.
(xiv) **No Withholding.** The transactions contemplated herein are not subject to the tax withholding provisions of Code section 3406, or of subchapter A of Chapter 3 of the Code or of any other provision of law.

(xv) **Permanent Establishment.** The Company does not have and has not had a permanent establishment in any foreign country, as defined in any applicable Tax treaty or convention between the United States of America and such foreign country.

(xvi) **Existing Partnerships.** The Company is not a party to any joint venture, partnership, or other arrangement or contract that could be treated as a partnership for federal income tax purposes.

(xvii) **Tax Basis and Tax Attributes.** Section ___ of the Disclosure Schedule sets forth as of the date hereof (i) the basis of the Company in its assets, (ii) the current and accumulated earnings and profits of the Company, (iii) the amount of any net operating loss, net capital loss, unused investment credit or other credit, unused foreign tax, or excess charitable contribution allocable to the Company, and (iv) the amount of any deferred gain or loss allocable to the Company arising out of any intercompany transactions.

(xviii) **Unpaid Tax.** The unpaid Taxes of the Company do not exceed the reserve for Tax liability (excluding any reserve for deferred Taxes established to reflect timing differences between book and Tax income) set forth or included in the Company's most recent balance sheet as adjusted for the passage of time through the Closing Date in accordance with the past custom and practice of the Company.

Comment: This representation overlaps with the representation in clause (ii) above and maybe used in place of clause (ii).

(xix) **Tax Ownership.** Each asset with respect to which the Company claims depreciation, amortization or similar expense for Tax purposes is owned for Tax purposes by the Company.
(xx) **Timing Differences.** No item of income or gain reported by the Company for financial accounting purposes in any pre-closing period is required to be included in taxable income for a post-closing period.

(xxi) **Section 197 Elections.** The Company has not made nor is bound by any election under Section 197 of the Code.

(xxii) **Excess Loss Accounts.** Neither the Company nor any Subsidiary has any excess loss account (as defined in Treasury Regulation Section 1.1502-19) with respect to the stock of any Subsidiary.

(xxiii) **No Rulings or Requests for Rulings.** There are no outstanding rulings of, or requests for rulings with, any Tax authority addressed to the Company that are, or if issued would be, binding on the Company.

**Comment:** 
1. All of the above representations may not be relevant to a particular transaction. Moreover, additional representations not included above may be desirable in a particular transaction.

2. To the extent the representations are made as of the signing date, the agreement will typically include a "bring-forward" provision requiring the seller to remake the representations as of the closing date (as a condition to closing). If the agreement contains such a provision, the seller should ensure that it has the ability to update the disclosure schedules to address any issues arising between signing date and closing date.

5. In a stock acquisition in which the parties will make a Code § 338(h)(10) election, the foregoing representations and warranties should also include the following statement:

**Seller represents that it is has filed a consolidated federal income tax return with Company for the taxable year immediately preceding the current taxable year and that Seller is eligible to make an election under section 338(h)(10) of the Code (and any comparable election under state, local or foreign tax law) with respect to the Company.**

**Comment.** If the buyer is acquiring the target company as well as subsidiaries of the target company, the regulations suggest that the parties should make a separate 338(h)(10) election with respect to each subsidiary to which the election is intended to apply (i.e. making the election at the target level will not automatically result in the election being deemed to have been made at the subsidiary level). See Treas. Reg. § 1.338(h)(10)-1(e)(2)(v)(Example (a)).
In a taxable asset acquisition, the liabilities (including tax liabilities) relating to the acquired assets or operations of the target are generally retained by the target unless expressly assumed by the buyer. In certain circumstances, however, where the buyer acquires substantially all of the assets or business of the target, the buyer may incur secondary liability for certain obligations of the target (including taxes) by reason of succeeding to the target's business (so-called successor liability rules).

In an asset acquisition, the parties' ultimate decision as to who takes pre-closing period tax liabilities with respect to the acquired business will depend on the manner in which purchase price is determined under the agreement. For example, if the buyer is entitled to income generated by the acquired business for the period from the pricing date to the closing date, it would be typical for the buyer to assume the tax liabilities relating to the operation of the business during that period. Conversely, if the seller is entitled to retain the ongoing business profits for the period between pricing and closing, the seller normally would bear the taxes for such period.

In certain situations the assets of the target acquired by the purchaser include stock in subsidiaries. In these situations, certain of the provisions discussed above relating to stock acquisitions will also need to be incorporated in the agreement. For example, the allocation of pre-closing period taxes between the subsidiary and the other members of the seller's consolidated group (including the target subsidiary's potential Reg. § 1.1502-6 liability) will have to be addressed. The following are sample representations and warranties for inclusion in an asset purchase agreement:

(i) **Filing of Returns.** There have been properly completed and filed on a timely basis and in correct form all Returns required to be filed on or prior to the date hereof with respect to the “Purchased Assets” or “Division.” As of the time of filing, the foregoing Returns correctly reflected the facts regarding the income, business, assets, operations, activities, status or other matters of the “Division” or any other information required to be shown thereon. An extension of time within which to file any Return with respect to the “Purchased Assets” or “Division” which has not been filed has not been requested or granted.

Comment. As discussed in ¶ 4 of this Section, the seller is likely to insist on modification of the scope of this representation to encompass "material" returns only. In addition, the seller may contend that the language pertaining to the correctness of the return is already adequately addressed by inclusion of a representation that all taxes owing have been paid.
(ii) **Payment of Taxes.** With respect to all amounts in respect of Taxes imposed over with respect to the “Division” or “Purchased Assets,” or for which the Company is or could be liable, whether to taxing authorities (as, for example, under law) or to other persons or entities (as, for example, under tax allocation agreements), with respect to all taxable periods (or portions thereof) ending on or before the Closing Date, all applicable tax laws and agreements have been fully complied with, and all such amounts required to be paid by the Company to taxing authorities or others on or before the date hereof have been paid.

Comment: Again, the seller may seek to limit the scope of the representation to "material" taxes. In this regard, the seller may contend that if de minimis taxes are not paid, the representation will be untrue and will accordingly provide the buyer with an opportunity to "walk" from the deal prior to closing. This tension can be addressed by requiring the representation to be made without limitation, but providing as part of the closing conditions that a de minimis breach will not provide the buyer with an opportunity to avoid closing. In that case, the deal will go forward, but the buyer will be entitled to damages for breach (to the extent such damages exceed any applicable materiality threshold).

(iii) **Limitation on Certain Representations and Warranties.** The representations and warranties set forth in subsections (i) and (ii) of this Section are not applicable to the extent the “Purchased Assets” or “Division” cannot be made subject to Tax liens and the Buyer cannot be made liable for Taxes relating to the matters constituting breaches of such representations and warranties.

Comment: This limitation may be appropriate in view of the fact that the buyer's principal concern in an asset acquisition is that the assets are being acquired free and clear of any liens.

(iv) **Liens.** There are no liens for Taxes (other than for current Taxes not yet due and payable) upon the Purchased Assets.

(v) **Safe Harbor Lease Property.** None of the Purchased Assets is property which is required to be treated as being owned by any other person pursuant to the so-called "safe harbor lease" provisions of former section 168(f)(8) of the Code.

(vi) **Security for Tax Exempt Obligations.** None of the Purchased Assets directly or indirectly secures any debt the interest on which is tax exempt under section 103(a) of the Code.
(vii)  **Tax Exempt Use Property.** None of the Purchased Assets is "tax-exempt use property" within the meaning of section 168(h) of the Code.

(viii)  **Foreign Person.** The Seller is not a person other than a United States person within the meaning of the Code.

(ix)  **No Withholding.** The transactions contemplated herein are not subject to the tax withholding provisions of Code section 3406, or of subchapter A of Chapter 3 of the Code or of any other provision of law.

(x)  **Parachute Payments.** Seller with respect to the Division or Purchased Assets has not made any payments, is not obligated to make any payments and is not a party to any agreement that could obligate it to make any payments, that will not be fully deductible under Sections 162(m) or 280G of the Code (or any similar provision of foreign, state or local law).

In the case of an "applicable asset acquisition" (generally defined in Code § 1060(c) to include the transfer of assets which constitute a trade or business and with respect to which the transferee's basis is determined by reference to the consideration paid for such assets), the purchaser and seller are required to allocate the purchase price among the purchased assets in accordance with Code § 1060. Code § 1060 provides, in general, for an allocation of the purchase price using the "residual method" to determine the amount allocable to goodwill or going concern value. In short, this means allocating the purchase price in the following priority: (i) first to cash and cash equivalents, (ii) next to marketable financial assets, (iii) next to operating assets, (iv) next to Code § 197 intangibles other than goodwill and going concern value and (v) then to Code § 197 intangibles in the nature of goodwill and going concern value. The following is sample language to be used in connection with allocation of the purchase price:

> The purchase price shall be allocated among the Purchased Assets in the manner required by Section 1060 of the Code. In making such allocation, the fair market values [or allocations] set forth in Schedule [X] attached hereto shall apply. The purchaser and seller hereby agree to timely file IRS Form 8594 based on the fair market values [or allocations] set forth in Schedule [X] attached hereto.

Alternative (Long Form):

(a)  Within 60 days after the Closing Date, Buyer will provide to Seller copies of IRS Form 8594 and any required exhibits thereto (the
"Asset Acquisition Statement") with Buyer's proposed allocation of the Purchase Price (together with any assumed liabilities). Within 15 days after the receipt of such Asset Acquisition Statement, Seller will propose to Buyer any changes to such Asset Acquisition Statement (and in the event no such changes are proposed in writing to Buyer within such time period, the Seller will be deemed to have agreed to, and accepted, the Asset Acquisition Statement). Buyer and Seller will endeavor in good faith to resolve any differences with respect to the Asset Acquisition Statement within 15 days after Buyer's receipt of written notice of objection from Seller.

(b) Subject to the provisions of the following sentence of this paragraph (b), the Purchase Price (together with any assumed liabilities) will be allocated in accordance with the Asset Acquisition Statement provided by Buyer to Seller pursuant to paragraph (a) above, and subject to the requirements of applicable tax law or election, all Tax Returns and reports filed by Buyer and Seller will be prepared consistently with such allocation. If Seller withholds its consent to the allocation reflected in the Asset Acquisition Statement, and Buyer and Seller have acted in good faith to resolve any differences with respect to items on the Asset Acquisition Statement and thereafter are unable to resolve any differences that, in the aggregate, are material in relation to the Purchase Price, then any remaining disputed matters will be finally and conclusively determined by an independent accounting firm of recognized national standing (the "Allocation Arbiter") selected by Buyer and Seller, which firm shall not be the regular accounting firm of Buyer or Seller. Promptly, but not later than 15 days after its acceptance of appointment hereunder, the Allocation Arbiter will determine (based solely on presentations by Seller and Buyer and not by independent review) only those matters in dispute and will render a written report as to the disputed matters and the resulting allocation of Purchase Price (together with any assumed liabilities), which report shall be conclusive and binding upon the parties. Buyer and Seller shall, subject to the requirements of any applicable tax law or election, file all Tax Returns and reports consistent with the allocation provided in the Asset Acquisition Statement or, if applicable, the determination of the Allocation Arbiter.

C. Covenants.

In contrast to representations and warranties, which generally consist of the seller's statements as to matters of fact or law, covenants obligate the parties to do (or refrain from doing) certain acts. Covenants may relate to pre-closing or post-closing periods.
The following are sample pre-closing covenants for inclusion in a stock purchase agreement:

(a) **Preparation and Filing of Tax Returns: Payment of Taxes.** Between the date hereof and the Closing Date, Seller shall cause the Company to prepare and file on or before the due date therefor all Tax Returns required to be filed by the Company (except for any Tax Return for which an extension has been granted as permitted hereunder) on or before the Closing Date, and shall pay, or cause the Company to pay, all Taxes (including estimated Taxes) due on such Tax Return (or due with respect to Tax Returns for which an extension has been granted as permitted hereunder) or which are otherwise required to be paid at any time prior to or during such period. Such Tax Returns shall be prepared in accordance with the most recent Tax practices as to elections and accounting methods except for new elections that may be made therein that were not previously available, subject to Purchaser’s consent (not to be unreasonably withheld or delayed).

Comment. The seller may object to the language in the first sentence of the covenant that requires the Company to pay, in addition to taxes shown due on Returns to be filed during the pre-closing period, any other taxes "which are otherwise required to be paid at any time prior to or during such period." If the seller is aware of an aggressive position on an earlier return, the failure to voluntarily pay the tax may technically constitute a breach of the above pre-closing covenant (providing the buyer with an opportunity to "walk"). If the seller has this concern, the problem might be addressed by limiting the catch-all phrase to taxes for which payment has been requested.

From the buyer's perspective, depending on the returns at issue, and the potential impact that positions reflected on such returns may have on post-closing periods, the buyer may want review rights with respect to such returns.

(b) **Notification of Tax Proceedings.** Between the date hereof and the Closing Date, to the extent Seller has knowledge of the commencement or scheduling of any Tax audit, the assessment of any Tax, the issuance of any notice of Tax due or any bill for collection of any Tax due for Taxes, or the commencement or scheduling of any other administrative or judicial proceeding with respect to the determination, assessment or collection of any Tax of the Company, Seller shall provide prompt notice to Purchaser of such matter, setting forth information (to the extent known) describing any asserted Tax liability in reasonable detail and including copies of any notice or other documentation received from the applicable Tax authority with respect to such matter.

(c) **Tax Elections, Waivers and Settlements.** Seller shall not, and shall cause Company not to, take any of the following actions:
(i) make, revoke or amend any Tax election;

(ii) execute any waiver of restrictions on assessment or collection of any Tax; or

(iii) enter into or amend any agreement or settlement with any Tax authority.

Comment. The seller may seek to limit the scope of the foregoing covenant to any such action to the extent it may have a material effect on the acquired company. It is also customary for the seller to request inclusion of consent language, i.e., providing that none of the actions enumerated can be taken without purchaser's consent (which consent shall not be unreasonably withheld or delayed).

(d) **Termination of Existing Tax-Sharing Agreements.** All tax-sharing agreements or similar arrangements with respect to or involving the Company shall be terminated with respect to the Company prior to the Closing Date, and, after the Closing Date, neither the Seller and its affiliates, on the one hand, nor the Company, on the other, shall be bound thereby or have any liability thereunder to the other party for amounts due in respect of periods prior to the Closing Date.

(e) **Clearance Certificate.** As a condition precedent to the consummation of the transactions contemplated by this Agreement, the Seller shall provide Buyer with a clearance certificate or similar document(s) that may be required by any state taxing authority in order to relieve Buyer of any obligation to withhold any portion of the Purchase Price.

(f) **Nonforeign Affidavit.** Seller shall furnish Buyer an affidavit, stating, under penalty of perjury, the transferor's United States taxpayer identification number and that the transferor is not a foreign person, pursuant to section 1445(b)(2) of the Code.

10 As noted above, in a stock acquisition agreement, post-closing covenants pertaining to Taxes are sometimes included in the main acquisition agreement and other times are embodied in a stand-alone agreement attached as an exhibit to the main agreement. Below are a sample list of post-closing tax covenants:

(a) **Preparation and Filing of Tax Returns.**

(i) **Seller’s Responsibilities.** Seller shall have the right and obligation to timely prepare and file, or cause to be timely prepared and filed, when due:
(1) any Tax Return that is required to include the operations, ownership, assets or activities of the Company for Tax Periods ending on or before the Closing Date; and

(2) all Tax Returns for Transfer Costs to be paid by Seller pursuant to the terms hereof.

(ii) Purchasers’ Rights and Responsibilities.

(1) Purchaser shall have the right and obligation to timely prepare and file, or cause to be timely prepared and filed, when due, all Tax Returns that are required to include the operations, ownership, assets or activities of the Company for any Tax Periods ending after the Closing Date (including any Straddle Periods); and

(2) all Tax Returns for Transfer Costs to be paid by Purchaser pursuant to the terms hereof.

Comment. To avoid disputes, the parties may want to list, typically by attached schedule, the specific jurisdictions in which returns will be filed, which party has filing responsibility, and the timetable on which information relevant to the returns will be supplied, the returns will be prepared for review and the returns will be filed.

(iii) Preparation of Tax Returns.

(1) Seller shall prepare and provide to Purchaser such Tax information as is reasonably requested by Purchaser with respect to the operations, ownership, assets or activities of the Company for Pre-Closing Periods to the extent such information is relevant to any Tax Return which Purchaser has the right and obligation hereunder to file.

(2) Seller shall, on the one hand, or Purchaser shall on the other, with respect to any Tax Return which such party is responsible hereunder for preparing and filing, or causing to be prepared and filed, make such Tax Return and related work papers available for review by the other party if the Tax Return (A) is with respect to Taxes for which the other party or one of its affiliates may be liable hereunder or under applicable tax law, or (B) claim tax benefits which the other party or one of its Affiliates is entitled to receive hereunder. The filing party shall use its
reasonable best efforts to make Tax Returns available for review as required under this paragraph sufficiently in advance of the due date for filing such Tax Returns to provide the non-filing party with a meaningful opportunity to analyze and comment on such Tax Returns and have such Tax Returns modified before filing, accepting the position of the filing party unless such position is contrary to the provisions of paragraph (a)(iv) hereof.

(iv) **Consistency of Accounting Method.** Any Tax Return which includes or is based on the operations, ownership, assets or activities of the Company for any Pre-Closing Period, and any Tax Return which includes or is based on the operations, ownership, assets or activities of the Company for any Post-Closing Period to the extent the items reported on such Tax Return might reasonably increase any Tax liability of Seller for any Pre-Closing Period or any Straddle Period, shall be prepared in accordance with past Tax accounting practices used with respect to the Tax Returns in question (unless such past practices are no longer permissible under the applicable tax law), and to the extent any items are not covered by past practices (or in the event such past practices are no longer permissible under the applicable tax law), in accordance with reasonable Tax accounting practices selected by the filing party with respect to such Tax Return under this Agreement with the consent (not to be unreasonably withheld or delayed) of the non-filing party.

**Comment.** The requirement that prior year returns and straddle period returns be prepared in accordance with past tax accounting practices can lead to serious disputes. This is particularly true where an item has not been subject to prior treatment. For example, if transaction costs or other items are not subject to a clearly defined past practice, and these costs are material, the parties may want to specifically provide in the agreement for how these items will be treated on the return. Of course, specifying the desired treatment in the tax sharing agreement may create audit risks if the parties expect to take an aggressive return position.

**b. Tax Controversies; Assistance and Cooperation.**

(i) **Notice.** In the event any Tax authority informs Seller, on the one hand, or Purchaser or Company, on the other, of any notice of proposed audit, claim, assessment or other dispute concerning an amount of Taxes with respect to which the other party may incur liability hereunder, the party so informed shall promptly notify the other party of such matter. Such notice shall
contain factual information (to the extent known) describing any asserted Tax liability in reasonable detail and shall be accompanied by copies of any notice or other documents received from any Tax authority with respect to such matter. If an indemnified party has knowledge of an asserted Tax liability with respect to a matter for which it is to be indemnified hereunder and such party fails to provide the indemnifying party prompt notice of such asserted Tax liability, (A) if the indemnifying party is precluded from contesting the asserted Tax liability in any forum as a result of the failure to give prompt notice, the indemnifying party shall have no obligation to indemnify the indemnified party for Taxes arising out of such asserted Tax liability, and (B) if the indemnifying party is not precluded from contesting the asserted Tax liability in any forum, but such failure to provide prompt notice results in a monetary detriment to the indemnifying party, then any amount which the indemnifying party is otherwise required to pay the indemnified party pursuant to this Agreement shall be reduced by the amount of such detriment.

Comment. As discussed in Section III. D below relating to indemnity provisions, the parties should keep in mind that if the tax matters article in the acquisition agreement contains a separate indemnity provision, the overlap between this provision and the general indemnity provision in the agreement will need to be addressed. It is not uncommon for the tax matters article to include a "trump" provision that indicates that for all (or certain specified) purposes, if there is an inconsistency between the tax matters article and other provisions in the agreement, the provisions of the tax matters article will control as to tax matters.

(ii) **Control Rights.** The filing party under this article shall control any audits, disputes, administrative, judicial or other proceedings related to Taxes with respect to which either party may incur liability hereunder. Subject to the preceding sentence, in the event an adverse determination may result in each party having responsibility for an amount of Taxes under this article, each party shall be entitled to fully participate in that portion of the proceedings relating to the Taxes with respect to which it may incur liability hereunder. For purposes of this section the term “participation” shall include (i) participation in conferences, meetings or proceedings with any Tax Authority, the subject matter of which includes an item for which such party may have liability hereunder, (ii) participation in appearances before any court or tribunal, the subject matter of which includes an item for which a party may have liability hereunder, and (iii) with respect to the matters described in the preceding clauses (i) and (ii), participation in the submission and determination of the
content of the documentation, protests, memorandum of fact and
law, briefs, and the conduct of oral arguments and presentations.

Comment. Under the above provision, the filing party has ultimate control over
tax proceedings, but the non-filing party possesses participation rights to the extent
it may have liability for taxes with respect to such returns. This approach is
generally less desirable than placing the control rights with the party that bears the
economic exposure. A different approach is to provide that the parties will have joint
control. This may be accomplished by establishing a tax contest committee with
appointees of each of the parties. In the final analysis, the determination of who
controls tax audits and other proceedings is likely to depend to a significant extent
on the parties' relative bargaining strength.

(iii) Consent to Settlement. Purchaser shall not, and Seller
shall not, agree to settle any Tax liability or compromise any
claim with respect to Taxes, which settlement or compromise
may affect the liability for Taxes hereunder (or right to tax
benefit hereunder) of the other party, without such other party’s
consent (which consent shall not be unreasonably withheld or
delayed).

(iv) Expenses. Purchaser and Seller shall bear their own
expenses incurred in connection with audits and other
administrative and judicial proceedings relating to Taxes for
which such party and its affiliates are liable under this article.

(v) Assistance and Cooperation. Seller on the one hand, and
Purchaser and Company, on the other, shall cooperate (and cause
their affiliates to cooperate) with each other and with each
other’s agents, including accounting firms and legal counsel, in
connection with Tax matters relating to the Company, including
(i) preparation and filing of Tax Returns, (ii) determining the
liability and amount of any Taxes due or the right to and amount
of any refund of Taxes, (iii) examinations of Tax Returns, and (iv)
any administrative or judicial proceedings in respect of Taxes
assessed or proposed to be assessed. Such cooperation shall
include each party making all information and documents in its
possession relating to the Company available to the other party.
The parties shall retain all Tax Returns, schedules and work
papers, and all material records and other documents relating
thereto, until the expiration of the applicable statute of limitation
(including, to the extent notified by any party, any extension
terof) of the Tax Period to which such Tax Returns and other
documents and information relate. Each of the parties shall also
make available to the other party, as reasonably requested and available, personnel (including officers, directors, employees and agents) responsible for preparing, maintaining, and interpreting information and documents relevant to Taxes, and personnel reasonably required as witnesses or for purposes of providing information or documents in connection with any administrative or judicial proceedings relating to Taxes. Any information or documents provided under this section shall be kept confidential by the party receiving such information or documents, except as may otherwise be necessary in connection with the filing of Tax Returns or in connection with administrative or judicial proceedings relating to Taxes.

11. In a stock acquisition in which the parties will make a Code § 338(h)(10) election, the covenants should also include the following:

Buyer shall make an election under section 338(g) of the Code (and any comparable election under state, local or foreign tax law) with respect to the Company. Buyer and Seller shall make an election under section 338(h)(10) of the Code (and any comparable election under state, local or foreign tax law) with respect to the acquisition of the Company by Buyer. Buyer and Seller shall cooperate fully with each other in the making of such election. In particular, and not by way of limitation, in order to effect such election, on or prior to the Closing Date, Buyer and Seller shall jointly execute necessary copies of Internal Revenue Service Form 8023 and all attachments required to be filed therewith pursuant to applicable Treasury regulations.

12. The following are sample covenants for inclusion in an asset purchase agreement:

**Tax Elections.** No new elections with respect to Taxes, or any changes in current elections with respect to Taxes, affecting the Purchased Assets or Division shall be made after the date of this Agreement without the prior written consent of Buyer.

**Clearance Certificate.** As a condition precedent to the consummation of the transactions contemplated by this Agreement, the Seller shall provide Buyer with a clearance certificate or similar document(s) which may be required by any state or foreign taxing authority in order to relieve Buyer of any obligation to withhold any portion of the Purchase Price.

**Nonforeign Affidavit.** Seller shall furnish Buyer an affidavit, stating, under penalty of perjury, the transferor's United States taxpayer
identification number and that the transferor is not a foreign person, pursuant to section 1445(b)(2) of the Code.

**Cooperation and Records Retention.** Seller and Buyer shall (i) each provide the other, and Buyer shall cause the Company to provide Seller, with such assistance as may reasonably be requested by any of them in connection with the preparation of any Return, audit or other examination by any taxing authority or judicial or administrative proceedings relating to liability for Taxes, (ii) each retain and provide the other, and Buyer shall cause the Company to retain and provide Seller, with any records or other information which may be relevant to such Return, audit or examination, proceeding or determination, and (iii) each provide the other with any final determination of any such audit or examination, proceeding or determination that affects any amount required to be shown on any Return of the other for any period.

Without limiting the generality of the foregoing, Buyer shall retain, and shall cause the Company to retain, and Seller shall retain, until the applicable statutes of limitations (including any extensions) have expired, copies of all Returns, supporting work schedules and other records or information which may be relevant to such returns for all tax periods or portions thereof ending before or including the Closing Date and shall not destroy or otherwise dispose of any such records without first providing the other party with a reasonable opportunity to review and copy the same.

**Transfer Taxes.** [Buyer and/or Seller] will pay any sales, use, transfer and documentary taxes and recording and filing fees applicable to the transfer of the Purchased Assets to Buyer at Closing.

**Preparation of W-2's, Etc.** Seller and Buyer agree that Buyer has purchased substantially all the property used in Seller's trade or business, and in connection therewith, Buyer shall employ individuals who immediately before the Closing Date were employed in such trade or business by the Seller. Accordingly, pursuant to Rev. Proc. 96-60, 1996-2 C.B. 399, provided that Seller provide Buyer with all necessary payroll records for the calendar year which includes the Closing Date, Buyer shall furnish a Form W-2 to each employee employed by Buyer who had been employed by Seller disclosing all wages and other compensation paid for such calendar year, and taxes withheld therefrom, and Seller shall be relieved of the responsibility to do so.

**Sale.** Buyer and Seller agree that the transactions contemplated by this Agreement constitute a sale of a trade or business within the meaning of Section 41(f)(3) of the Code. Seller will provide to Buyer upon request all information necessary in order to permit Buyer to apply the provisions of Section 41(f)(3)(A) of the Code.
D. **Indemnity Provisions.**

1. **Overview.** The indemnity provision in the acquisition agreement is the mechanism which provides for payment of damages in the event that one of the parties breaches its representations, warranties or covenants to the other party in the agreement. From a drafting perspective, the following is a list of certain of the principal concerns in structuring the indemnity provisions:

   (i) how long should the representations and warranties survive the closing?

   (ii) to whom can the purchaser look for indemnity, i.e., selling parent, other subsidiaries, etc?

   (iii) to what extent is the purchaser entitled to a hold-back or escrow (and for what time period)?

   (iv) which party should have the authority to contest any tax items which may give rise to an indemnity obligation under the acquisition agreement?

   (v) what, if any, minimum or maximum "caps" should be placed on the amount which one party can recover from the other?

Other tax-related issues pertaining to the drafting of indemnity provisions include whether to incorporate a provision for tax-effecting indemnity payments and whether to incorporate a provision that requires the parties to characterize indemnity payments for tax purposes in a particular manner, i.e., as an adjustment to purchase price.

Because the tax indemnity language is often included in a separate article in the acquisition agreement (or sometimes in a stand-alone agreement), it is imperative that the parties address in the agreement the manner in which inconsistencies between the general indemnity provisions and the tax indemnity provisions are to be resolved.

2. **Key Provisions.**

   a. **Survival of Representations and Warranties.** To the extent a representation or warranty addresses a particular tax or tax period, the representation or warranty should generally survive the closing until some specified period of time after the applicable statute of limitations (as extended) has expired. In the case of other representations and warranties, the survival period should last at least long enough to provide the purchaser with a reasonable opportunity to discover any breach or misrepresentation. The length of the survival period will likely depend on the time period agreed to by the parties for non-tax representations and warranties. Other factors relevant to a determination of the length of the survival period will include the relative
b. **Indemnifying Party.** In an asset acquisition, the purchaser must determine whether the target company, if it continues in existence post-acquisition, has the resources to cover the indemnity obligations provided for in the acquisition agreement, or whether the purchaser needs to be able to look to the beneficial owners of the target company for a reasonable prospect of recovery. In a stock acquisition, the purchaser is confronted with similar issues but at the selling corporation level rather than the target level. In either situation, a significant practical difference exists between closely held and public companies. If the ownership of the target company (or in the case of a stock acquisition, the seller) is concentrated in the hands of a few persons, the purchaser can negotiate directly with these persons with respect to their willingness to stand behind the indemnity obligations. In contrast, where the ownership of the target company (or in the case of a stock acquisition, the seller) is widely held, the purchaser will be unable as a practical matter to obtain any guarantees from the public shareholders. In addition, the purchaser's recourse against the target company (or in the case of a stock acquisition, selling company) may be limited in the event the target company (or selling company) liquidates after the transaction (or otherwise reduces its net worth beyond a level sufficient to cover the applicable indemnity obligations). Corporate law procedures for the set-aside of reserves in the case of liquidation (and covenants with respect to net worth) may not provide sufficient protection. For this reason, use of a hold-back or escrow may be appropriate in such a situation.

c. **Hold-back or Escrow.** Where the purchaser determines that the seller is unlikely to have the resources to meet potential liability claims in connection with the transaction, the purchaser may seek the ability to hold-back (or escrow) a portion of the purchase price until the indemnity period (or as is more likely the case, a portion of the indemnity period) has expired.

d. **"Floors" and "Caps".** It is common in acquisition transactions to find both a minimum ("floor") and maximum ("cap") placed on amounts for which indemnification may be sought. The purpose in setting a floor is to discourage the parties from engaging in future disputes (and incurring costs) with respect to issues that do not materially impact on the economics of the bargain. The threshold at which the floor is set will obviously depend on many factors, including the size of the deal. In contrast, the purpose in setting a cap is clearly designed as a means of limiting the seller's risk. Whether a cap is justified in a particular situation, and if so, the appropriate amount, will likewise depend on the facts and circumstances of the particular situation.

3. **Sample Provisions.** The following are two sample survival and indemnity provisions:
Alternative One:

Survival. The covenants, representations and warranties made by the parties in this Agreement and in any other certificates and documents delivered in connection herewith shall survive the Closing Date and shall continue in full force and effect until [30 (thirty) days after] all applicable statutes of limitations, including waivers and extensions, have expired with respect to the matters addressed therein, and if no statute of limitations exists, forever thereafter.

Indemnification. (a) Indemnification Provisions for Benefit of the Purchaser. From and after the Closing, provided that the Purchaser makes a written claim for indemnification against the Seller prior to the expiration of any applicable survival period, the Seller will indemnify the Purchaser from and against any actual losses, expenses (including reasonable attorney’s, accountant’s and expert’s fees and expenses), damages and other liabilities (collectively “Losses”) suffered or incurred by the Purchaser or any of its Affiliates (collectively, the “Purchaser Indemnified Parties”), resulting from, arising out of, or caused by any breach by the Seller of any of its representations, warranties or covenants contained in this Agreement provided, however that (i) the Seller will not have any obligation to indemnify the Purchaser from and against any such Losses except to the extent the Purchaser Indemnified Parties have suffered such Losses which in the aggregate, exceed $_______, (ii) in no event shall Seller’s aggregate obligation to indemnify the Purchaser Indemnified Parties under this Section exceed $_______; and (iii) Purchaser shall not make any claim against Seller which individually (or in the aggregate with respect to related claims) does not exceed $______, and such claims that do not meet this threshold shall not be applied against the basket amount set forth in clause (i) above.

(b) Indemnification Provisions for Benefit of the Seller. From and after the Closing, provided that the Seller makes a written claim for indemnification against the Purchaser prior to the expiration of any applicable survival period, then the Purchaser will indemnify the Seller from and against any actual Losses suffered or incurred by the Seller or any of its Affiliates (collectively, the “Seller Indemnified Parties”), resulting from, arising out of, or caused by any breach by Purchaser of any of its representations, warranties or covenants contained in this Agreement, provided, however that (i) the Purchaser will not have any obligation to indemnify the Seller from and against any such Losses except to the extent the Seller Indemnified Parties have suffered such Losses which, in the aggregate, exceed $_______, (ii) in no event shall Purchaser’s aggregate obligation to indemnify the Seller Indemnified
Parties under this Section exceed $____________ and (iii) Seller shall not make any claim against Purchaser which individually (or in the aggregate with respect to related claims) does not exceed $________, and such claims that do not meet this threshold shall not be applied against the basket amount set forth in clause (i) above.

(c) **Indemnification Limitations.** (i) If the amount with respect to which any claim is made under this Section (an “Indemnity Claim”) gives rise to a currently realizable Tax Benefit to the party making the claim, the indemnity payment shall be reduced by the amount of the Tax Benefit available to the party making the claim. To the extent such Indemnity Claim does not give rise to a currently realizable Tax Benefit, if the amount with respect to which any Indemnity Claim is made gives rise to a subsequently realized Tax Benefit to the party that made the claim, such party shall refund to the indemnifying party the amount of such Tax Benefit when, as, and if realized. For purposes of this Agreement, any subsequently realized Tax Benefit shall be treated as though it were a reduction in the amount of the initial Indemnity Claim, and the liabilities of the parties shall be redetermined as though both occurred at or prior to the time of the indemnity payment. For purposes of this paragraph, a “Tax Benefit” means an amount by which the Tax liability of the party (or group of corporations including the party) is reduced (including, without limitation, by deduction, reduction of income by virtue of increased tax basis or otherwise, entitlement to refund, credit or otherwise) plus any related interest received from the relevant taxing authority. Where a party has other losses, deduction, credits or items available to it, the Tax Benefit from any losses, deductions, credits or items relating to the Indemnity Claims shall be deemed to be realized only after the utilization of such other losses, deductions, credits or items. For purposes of this paragraph (c), a Tax Benefit is “currently realizable” to the extent it can be reasonably anticipated that such Tax Benefit will be realized in the current taxable period or year or in any tax return with respect thereto (including through a carryback to a prior taxable period) or in any taxable period or year prior to the date of the Indemnity Claim. In the event that there should be a determination disallowing the Tax Benefit, the Indemnifying Party shall be liable to refund to the Indemnified Party the amount of any related reduction previously allowed or payments previously made to the Indemnifying Party pursuant to this Section paragraph (c). The amount of the refunded reduction or payment shall be deemed a payment under paragraphs (a) and (b) of this Agreement and thus shall be paid subject to any applicable reductions under this paragraph.

(d) **Characterization of Indemnity Payments.** The parties agree that any indemnification payments made (and/or any payments or adjustments) made with respect to a Tax Benefit pursuant to this
Agreement shall be treated for all Tax purposes as an adjustment to the Purchase Price, unless otherwise required by applicable law, in which event such payments shall be made in an amount sufficient to indemnify the party on a net after-Tax basis.

Comment. Tax gross-up provisions are typically drafted on one of two bases: (1) to provide for payment to the indemnifying party of an assumed tax benefit realized by the indemnified party resulting from the indemnified party’s payment of the loss--equal to the highest applicable (or some other negotiated) tax rate multiplied by the amount of any such deductible payment or (2) to provide for payment to the indemnifying party of any tax benefit realized by the indemnified party “when and if” the tax benefit is actually realized. The former approach is significantly more easy to apply and does not require the seller to monitor the buyer's tax returns into the future. On the other hand, the former approach may result in the buyer having to make payments to the seller in situations where the buyer in fact has not received a tax benefit from the indemnity payment (for example, because the buyer is in an NOL position). The above sample language incorporates the "when and as realized" approach.

Alternative Two:

Survival. The representations and warranties made by the parties in this agreement and in any other certificates and documents delivered in connection herewith shall survive the Closing under this Agreement without limitation. All covenants of the parties that are to be performed under this Agreement shall continue in effect after the closing and expire in accordance with their respective terms.

Indemnification by Seller. Seller agrees to indemnify and hold harmless Buyer and its successors and assigns from and against any and all liabilities, demands, claims, actions or causes of action, assessments, fines, penalties, costs, damages, losses and expenses (including, without limitation, reasonable attorneys', accountants' and expert witness fees) caused by or arising out of (a) any breach of or inaccuracy in a warranty or representation made or undertaken by Seller to Buyer herein or in any document delivered in connection herewith, (b) any nonfulfillment of any agreement or covenant on the part of Seller under this Agreement, (c) the failure of Seller to fully discharge when due any liabilities or obligations of Seller that are retained liabilities, or any claim against Buyer with respect to any such obligation or alleged obligation, or (d) the operation of the [target company’s business] by Seller or its successors on or prior to the Closing Date.

Comment. Both of the above sample indemnity provisions assume that tax indemnities will be covered as part of the general indemnity provision. When tax matters are addressed in a separate article in the acquisition agreement, it is typically
the case that the indemnity language in the tax article provides that seller will indemnify, defend and hold buyer harmless from certain taxes and buyer will indemnify, defend and hold seller harmless from certain taxes. See Appendices A, B and C for detailed examples of customary tax indemnity language.

IV. TAX ALLOCATION PROVISIONS

A. **Overview.** The acquisition of a member of a consolidated return group generally presents a more complicated set of tax allocation issues than arise in an asset acquisition (or purchase of stock of a stand-alone corporation). In the case of an asset acquisition, the purchaser does not inherit the tax attributes of the target company. Thus, the principal tax allocation issue for purchaser and seller essentially involves the question of who is responsible for payment of transfer and related taxes on the sale of the assets (or, if the buyer expressly assumes certain tax liabilities, the nature and scope of such assumption). Similarly, when a purchaser acquires the stock of a stand-alone corporation, although the target company's tax attributes generally do survive the closing (subject to limitations), there is little question that the target company, and not some other entity, has both the right and the obligation to file returns for pre-closing periods (and to pay any related tax liabilities).

In contrast, where the purchaser is acquiring a member of the seller's consolidated return group, the purchaser and seller must deal with a host of allocation issues which arise from the fact that the income tax liability of the target company was computed on a consolidated basis (and the target company has joint and several liability for all federal tax deficiencies of the selling consolidated group during the years it was a member of such group). For example, although the purchaser and seller may agree that the seller bears the income tax liability for pre-closing periods, and the buyer bears the income tax liability for post-closing periods, there may be carrybacks or carryforwards between pre-closing and post-closing periods. In addition, pre-closing audit adjustments may affect the tax attributes of the target company on a going forward basis. Furthermore, the target company, as a member of a consolidated return group, may be liable for past taxes of other members of the group (although the target company will not be the party dealing with the taxing authorities on such issues). Finally, if the purchase price for the target company stock is determined based on a valuation as of a date prior to the actual closing date, the purchaser may be entitled to certain of the economic benefits during the interim period, while the seller remains liable for the income tax liability during this period.

Because the tax issues involved in the acquisition of a member of a consolidated return group are often numerous and complicated, it may be the case that these issues are best addressed in a stand-alone agreement attached as an exhibit to the main acquisition agreement. This approach tends to permit the parties to focus on the relevant tax issues in an organized fashion outside of the general chaos surrounding negotiation of the principal acquisition document. On the other hand, use of a separate agreement often removes the tax practitioner from the loop with respect to drafts of the main agreement, and this can lead to inconsistencies between the main agreement and the tax agreement.
B. **Key Provisions.** Below is a summary of certain of the key provisions contained in a standard tax matters article of an acquisition agreement (or stand-alone tax sharing agreement). It is assumed that the purchaser, the seller and the target company are U.S. corporations, and that the seller and target company are members of a consolidated return group, of which the seller is the common parent corporation. (Note: As described in paragraph C below, form tax provisions are attached as Appendices to this outline).

1. **General.** Often times, the tax matters article in the acquisition agreement will contain a general statement that it is the intent of the parties that the seller will bear all tax liabilities for pre-closing periods, and the purchaser will bear all tax liabilities for post-closing periods, and that the article will be construed accordingly. While a statement of general intent may assist the parties in reaching the intended result where the agreement is silent (or ambiguous), in those situations where the parties are left to resolving an issue by reference to a principle of general intent it usually means that the article failed in adequately addressing the subject matter.

2. **Taxes Covered.** Typically, the tax matters article in the acquisition agreement covers all federal, state, local or foreign taxes measured by net income. If other potential taxes such as ad valorem, sales, franchise taxes and the like, are not covered in the tax matters article, they should be covered in the general liability section of the acquisition agreement (where other liabilities are treated).

3. **Termination of Existing Tax Sharing Agreements.** The parties will want to terminate any tax sharing or allocation agreements to which the target company is a party. If this is not done, either party may end up having to make a significant payment to the other under the terms of an agreement to which the target company was a party.

4. **Allocation of Liabilities.** Obviously, the centerpiece of the tax matters article is the provision setting forth the manner in which the purchaser and seller will bear income tax liabilities of the target company. The tax matters article will typically divide the "time line" of the target company into periods, and then allocate liability for taxes based upon the period to which the tax is attributable. For example, if the economic intent of the parties is that the seller will bear any tax liabilities for pre-closing periods and the purchaser will bear any tax liabilities for post-closing periods, the tax matters article may define old periods as periods under applicable law for which a tax is imposed which end on or prior to the closing date. New periods would then be periods commencing after the closing date. Any period which commenced prior to the closing date but ended thereafter would be defined as a "straddle period," and the taxes attributable to such straddle period would generally be allocated between the parties on an interim closing of the books basis. This basic structure will obviously need to be tailored for the specifics of each particular transaction. For example, the parties may want to provide that any income item of adjustment necessary to implement an accounting method change for an old period, or the restoration of any deferral of income under the consolidated return regulations by reason of the transactions contemplated in the acquisition agreement, should be attributable to an old period. In addition, if a Code § 338 election is contemplated, the parties will want to provide that any income or tax resulting from the § 338
election will be treated as attributable to a new period (i.e., will be borne by the purchaser). Conversely, if a Code § 338 (h)(10) election is contemplated, the parties will generally wish to allocate any resulting tax to the seller.

5. **Carryforwards and Carrybacks.** The parties may desire to provide that if items of loss, deduction or credit are carried from a pre-closing period to a post-closing period, or vice-versa, payment of 100% of such carryover item in the case of a credit, and the maximum corporate tax rate applied to such item in the case of a loss or deduction, will be made by the party benefitting from such item to the other party. For example, if a credit item is carried from a pre-closing period to a post-closing period, the purchaser would be obligated to pay to the seller an amount equal to 100% of such credit. This concept may be modified in numerous ways to address the economic intent of the parties. For example, in addition to the carryforward or carryback of the item, the parties may require that the item in fact be utilized by the party to whom the item is carried for there to be a reimbursement obligation. Although a carryover provision may make sense from an economic point of view, such a provision often times is an invitation to future disputes. If a carryback provision is included in the agreement, the parties will have to address the extent, if any, to which the buyer’s carryback items should result in a payment to buyer if the seller also has carryforward or carryback items and there is insufficient income to absorb all such items. A common approach to this issue is to treat the attribute as utilized in the manner required by applicable treasury regulations.

6. **Inter-period Adjustments.** An item of income, loss or deduction (or other item) may be shifted from a seller period to a buyer period, or vice-versa, other than by way of carrybacks or carryovers (e.g., 482 adjustment). In that event, the parties may desire to provide that if such shifting results in a tax benefit to one party, and a tax liability to the other party, the party receiving the tax benefit will be obligated to pay to the other party the lesser of the amount of the benefit or the liability (or detriment) to the other party.

7. **Preparation and Filing of Tax Returns.** The tax matters article should also allocate return filing responsibility between the parties. In the case of "straddle periods" the agreement should provide that the seller will timely pay to the target company any taxes allocated to the seller for the straddle period, so that the target company may timely file the return (and pay the associated taxes) for such period. The seller may desire the right to review any returns filed for a straddle period.

8. **Cooperation and Record Retention.** In order to facilitate the return and compliance obligations of both parties, the tax matters article should typically include a provision which requires the seller, on the one hand, and the purchaser and target company, on the other, to provide each other with such cooperation and information as either of them reasonably requests in connection with filing any return or claim for refund,
computing any tax liability or in connection with any audit or other proceeding. The concept of cooperation may be defined to include providing copies of all relevant returns, workpapers and other documents relating to the tax return or tax matter in question. In addition, the parties may provide that they will make their employees available to the other party to provide explanation of any documents or materials provided to the other party in accordance with the terms of the tax sharing agreement. The parties should also require that any tax returns, workpapers and other records be retained until the expiration of the applicable statute of limitations. Typically, the foregoing provisions will be accompanied by an obligation of each of the parties to keep any information obtained from the other party under the terms of such provision confidential except as necessary in connection with the filing of returns or audit proceedings.

9. Audit Proceedings. The agreement should set forth procedures for dealing with any audit or other proceeding relating to the determination of taxes of the target company. Typically, the right to control the audit or other proceeding is delegated to the party who will benefit (or be economically burdened) by the particular course of action. Often, the controlling party will be required to indemnify the other party for any liability incurred by such party in excess of the liability which would have been incurred by such party if its desired course of action had been pursued. In addition to the foregoing, the parties may desire to include specific notification and related procedures designed to protect the economic position of the party not receiving notice from the government.

C. Special Considerations in Spin-Off Transactions. The distribution by one company (the "distributing company") of 80% or more of the stock of another company (the "controlled company") in a tax-free transaction under Code Section 355 (a "spin-off transaction") is a popular technique for disposing of subsidiaries. Although a detailed discussion of the operating rules of Code Section 355 is beyond the scope of this outline, the popularity of spin-off transactions warrants an analysis of some of the key issues that arise in negotiating and drafting a tax sharing agreement in connection with a spin-off transaction.

1. General. A spin-off transaction at its core involves the separation of one part of an overall business from the remainder of the business. As one might expect, this type of corporate "divorce" creates significant strains on the relationships that exist between personnel, including tax personnel, of the distributing company and the controlled company. In many circumstances, the distributing company and controlled company will view the restructuring transactions differently because of the manner in which the transactions can be expected to impact each of the companies. These differing points of view, as well as prior reporting relationships, can make negotiating a tax sharing agreement quite difficult.

2. Allocation of Pre-Distribution Tax Liabilities. The issue of how to allocate the group's pre-closing tax liabilities is closely tied to the manner in which the parties
decide to split-up the tax reserves of the group. In certain situations, if the controlled company has a good handle on the adequacy of tax reserves relating to its tax liabilities, it may be preferable for the controlled company to assume responsibility for its share of the pre-closing exposures, provided the related reserves are retained by, or transferred to, the controlled company.

In the case of consolidated federal income tax liabilities, there are numerous approaches that can be used to allocate to the controlled company its share of the consolidated tax liability. One approach is to simply allocate liability in accordance with Treas. Reg. § 1.1552-1(a)(1)(which generally apportions tax liability of the group to its members in accordance with their respective share of the consolidated taxable income). A different approach would be to require a computation of the distributing group and the controlled group's stand-alone tax liability and then allocate the consolidated liability to the companies in proportion to such amounts.

With respect to audit adjustments, as a general rule, the parties will seek to allocate any increased liability (or refund) to the company that is responsible for the increase (or decrease) in tax. For example, if for a pre-closing period, deductions of the controlled company are disallowed, the resulting tax increase would be borne by the controlled company. The audit adjustment allocation rules can quickly become complicated when the parties consider the myriad of situations that may arise, e.g. how to treat disallowances that do not result in immediate tax increases because of attribute carryovers, disallowances that result in tax benefits to the other party, and so on. As a practical matter, the tax sharing agreement cannot specifically address every imaginable situation. Thus, it is important, from both parties point of view, that the parties focus on significant fact patterns that are most likely to arise given the specific tax history of the companies.

In the case of state tax liabilities, the tax sharing agreement usually distinguishes between separate company returns and combined returns. Tax adjustments with respect to separate company returns are typically borne by the party responsible for filing such return. In the case of combined, unitary or similar group filings, the parties will need to decide upon a method for apportioning liabilities similar to the methods discussed above in connection with allocating the group's federal consolidated income tax liability.

3. Allocation of Transaction Taxes. The tax sharing agreement also allocates between the distributing company and the controlled company responsibility for taxes that directly result from spin-off and related transactions. These taxes generally fall into three categories: (1) taxes that result from the spin-off and related transactions failing to qualify as tax-free as intended by the parties (including the failure of the distribution to qualify under Code Section 355), (2) taxes that result from the spin-off and related transactions which the parties recognize will be triggered by the transaction (e.g. taxes resulting from income or gain recognized under Treas. Reg. § 1.1502-13 (deferred intercompany gains) and Treas. Reg. § 1.1502-19 (excess loss
accounts), and (3) sales, use and other transfer taxes imposed on transfers occurring pursuant to the spin-off and related transactions.

There are no hard and fast rules on the manner in which the above transaction taxes are to be shared between the parties. The parties may decide to allocate the taxes on a percentage basis in accordance with relative market capitalization or some other measurement. The parties may instead allocate some or all of these taxes based on the legal entity incurring the tax. In any case, as discussed in ¶ 4 below, if either the distributing company or controlled company acts in a manner that causes the spin-off to be taxable, such party will typically be responsible for the resulting tax.

4. Covenants and Indemnities Relating to Tax-Free Treatment of the Spin-Off. The tax sharing agreement typically includes a covenant on the part of both distributing company and controlled company that neither party will take any action which is inconsistent with the tax treatment contemplated by the ruling request (or if no such request has been made, as otherwise contemplated by the parties in the distribution agreement). The tax sharing agreement may also include specific covenants such as an agreement on the part of the distributing and controlled companies that they will each continue the conduct of the active trade or business on which the Code § 355 treatment is based for a specified period of time. The parties may also agree that neither party will file an amendment or supplement to the original ruling without the consent of the other party. The tax sharing agreement should also generally provide that each company will indemnify the other if such company breaches its covenant not to engage in acts inconsistent with the intended tax treatment. In addition, to the extent certain factual statements and representations in the original ruling request are the responsibility of either the distributing or controlled company, the agreement may provide that liability resulting from the inaccuracy of such fact or representation will be borne by the party with responsibility for such statement.

5. Return Preparation. Allocation of responsibility for filing tax returns in the spin-off context raises many of the same issues discussed in ¶ 4 above relating to stock acquisitions. Because the controlled company's short period ending on the distribution date is included in the distributing company's consolidated return for the year in which the distribution occurs, the parties will have to address who has responsibility for preparing the separate company information for the controlled company for the short period and the extent to which past practices will govern the preparation of such return.

6. Tax Payments and Intercompany Billings. In a spin-off transaction, the payment of taxes with respect to the distributing company's federal consolidated returns filed after the distribution date may raise difficult issues. The controlled company will typically be responsible for its share of the consolidated tax liability over the cumulative net payments made with respect to the return by the controlled company and its affiliates. Difficulties often arise in determining what portion of the estimated tax payments made by the group should be credited to the controlled company. Negotiation of this dollar amount prior to the distribution date may avoid future disputes.
The above discussion only scratches the surface of the many issues that need to be addressed in the tax sharing agreement for a spin-off transaction. Many of the same issues discussed above with respect to stock acquisitions, e.g. scope of indemnities, use of past tax accounting practices, carryovers and carrybacks and control of tax contests, will also need to be addressed in a spin-off transaction. The sample Tax Sharing Agreement attached as Appendix C provides an illustration of how these issues may be handled in the spin-off context.

D. **Form Tax Sharing Agreements.** Included in the materials as Appendices A, B, C and D are separate form provisions. These provisions address the above basic considerations (and others) in the context of a stock sale, a stock sale including a Code § 338(h)(10) election, an asset sale and a spin-off transaction. In the case of each, it is assumed that the seller, the purchaser and the target company are U.S. corporations. It is further assumed that the seller and the target company are members of a consolidated return group of which the seller is the common parent corporation.

The form provisions included in the materials are intended only as an illustration of how the issues covered in paragraph B above may be dealt with in the tax provisions included in an acquisition agreement. Certain matters covered in the form provisions may not be relevant to particular fact situations. Conversely, particular fact situations may require concepts not included in the form agreements. As is always the case with respect to the use of forms, the practitioner will need to modify the agreement to deal with the particular facts and circumstances at hand. The forms are only a starting point. The success of the tax planning will depend on how these standard forms are tailored to the specific deal.

V. **CONCLUSION**

Although sometimes overlooked, the tax practitioner's role in the acquisition process extends well beyond that of providing initial input into the structuring of the parties' economic bargain. Whether the practitioner successfully performs his or her due diligence and drafting role will ultimately determine whether the initial tax planning produces the desired results.

In the tax practitioner's due diligence role, the key to success is understanding the critical questions which need to be asked and obtaining complete responses in an organized manner. It is virtually impossible to complete the due diligence inquiry without the aid of a well developed checklist on which the relevant information can be charted. The material contained in Section II provides the basis for such a checklist. In addition, it is essential that the due diligence process be started early in the transaction. Review of the relevant materials at the twelfth hour is a sure invitation for disaster.

In addition, as noted above, in today's high-paced acquisition environment, the tax practitioner will frequently be called upon to negotiate, draft and/or review the tax sensitive provisions contained in acquisition documentation in an extremely short time frame. Because these provisions often will not be reviewed by other professionals engaged in the transaction, or if
reviewed, may not be completely understood by such individuals, the tax practitioner must ultimately be able to quickly understand and analyze these issues.

*       *       *       *       *

APPENDIX A

STOCK PURCHASE AGREEMENT

The following text is drawn from a stock purchase agreement pursuant to which Purchaser acquired the stock of several wholly owned subsidiaries of Seller (including second and lower tier subsidiaries).

* * * *
**PROVISIONS RELATING TO DEFINITIONS SECTION**

**Specific Definitions.** As used in this Agreement, the following terms shall, except as otherwise expressly provided herein, have the meanings set forth or referenced below:

“Applicable Tax Law” shall mean any Law of any nation, state, region, province, locality, municipality or other jurisdiction relating to Taxes, including regulations and other official pronouncements of any governmental entity or political subdivision of such jurisdiction charged with interpreting such Laws.

“Post-Closing Period” shall mean, with respect to any Company, any Tax Period commencing after the Closing Date and the portion of any Straddle Period commencing after the Closing Date.

“Pre-Closing Period” shall mean, with respect to any Company, any Tax Period ending on or before the Closing Date and the portion of any Straddle Period ending on the Closing Date.

“Straddle Period” shall mean, with respect to any Company, any Tax Period that begins before and ends after the Closing Date.

“Tax” or “Taxes” shall mean any income, corporation, gross receipts, profits, gains, capital stock, capital duty, franchise, withholding, social security (including any social security charge or premium), unemployment, disability, property, wealth, welfare, stamp, excise, occupation, sales, use, transfer, value added, alternative minimum, estimated or other similar tax (including any fee, assessment, or other charge in the nature of or in lieu of any tax) imposed by any governmental entity (whether national, local, municipal or otherwise) or political subdivision thereof, and any interest, penalties, additions to tax, or additional amounts in respect of the foregoing, and including any transferee or secondary liability in respect of any tax (whether by Law, contractual agreement or otherwise) and any liability in respect of any tax as a result of being a member of any affiliated, consolidated, combined, unitary or similar group.

“Tax Authority” shall mean, with respect to any Tax, the governmental entity or political subdivision thereof that imposes such Tax, and the agency (if any) charged with the collection of such Taxes for such entity or subdivision, including any governmental or quasi-governmental entity or agency that imposes, or is charged with collecting, social security or similar charges or premiums.

“Tax Benefit” shall mean the present value of any refund, credit or reduction in otherwise required Tax payments including any interest payable thereon, which present value shall be computed as of the Closing Date or the first date on which the right to the refund, credit or other Tax reduction arises or otherwise becomes available to be utilized, whichever is later, (i) using the Tax rate applicable to the highest level of income with respect to such Tax under the Applicable Tax Law on
such date, and (ii) using the interest rate on such date imposed on corporate
deficiencies paid within 30 days of a notice of proposed deficiency under the U.S.
Code or other Applicable Tax Law. Any Tax Benefit shall be computed net of any
related Tax cost (which shall be computed in the same manner in which Tax Benefits
are otherwise computed pursuant to this definition).

“Tax Period” shall mean, with respect to any Tax, the period for which the Tax is
reported as provided under Applicable Tax Laws.

“Tax Return” shall mean, with respect to any Tax, any information return with
respect to such Tax, any report, statement, declaration or document required to be
filed under the Applicable Tax Law in respect of such Tax, any claims for refund of
Taxes paid, and any amendment or supplements to any of the foregoing.

“U.S. Code” shall mean the United States Internal Revenue Code of 1986, as
amended, or any successor law.

* * * *

PROVISIONS RELATING TO TAX REPRESENTATIONS

**Tax Representations.** The following representations are made with respect to each of the
Companies:

(i) Each of the Companies has duly and timely filed each Material Tax
Return required to be filed with any Tax Authority (or has timely and properly filed
valid extensions of time with respect to the filing thereof) and Sellers or Sellers’
Affiliates have duly and timely filed each Material Tax Return required to be filed
with any Tax Authority by Sellers or Sellers’ Affiliates which include or are based
upon the assets, operations, ownership or activities of any of the Companies,
including any consolidated, combined, unitary, fiscal unity or similar Tax Return
which includes or is based upon the assets, operations, ownership or activities of any
of the Companies (or Sellers or Sellers’ Affiliates have timely and properly filed
valid extensions of time with respect to the filing thereof). Except as disclosed on
the Disclosure Memorandum, to the knowledge of Sellers, (A) there is no
investigation or other proceeding pending, threatened or expected to be commenced
by any Tax Authority for any jurisdiction where any of the Companies do not file
Tax Returns with respect to a given Tax that may lead to an assertion by such Tax
Authority that any of the Companies is or may be subject to a given Tax in such
jurisdiction, and (B) there is no meritorious basis for such an investigation or other
proceedings that would result in any such assessment.

(ii) The Companies (or Sellers or Sellers’ Affiliates on behalf of the
Companies) have paid, and as of the Closing Date, the Companies (or Sellers or
Sellers’ Affiliates on behalf of the Companies) will have paid, each Material Tax
owing with respect to the assets, ownership, operations and activities of the
Companies (whether or not shown on any Tax Return) and have withheld and paid
each Material Tax required to have been withheld and paid in connection with amounts paid or owing to any employee, independent contractor, creditor, shareholder or other party.

(iii) Except as disclosed on the Disclosure Memorandum, to the knowledge of Sellers (A) there are no pending, threatened, or proposed audits, assessments or claims from any Tax Authority for deficiencies, penalties or interest against any of the Companies or any of their assets, operations or activities as of the date hereof or as of the Closing Date, and (B) there is no basis for any such audit, assessment or claim. Except as disclosed on the Disclosure Memorandum, there are no pending claims for refund of any Tax of any of the Companies (including refunds of Taxes allocable to the Companies or with respect to consolidated, combined, unitary, fiscal unity or similar Tax Returns).

(iv) Except as disclosed on the Disclosure Memorandum, each asset with respect to which any Company claims depreciation, amortization or similar expense for Tax purposes is owned for Tax purposes by such Company under Applicable Tax Law. Except as disclosed on the Disclosure Memorandum, no Company owns, directly or indirectly, any interest in any entity classifies as a partnership for United States federal income Tax purposes.

(v) Except as disclosed on the Disclosure Memorandum, there are no outstanding rulings of, or requests for rulings with, any Tax Authority expressly addressed to any of the Companies (or to an Affiliate of any Company) that are, or if issued would be, binding upon the Companies for any Post-Closing Period.

(vi) Except as disclosed on the Disclosure Memorandum, none of the Companies (or Sellers or Sellers’ Affiliates with respect to any of the Companies) has, in a manner that would be binding on any of the Companies or for any Post-Closing Period, (A) executed, become subject to or entered into any closing agreement pursuant to Section 7121 of the U.S. Code or any similar or predecessor provision thereof under the U.S. Code or other Applicable Tax Law, (B) agreed to any extension of time with respect to the filing of any Tax Return of any of the Companies (including any Tax Return which includes or is based upon their respective assets, ownership, operations or activities), the payment of any Taxes of any of the Companies, or any limitation period regarding the assessment of any such Taxes or (C) received approval to make or agreed to a change in accounting method or has any application pending with any Tax Authority requesting permission for any such change.

(vii) Except as disclosed on the Disclosure Memorandum, as to each year or period for which the statute of limitations for assessments has not yet expired as to a given Tax, none of the Companies is (A) a member of an affiliated, consolidated, unitary, fiscal unity, combined or similar Tax group which files a consolidated unitary, combined or similar Tax Return for purposes of that Tax or (B) a party to any Tax allocation, Tax sharing or Tax reimbursement agreement or arrangement with any Person.
(viii) Except as disclosed on the Disclosure Memorandum, no item of income or gain reported for financial purposes in any Pre-Closing Period is required to be included in taxable income for a Post-Closing Period.

(ix) Except as disclosed on the Disclosure Memorandum, no Company will have any taxable income or gain as a result of prior intercompany transactions that have been deferred and that will be taxed as a result of the changes in ownership contemplated by this Agreement.

(x) None of the Companies (or Sellers or Sellers’ Affiliates on behalf of such Companies) (A) has made or is subject to any election under Section 341(f) of the U.S. Code or (B) has executed or caused any Company to become subject to such election.

(xi) None of the assets of the Companies is (A) required to be or are being depreciated under the alternative depreciation system under Section 168(g)(2) of the U.S. Code, or (B) is subject to Section 168(f) of the U.S. Code. None of the assets of the Companies is property which the Purchaser or the Companies will be required to treat as “tax exempt use property” within the meaning of Section 168(h)(1) of the U.S. Code. Except as disclosed on the Disclosure Memorandum, no “industrial development bonds” within the meaning of Section 103 of the United States Internal Revenue Code of 1954, as amended and in effect prior to the enactment of the United States Tax Reform Act of 1986, “private activity bonds” within the meaning of Section 141 of the U.S. Code or other tax exempt financing which have been used to finance assets of the Companies, whether leased or owned.

(xii) There is no contract, agreement, plan or arrangement covering any individual or entity treated as an individual included in the business or assets of the Companies that, individually or collectively, could give rise to the payment by the Companies or the Purchaser or its Affiliates, of an amount that would not be deductible by reason of Section 280G of the U.S. Code or similar provisions under other Applicable Tax Laws.

(xiii) No Company has made or is bound by any election under Section 197 of the U.S. Code.

(xiv) Except as disclosed on the Disclosure Memorandum, no Company has any excess loss account (as defined in Treasury Regulation Section 1.1502-19) with respect to the stock of any Subsidiary.

* * * *

PROVISIONS RELATING TO TAX COVENANTS

(a) Preparation and Filing of Tax Returns: Payment of Taxes. Between the date hereof and the Closing Date, Seller shall cause the Company to
prepare and file on or before the due date therefor all Tax Returns required to be filed by the Company (except for any Tax Return for which an extension has been granted as permitted hereunder) on or before the Closing Date, and shall pay, or cause the Company to pay, all Taxes (including estimated Taxes) due on such Tax Return (or due with respect to Tax Returns for which an extension has been granted as permitted hereunder) or which are otherwise required to be paid at any time prior to or during such period. Such Tax Returns shall be prepared in accordance with the most recent Tax practices as to elections and accounting methods except for new elections that may be made therein that were not previously available, subject to Purchaser’s consent (not to be unreasonably withheld or delayed).

(b) Notification of Tax Proceedings. Between the date hereof and the Closing Date, to the extent Seller has knowledge of the commencement or scheduling of any Tax audit, the assessment of any Tax, the issuance of any notice of Tax due or any bill for collection of any Tax due for Taxes, or the commencement or scheduling of any other administrative or judicial proceeding with respect to the determination, assessment or collection of any Tax of the Company, Seller shall provide prompt notice to Purchaser of such matter, setting forth information (to the extent known) describing any asserted Tax liability in reasonable detail and including copies of any notice or other documentation received from the applicable Tax authority with respect to such matter.

(c) Tax Elections, Waivers and Settlements. Seller shall not, and shall cause Company not to, take any of the following actions:

(i) make, revoke or amend any Tax election;
(ii) execute any waiver of restrictions on assessment or collection of any Tax; or
(iii) enter into or amend any agreement or settlement with any Tax authority.

PROVISIONS RELATING TO TAX EFFECT OF INDEMNITY PAYMENTS

**Tax Gross-Up.** Any payment made by any indemnifying party hereunder shall be reduced (but not below zero) by an amount equal to the Tax Benefits, if any, attributable to the loss giving rise to such payment. For purposes of indemnity payments relating to Taxes, the indemnity payment shall be reduced (but not below zero) by the Tax Benefit, if any, attributable to (or arising out of) the adjustment giving rise to the indemnity payment. [NOTE: In view of the definition of Tax Benefits, this language compensates the seller even if the buyer in fact realizes no tax benefit from the payment.]

**Characterization of Indemnification Payments.** All amounts paid by Purchasers or Sellers, as the case may be, under the terms hereof shall be treated to the extent permitted under
Applicable Tax Law as adjustments to the Purchase Price for all Tax purposes, and to the extent not so permitted, the amount of any such payment shall be increased to take into account the Tax, if any, resulting from the receipt of such payment.

* * * *

TAX MATTERS ARTICLE

1. **Scope of Tax Indemnity Provisions: Relationship of this Article to [General Indemnity Article].**

   (a) In the case of any indemnity claim for Taxes for a Pre-Closing Period, the indemnity obligations of Seller, and the rights of Purchaser with respect to indemnification, shall be governed by this Article and not by [the general indemnity section] hereof (regardless of whether the Taxes for which indemnity is being claimed result from the breach of a representation in section ___ hereof).

2. **Allocation of Liability for Taxes.**

   (a) **General.** Subject to Section 2(b) hereof:

      (i) Seller shall be liable for, and shall indemnify, defend and hold Purchaser harmless from and against, any and all Taxes imposed on or with respect to the Companies, or their respective assets, operations or activities for any Pre-Closing Period.

      (ii) Purchaser shall be liable for, and shall indemnify, defend and hold Seller harmless from and against, any and all Taxes imposed on or with respect to the Companies or their respective operations, ownership, assets or activities for any Post-Closing Period.

   (b) **Certain Transaction Costs.** Notwithstanding anything to the contrary in this Section 2, [Purchaser or Seller] shall be liable for and pay any and all transfer Taxes arising in connection with the transfer of the stock of the Companies hereunder and [Purchaser or Seller] shall indemnify, defend and hold the other party harmless against any and all such transfer Taxes.

3. **Proration of Taxes.**

   (a) **Method of Proration.** Tax items shall be apportioned between Pre-Closing Periods and Post Closing Periods based on a closing of the books and records of the relevant entity or entities as of the Closing Date (provided that (i) any Tax item incurred by reason of the transactions occurring on or before the Closing Date as contemplated by this Agreement shall be treated as occurring in a Pre-Closing Period and (ii) depreciation, amortization and depletion for any Straddle Period shall be apportioned on a daily pro rata basis). Notwithstanding anything to the contrary in the preceding sentence, the parties agree that for U.S. federal income Tax purposes, Tax Items for any Straddle Period shall be
apportioned between Pre-Closings Periods and Post-Closing Periods in accordance with U.S. Treasury Regulations Section 1.1502-76(b), which regulations shall be reasonably interpreted by the parties in a manner intended to achieve the method of apportionment described in the preceding sentence.

(b) **No Contrary Elections.** Seller and Purchaser will not exercise any option or election (including any election to ratably allocate a Tax year’s items under Treasury Regulation Section 1.1502-76(b)(2)(ii)) to allocate Tax items in a manner inconsistent with Section 3(a) hereof.

4. **Refunds of Taxes; Amended Returns; Carryovers.**

(a) **Refunds.** Subject to Section 4(c) hereof, if Purchaser, receives a Tax refund with respect to Taxes arising in a Pre-Closing Period, Purchaser shall pay, within the thirty (30) days following the receipt of such Tax refund, the amount of such Tax refund to the Seller. If Seller receives a Tax refund with respect to Taxes arising in any Post-Closing Tax Period, within thirty (30) days following the receipt of such Tax refund, Seller will pay the amount of such Tax refund to Purchaser.

(b) **Amended Tax Returns.**

(i) Subject to Section 4(c) hereof, any amended Tax Return or claim for Tax refund for any Pre-Closing Period other than a Straddle Period shall be filed, or caused to be filed, only by Seller. Seller shall not, without the prior written consent of Purchaser (which consent shall not be unreasonably withheld or delayed) make or cause to be made, any such filing, to the extent such filing, if accepted, reasonably might change the Tax liability of Purchaser for any Tax Period.

(ii) An amended Tax Return or claim for Tax refund for any Straddle Period shall be filed by the party responsible for filing the original Tax Return hereunder if either Purchaser or Seller so requests, except that such filing shall not be done without the consent (which shall not be unreasonably withheld or delayed) of Purchaser (if the request is made by Seller) or of Seller (if the request is made by Purchaser).

(iii) Any amended Tax Return or claim for Tax refund for any Post-Closing Period other than a Straddle Period shall be filed, or caused to be filed, only by Purchaser, who shall not be obligated to make (or cause to be made) such filing. Purchaser shall not, without the prior written consent of Seller (which consent shall not be unreasonably withheld or delayed) file, or cause to be filed, any amended Tax Return or claim for Tax refund for any Post-Closing Period to the extent that such filing, if accepted, reasonably might change the Tax liability of Seller for any Pre-Closing Period.

(c) **Carrybacks.** If any Tax loss or credit with respect to the Companies arising in a Post-Closing Period may be carried back and included in any Tax Return filed or caused to be filed by Seller with respect to the Companies for any Pre-Closing Period, Purchaser may, elect (at its expense) to carry back such Tax items (subject to Seller’s consent, which
consent shall not be unreasonably withheld or delayed), in which case Seller shall pay to Purchaser amount equal to the Tax Benefit resulting from such carryback of Tax loss or credit, provided that Seller shall not be required to file any carryback claim unless Purchaser so requests in writing and agrees to pay the reasonable expenses related to the claim for refund.

5. **Preparation and Filing of Tax Returns.**

   (a) **Seller’s Responsibilities.** Seller shall have the right and obligation to timely prepare and file, and cause to be timely prepared and filed, when due:

   (i) any Tax Return that is required to include the operations, ownership, assets or activities of the Company for Tax Periods ending on or before the Closing Date; and

   (ii) all Tax Returns for Transfer Costs to be paid by Seller pursuant to the terms hereof.

   (b) **Purchasers’ Rights and Responsibilities.**

   (i) Purchaser shall have the right and obligation to timely prepare and file, or cause to be timely prepared and filed, when due, all Tax Returns that are required to include the operations, ownership, assets or activities of the Company for any Tax Periods ending after the Closing Date (including all Straddle Period Returns).

   (ii) all Tax Returns for transfer costs to be paid by Purchaser pursuant to the terms hereof.

   (c) **Preparation of Tax Returns.**

   (i) Seller shall prepare and provide to Purchaser such Tax information as is reasonably requested by Purchaser with respect to the operations, ownership, assets or activities of the Companies or the Subsidiaries for Pre-Closing Periods to the extent such information is relevant to any Tax Return which Purchaser has the right and obligation hereunder to file.

   (ii) Seller shall, on the one hand, or Purchaser shall, on the other, with respect to any Tax Return which such party is responsible hereunder for preparing and filing, or causing to be prepared and filed, make such Tax Return and related work papers available for review by the other party if the Tax Return (A) is with respect to Taxes for which the other party or one of its affiliates may be liable hereunder or under applicable tax law, or (B) claims Tax Benefits which the other party or one of its Affiliates is entitled to receive hereunder. The filing party shall use its reasonable best efforts to make Tax Returns available for review as required under this paragraph sufficiently in advance of the due date for filing such Tax Returns to provide the non-filing party with a meaningful opportunity to analyze and comment on such Tax Returns and have such Tax Returns modified before
filing, accepting the position of the filing party unless such position is contrary to the provisions of Section 5(d) hereof.

(d) **Consistency of Accounting Method.** Any Tax Return which includes or is based on the operations, ownership, assets or activities of the Company or for any Pre-Closing Period, and any Tax Return which includes or is based on the operations, ownership, assets or activities of the Company for any Post-Closing Period to the extent the items reported on such Tax Return might reasonably increase any Tax liability of Seller for any Pre-Closing Period or any Straddle Period shall be prepared in accordance with past Tax accounting practices used with respect to the Tax Returns in question (unless such past practices are no longer permissible under the applicable tax law), and to the extent any items are not covered by past practices (or in the event such past practices are no longer permissible under the applicable tax law), in accordance with reasonable Tax accounting practices selected by the filing party with respect to such Tax Return under this Agreement with the consent (not to be unreasonably withheld or delayed) of the non-filing party.

6. **Tax Controversies; Assistance and Cooperation.**

   (a) **Notice.**

   In the event any Tax Authority informs Seller, on the one hand, or Purchaser or Company, on the other, of any notice of proposed audit, claim, assessment or other dispute concerning an amount of Taxes with respect to which the other party may incur liability hereunder, the party so informed shall promptly notify the other party of such matter. Such notice shall contain factual information (to the extent known) describing any asserted Tax liability in reasonable detail and shall be accompanied by copies of any notice or other documents received from any Tax authority with respect to such matter. If an indemnified party has knowledge of an asserted Tax liability with respect to a matter for which it is to be indemnified hereunder and such party fails to provide the indemnifying party prompt notice of such asserted Tax liability, then (A) if the indemnifying party is precluded from contesting the asserted Tax liability in any forum as a result of the failure to give prompt notice, the indemnifying party shall have no obligation to indemnify the indemnified party for Taxes arising out of such asserted Tax liability, and (B) if the indemnifying party is not precluded from contesting the asserted Tax liability in any forum, but such failure to provide prompt notice results in a monetary detriment to the indemnifying party, then any amount which the indemnifying party is otherwise required to pay the indemnified party pursuant to this Agreement shall be reduced by the amount of such detriment.

   (b) **Control Rights.** The filing party under this Article shall control any audits, disputes, administrative, judicial or other proceedings related to Taxes with respect to which either party may incur liability hereunder. Subject to the preceding sentence, in the event an adverse determination may result in each party having responsibility for any amount of Taxes under this Article, each party shall be entitled to fully participate in that portion of the proceedings relating to the Taxes with respect to which it may incur liability hereunder. For purposes of this Section 6(b), the term “participation” shall include (i) participation in conferences, meetings or proceedings with any Tax Authority, the subject matter of which...
includes an item for which such party may have liability hereunder, (ii) participation in appearances before any court or tribunal, the subject matter of which includes an item for which a party may have liability hereunder, and (iii) with respect to the matters described in the preceding clauses (i) and (ii), participation in the submission and determination of the content of the documentation, protests, memorandum of fact and law, briefs, and the conduct of oral arguments and presentations.

(c) **Consent to Settlement.** Purchaser and Seller shall not agree to settle any Tax liability or compromise any claim with respect to Taxes, which settlement or compromise any affect the liability for Taxes hereunder (or right to tax benefit) of the other party, without such other party’s consent (which consent shall not be unreasonably withheld or delayed).

(d) **Expenses.** Purchaser and Seller shall, bear their own expenses incurred in connection with audits and other administrative judicial proceedings relating to Taxes for which such party and its affiliates are liable under this Article.

(e) **Assistance and Cooperation.** Seller on the one hand, and Purchaser and Company, on the other, shall cooperate (and cause their affiliates to cooperate) with each other and with each other’s agents, including accounting firms and legal counsel, in connection with Tax matters relating to the Company, including (i) preparation and filing of Tax Returns, (ii) determining the liability and amount of any Taxes due or the right to and amount of any refund of Taxes, (iii) examinations of Tax Returns, and (iv) any administrative or judicial proceeding in respect of Taxes assessed or proposed to be assessed.

Such cooperation shall include each party making all information and documents in its possession relating to the Company and available to the other party. The parties shall retain all Tax Returns, schedules and work papers, and all material records and other documents relating thereto, until the expiration of the applicable statute of limitations (including, to the extent notified by any party, any extension thereof) of the Tax Period to which such Tax Returns and other documents and information relate. Each of the parties shall also make available to the other party, as reasonably requested and available, personnel (including officers, directors, employees and agents) responsible for preparing, maintaining, and interpreting information and documents relevant to Taxes, and personnel reasonably required as witnesses or for purposes of providing information or documents in connection with any administrative or judicial proceedings relating to Taxes.

7. **Termination of Tax Allocation Agreements.** As of the Closing Date, Seller shall cause all Tax allocation, Tax sharing, Tax reimbursement and similar arrangements or agreements between Seller and its Affiliates on the one hand, and the Companies, on the other, to be extinguished and terminated with respect to the Companies and any rights or obligations existing under any such agreement or arrangement to be no longer enforceable.

* * * *
APPENDIX B

STOCK PURCHASE AGREEMENT
PROVISIONS RELATING TO CODE § 338(h)(10) ELECTION

The text is drawn from a stock purchase agreement pursuant to which Buyer acquired from Seller 100% of the stock of target (“Company”) and Buyer and Seller agreed to join in the making
of a Code § 338(h)(10) election. We have reproduced below only those provisions directly relating to the 338(h)(10) election. Accordingly, many of the customary tax provisions relevant to a stock acquisition (see Appendix A) will also have to be included in the acquisition document. Any capitalized terms used below that are not otherwise defined below have the meanings ascribed to them in Appendix A.

* * * *

REPRESENTATION AS TO ELIGIBILITY TO MAKE CODE § 338(H)(10 ELECTION

Eligibility Under Section 338(h)(10). Seller represents that it filed a consolidated federal income tax return with the Company for the taxable year immediately preceding the current taxable year and that Seller is eligible to make an election under section 338(h)(10) of the Code (and any comparable election under state, local or foreign tax law) (the “338(h)(10) Election”) with respect to Company.

* * * *

COVENANT TO MAKE CODE § 338(H)(10) ELECTION

Election Under Section 338(h)(10). Buyer shall make an election under section 338(g) of the Code (and any comparable election under state, local or foreign tax law) with respect to the Company. Buyer and Seller shall make an election under section 338(h)(10) of the Code (and any comparable election under state, local or foreign tax law) with respect to the acquisition of the Company by Buyer. Buyer and Seller shall cooperate fully with each other in the making of such election. In particular, Buyer shall be responsible for the preparation and filing of all tax returns and forms (the “Section 338 Forms”) required under Applicable Tax Law to be filed in connection with making the 338(h)(10) Election. Seller shall deliver to Buyer, within [ ] days prior to the date the Section 338 Forms are required to be filed, such documents and other forms as reasonably requested by Buyer to properly complete the Section 338 Forms.

* * * *

PURCHASE PRICE ALLOCATION

(a) Buyer and Seller shall allocate the Purchase Price in the manner required by Section 338 of the Code and the Treasury Regulations promulgated thereunder. Such allocation shall be used for purposes of determining the modified aggregate deemed sales price under the applicable Treasury Regulations and in reporting the deemed sale of assets of the Company in connection with the 338(h)(10) Elections.

(b) Buyer shall initially prepare a completed set of IRS Forms 8023-A (and any comparable forms required to be filed under state, local or foreign tax law) and any additional data or materials required to be attached to Form 8023-A pursuant to the Treasury Regulations promulgated under Section 338 of the Code. Buyer shall deliver said forms to Seller for review no later than 45 days prior to the date the Section 338 Forms are required to be filed. In the event Seller objects to the manner in which the Section 338 Forms have been prepared, Seller shall notify Buyer
within 15 days of receipt of the Section 338 Forms of such objection, and the parties shall endeavor within the next 15 days in good faith to resolve such dispute. If the parties are unable to resolve such dispute within said 15 day period, Buyer and Seller shall submit such dispute to an independent accounting firm of recognized national standing (the “Allocation Arbiter”) selected by Buyer and Seller, which firm shall not be the regular accounting firm of Buyer or Seller. Promptly, but not later than 15 days after its acceptance of appointment hereunder, the Allocation Arbiter will determine (based solely on presentations of Buyer and Seller and not by independent review) only those matters in dispute and will render a written report as to the disputed matters and the resulting preparation of the Section 338 Forms shall be conclusive and binding upon the parties.

* * * *

TAX ALLOCATION PROVISION

Allocation of Tax Liabilities.

(i) Federal Income Taxes. Seller shall be responsible for all federal income Taxes attributable to Company for periods ending on or before the Closing Date (including any Tax resulting from the Code § 338(h)(10 Election). Buyer shall be responsible for all federal income Taxes of Company for periods ending after the Closing Date.

(ii) Other Tax Jurisdictions. Seller shall be liable for any state, local, or foreign Tax attributable to an election under the state, local, or foreign law similar to the election available under Section 338(h)(10) of the Code. Further, if a state, local or foreign jurisdiction does not have provisions similar to the election available under Section 338(h)(10) of the Code, Seller will be liable for any Tax imposed on Company by such state, local and/or foreign jurisdiction resulting from the transactions contemplated by this Agreement and the stock purchase agreement. Finally, Seller will be liable for non-federal income Taxes of Company ending on or before the Closing Date, and Buyer and Company will be liable for non-federal income Taxes of Company for periods ending after the Closing Date.

* * * *

APPENDIX C

ASSET PURCHASE AND SALE AGREEMENT

The following text is drawn from an asset purchase and sale agreement. The transaction involved Buyer’s acquisition of some (but not all) of Seller’s assets. The acquired assets include the Seller’s stock interest in a wholly owned subsidiary (“Sub Co.”) and the Seller’s interest in a limited liability company (“LLC”). The limited liability company is classified as a partnership for federal income tax purposes. Any capitalized terms not otherwise defined below shall have the meaning ascribed to such terms in Appendix A.

* * * *

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Acquired Assets. Seller hereby agrees to sell, assign, transfer, convey and deliver to Buyer, and Buyer hereby agrees to purchase, acquire and accept from Seller, all of Seller’s right, title and interest in and to all of the assets, properties, rights and contracts held or used primarily in connection with the [acquired divisions (“Divisions”)] wherever located (collectively, the “Assets”), free and clear of all liens, claims, charges, security interests, restrictions or other encumbrances of any kind or nature (collectively, “Liens”) except those set forth in the relevant schedules to this Agreement or otherwise specifically assumed pursuant to this Agreement, including the following:

...Business Records. All business and financial records (including all Tax records relating to the Divisions), ledgers sales invoices, accounts and payroll records, files, books and documents including, but not limited to, manuals, data, sales and advertising materials, customer and supplier lists and reports, sales, distribution and purchase correspondence, engineering drawings, notebooks and logbooks, and all original and duplicate copies thereof (but excluding certain business records relating solely to the “Excluded Assets” and the “Excluded Liabilities” set forth herein, respectively) (collectively, the “Business Records”);

Excluded Assets. Notwithstanding anything to the contrary contained herein, Seller is under no obligation to sell, assign, transfer or convey, and Buyer is under no obligation to accept or purchase any of the following assets, rights and properties of Seller (the “Excluded Assets”):

...Tax Refunds. Any Tax refund relating to the Divisions for periods ending on or prior to the Closing Date.

Assumed Liabilities. Buyer hereby agrees to assume, perform, pay and discharge, and to indemnify Seller in accordance with the terms hereof, with respect to the following liabilities and obligations of Seller relating to or arising out of the operation, business and affairs of the Divisions (collectively, the “Assumed Liabilities”):

...Taxes. All federal, state, local and foreign taxes, and any charges, penalties, interest, fees, imposts, duties or other assessments with respect thereto (collectively “Taxes”), arising out of the operation of the Divisions or relating to the Purchased Assets with respect to any period ending prior to , on or after the Closing Date, including without limitation gross receipts, excise, employment, sales, use, transfer, license, payroll, franchise, severance, stamp, occupation, environmental, customs duties, tariffs, ad valorem, value added or other taxes or fees, provided however that nothing herein shall require Buyer to assume, perform, pay or discharge any Taxes or net income or gain with respect to a period (or any portion thereof) ending on or before the Closing Date (a “Pre-Closing Period”).

[NOTE: The transaction required the buyer to assume non-income taxes for pre-closing periods].
...Post-Closing Liabilities. Any and all liabilities, obligations and other debts relating to Buyer’s ownership of the Purchased Assets or its conduct of the Divisions and any related operations from and after the Closing Date.

Excluded Liabilities. Notwithstanding the provisions [with respect to Assumed Liabilities] the following obligations and liabilities relating to the Divisions or the Purchased Assets are not being assumed by Buyer under the terms hereof and are being retained by Seller (the “Excluded Liabilities”):

...Other Excluded Liabilities. Any liabilities or obligations not expressly assumed by Buyer pursuant to this Agreement.

* * * *

PROVISIONS RELATING TO PURCHASE PRICE DETERMINATION

Purchase Price.

Delivery. At the Closing, Buyer shall cause to be delivered the sum of $__________ (the “Purchase Price”) to Seller by bank wire transfer in immediately available funds to an account designated in writing by Seller within three business days prior to the Closing Date. The Purchase Price shall be subject to adjustment after the Closing as provided herein.

Allocation. (a) Within 60 days after the Closing Date, Buyer will provide to Seller copies of IRS Form 8594 and any required exhibits thereto (the "Asset Acquisition Agreement") with Buyer's proposed allocation of the Purchase Price (together with any assumed liabilities). Within 15 days after the receipt of such Asset Acquisition Statement, Seller will propose to Buyer any changes to such Asset Acquisition Statement (and in the event no such changes are proposed in writing to Buyer within such time period, the Seller will be deemed to have agreed to, and accepted, the Asset Acquisition Statement). Buyer and Seller will endeavor in good faith to resolve any differences with respect to the Asset Acquisition Statement within 15 days after Buyer's receipt of written notice of objection from Seller.

(b) Subject to the provisions of the following sentence of this paragraph (b), the Purchase Price (together with any assumed liabilities) will be allocated in accordance with the Asset Acquisition Statement provided by Buyer to Seller pursuant to paragraph (a) above, and subject to the requirements of applicable tax law or election, all Tax Returns and reports filed by Buyer and Seller will be prepared consistently with such allocation. If Seller withholds its consent to the allocation reflected in the Asset Acquisition Statement, and Buyer and Seller have acted in good faith to resolve any differences with respect to items on the Asset Acquisition Statement and thereafter are unable to resolve any differences that, in the aggregate, are material in relation to the Purchase Price, then any remaining disputed matters will be finally and conclusively determined by an independent accounting
firm of recognized national standing (the "Allocation Arbiter") selected by Buyer and Seller, which firm shall not be the regular accounting firm of Buyer or Seller. Promptly, but not later than 15 days after its acceptance of appointment hereunder, the Allocation Arbiter will determine (based solely on presentations by Seller and Buyer and not by independent review) only those matters in dispute and will render a written report as to the disputed matters and the resulting allocation of Purchase Price (together with any assumed liabilities), which report shall be conclusive and binding upon the parties. Buyer and Seller shall, subject to the requirements of any applicable tax law or election, file all Tax Returns and reports consistent with the allocation provided in the Asset Acquisition Statement or, if applicable, the determination of the Allocation Arbiter.

PROVISIONS RELATING TO TAX REPRESENTATIONS

Taxes.

Tax Returns. All material tax returns, reports and forms (collectively, the “Tax Returns”) required to be filed on or before the Closing Date by Seller with respect to the Purchased Assets or the Divisions with any domestic or foreign taxing authority have been or will be filed in accordance with all applicable laws, are in all material respects true, complete and correct, and all Taxes, which were shown to be due on such Tax Returns have been or will be paid (either directly by Seller or indirectly through applicable tax sharing arrangements) prior to their due dates; provided however, that the representations and warranties set forth in this Section are made only to the extent that Taxes (i) are or may become liens on the Purchased Assets or (ii) for which Buyer is or may be liable in the capacity of transferee of the Purchased Assets.

Allocations. Seller is not a party to any Tax allocation or sharing agreement with respect to the Divisions (including any such agreement between Seller and Sub Co. or LLC).

Non-deductible Payments. Seller, with respect to the Divisions or the Purchased Assets has not made any payments, is not obligated to make any payments and is not a party to any agreement that could obligate it to make any future payments that will not be fully deductible under Sections 162(m) or 280G of the Code.

Tax Liens. Except as set forth on the Disclosure Schedule, none of the Purchased Assets and none of the assets or properties of Sub Co. or LLC (i) is subject to any Lien arising in connection with any failure or alleged failure to pay any Tax, (ii) secures any debt the interest on which is tax-exempt under Section 103(a) of the Code, (iii) is “tax-exempt use property” within the meaning of Section 168(h) of the Code, (iv) is “tax exempt bond financing property” within the meaning of Section 168(g)(5) of the Code, (v) is “limited use property” with the meaning of Revenue Procedure 76-30 or (vi) will be treated as owned by any other person pursuant to the provisions of Section 168(f)(8) of the Code. The transactions contemplated by this Agreement are not subject to tax withholding pursuant to the provisions of Section
3406 or Subchapter A of Chapter 3 of the Code or any other provision of applicable Law. Seller is not a corporation other than a United States corporation within the meaning of the Code.

**LLC.** LLC has always been treated as a partnership for federal, state and local income tax purposes. Except as set forth on the Disclosure Schedule, there does not exist any agreement for the sale of additional interests in the capital or profits of LLC. Seller has provided, or will provide prior to Closing, Buyer with correct and complete copies of the federal, state and local income Tax Returns filed on behalf of LLC and all Schedules K-1 delivered to Seller with respect to LLC. There is no partnership minimum gain or partnership nonrecourse debt minimum gain, as such terms are defined in Treasury Regulations Section 1.704-2(b)(2) and 1.704(i)(2), respectively, currently allocable to Seller’s interest in LLC. The members’ capital accounts of LLC have not been increased or decreased because of a revaluation of property or LLC under Treasury Regulation Section 1.704-1(b)(2)(iv)(f) and no event has occurred that would allow such a revaluation to be made. No audit, appeal or other judicial or administrative proceeding is pending or, to Seller’s knowledge, overtly threatened with respect to any Tax item involving LLC.

**PROVISIONS RELATING TO TAX COVENANTS (INCLUDING PARTIES’ AGREEMENT TO MAKE A CODE § 338(H)(10) ELECTION WITH RESPECT TO SUB CO.)**

**Agreements Regarding Tax Matters.**

**Tax Returns.** Seller and Buyer will each provide the other party with such assistance as may reasonably be requested in connection with preparation of any Tax Return, audit or other examination by any taxing authority or judicial or administrative proceeding relating to liability for Taxes, will each retain and provide to the other party all records and other information that may be relevant to any such Tax Return, audit or examination, proceeding or determination and will each provide the other party with any final determination of any such audit or examination, proceeding or determination that affects any amount required to be shown on any Tax Return of the other party for any period. Without limiting the generality of the foregoing, each of Buyer and Seller will retain, until the expiration of the applicable statutes of limitation (including any extensions thereof) copies of all Tax Returns, supporting work schedules and other records relating to Tax periods or portions thereof ending on or prior to the Closing Date.

**Tax Return Packages.** Buyer will cause appropriate Division employees and employees of Sub Co. and LLC to prepare usual and customary Tax Return packages with respect to the tax period beginning January ____, 19__ and ending as of the Closing Date. Buyer will use its commercially reasonable efforts to cause such Tax Return packages to be delivered to Seller on or before March ____, 19__, but in any event not later than May ____, 19__. 
**Payroll Records.** Seller and Buyer agree that Buyer has purchased substantially all of the property used in the Divisions and that in connection therewith Buyer will employ individuals who immediately before the Closing Date were employed in such trade or business by Seller. Accordingly, pursuant to Rev. Proc. 96-60, 1996-2 C.B. 399, provided that Seller makes available to Buyer all necessary payroll records for the calendar year that includes the Closing Date, Buyer will furnish a Form W-2 to each employee employed by Buyer who had been employed by Seller, disclosing all wages and other compensation paid for such calendar year, and Taxes withheld therefrom, and Seller will be relieved of the responsibility to do so.

**Tax Sharing Agreements With Subsidiaries.** Any tax sharing agreements between Seller and Sub Co. or LLC will terminate as of the Closing Date and will have no further effect for any taxable year (whether past, current or future).

**Stub Period For Subsidiaries.** Seller will include the taxable income or loss of Sub Co. and LLC (including any deferred income triggered into income under Treasury Regulation Section 1.1502-13 and 1.1502-14 and any excess loss accounts taken into income under Treasury Regulation Section 1.1502-1) on Seller’s consolidated federal income Tax returns for all periods through the Closing Date and pay any federal income taxes attributable to such income. The income of Sub Co. and LLC will be apportioned through the period up to and including the Closing date and the period after the Closing Date by closing the books of Sub Co. and LLC as of the Closing Date.

**338(h)(10) Election.** Buyer and Seller will join in making an election under Sections 338(g) and 338(h)(10) of the Code and any corresponding elections under state, local or foreign law (collectively, a “Section 338(h)(10) Election”) with respect to the purchase of the shares of the capital stock of Sub Co. by Buyer pursuant to this Agreement. Seller shall be liable for, and shall pay, any Tax attributable to the making of the Section 338(h)(10) Election and will indemnify Buyer and its Affiliates (including Sub Co.) from and against any Tax liability or other adverse consequences arising out of any failure to pay such Tax. Seller will also pay any state, local or foreign Tax (and will indemnify Buyer and its Affiliates (including Sub Co.) from and against any Tax liability or other adverse consequence arising out of any failure to pay such Tax) attributable to an election under state, local or foreign law similar to the election available under Section 338(h) of the Code (or which results from making of any election under Section 338(h) of the Code) with respect to the purchase of the shares of Sub Co. pursuant to this Agreement where the state, local or foreign tax jurisdiction does not provide for or recognize the Section 338(h)(10) Election.

**Clearance Certificates.** On or prior to the Closing Date, Seller will provide Buyer, at Buyer’s request, with all clearance certificates or similar documents that may be required by any state, local or other taxing authority in order to relieve Buyer of any obligation to withhold or escrow any portion of the Purchase Price. On or prior to the Closing Date, Seller will furnish to Buyer an affidavit stating, under penalty of
perjury, Seller’s United states taxpayer identification number and that Seller is no a foreign person, pursuant to Section 1445(b)(2) of the Code.

APPENDIX D

TAX SHARING AGREEMENT

This Agreement is entered into as of ________, 1997 by and between Distributing Co. and Controlled Co. (Distributing Co. and Controlled Co. are sometimes collectively referred to herein as the “Companies”). Capitalized terms used in this Agreement are defined in Section 1 below. Unless otherwise indicated, all “Section” references in this Agreement are to sections of this Agreement.
RECITALS

WHEREAS, as of the date hereof, Distributing Co. is the common parent of an affiliated group of corporations, including Controlled Co., which has elected to file consolidated Federal income tax returns; and

WHEREAS, the Companies have entered into a Distribution Agreement setting forth the corporate transactions pursuant to which Distributing Co. will distribute all of the outstanding shares of common stock of Controlled Co. to Distributing Co. shareholders in a transaction intended to qualify as a tax-free distribution under Section 355 of the Code (as defined below); and

WHEREAS, as a result of the Distribution, Controlled Co. and its subsidiaries will cease to be members of the affiliated group of which Distributing Co. is the common parent, effective as of the Distribution Date; and

WHEREAS, the Companies desire to provide for and agree upon the allocation between the parties of liabilities for Taxes arising prior to, as a result of, and subsequent to the transactions contemplated by the Distribution Agreement, and to provide for and agree upon other matters relating to Taxes;

NOW THEREFORE, in consideration of the mutual agreements contained herein, the Companies hereby agree as follows:

Section 1. Definition of Terms. For purposes of this Agreement (including the recitals hereof), the following terms have the following meanings:

“Accounting Cutoff Date” means, with respect to Controlled Co., any date as of the end of which there is a closing of the financial accounting records for such entity.

“Accounting Firm” shall have the meaning provided in Section 15.

“Adjustment Request” means any formal or informal claim or request filed with any Tax Authority, or with any administrative agency or court, for the adjustment, refund, or credit of Taxes, including (a) any amended Tax return claiming adjustment to the Taxes as reported on the Tax Return or, if applicable, as previously adjusted, or (b) any claim for refund or credit of Taxes previously paid.

“Affiliate” means any entity that directly or indirectly is “controlled” by the person or entity in question. “Control” means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through ownership of voting securities, by contract or otherwise. Except as otherwise provided herein, the term Affiliate shall refer to Affiliates of a person as determined immediately after the Distribution.

“Agreement” shall mean this Tax Sharing Agreement.
“Allocated Federal Tax Liability” shall have the meaning provided in Section 5.01(b)(i).

“Carryback” means any net operating loss, net capital loss, excess tax credit, or other similar Tax item which may or must be carried from one Tax Period to another Tax Period under the Code or other applicable Tax Law.


“Companies” means Distributing Co. and Controlled Co., collectively, and "Company" means any one of Distributing Co. and Controlled Co.

“Consolidated or Combined Income Tax” means any Income Tax computed by reference to the assets and activities of members of more than one Group.

“Consolidated or Combined State Income Tax” means any State Income Tax computed by reference to the assets and activities of members of more than one Group.

“Consolidated Tax Liability” means, with respect to any Distributing Co. Federal Consolidated Return, the "tax liability of the group" as that term is used in Treasury Regulation Section 1.1552-1 (a)(1) (including applicable interest, additions to the tax, additional amounts, and penalties as provided in the Code), adjusted as follows:

(i) such tax liability be treated as including any alternative minimum tax liability under Code Section 55; and

(ii) in the case of the Tax Period which includes the Distribution Date, the Consolidated Tax Liability shall be computed as if the Distribution Date were the last day of the Tax Period.

“Controlled Adjustment” means any proposed adjustment by a Tax Authority or claim for refund asserted in a Tax Contest to the extent Controlled Co. would be exclusively liable for any resulting Tax under this Agreement and exclusively entitled to receive any resulting Tax Benefit under this Agreement.

“Controlled Group” means Controlled Co. and its Affiliates as determined immediately after the Distribution.

“Controlled Group Prior Federal Tax Liability” shall have the meaning provided in Section 2.02(b)(ii).

“Controlled Group Prior State Tax Liability” shall have the meaning provided in Section 2.03(b)(ii)(B).

“Controlled Group Recomputed Federal Tax Liability” shall have the meaning provided in Section 2.02(b)(i).
“Controlled Group Recomputed State Tax Liability” shall have the meaning provided in Section 2.03(b)(ii)(A).

“Cumulative Federal Tax Payment” shall have the meaning provided in Section 5.01(b)(ii).

“Distributing Adjustment” means any proposed adjustment by a Tax Authority or claim for refund asserted in a Tax Contest to the extent Distributing Co. would be exclusively liable for any resulting Tax under this Agreement and exclusively entitled to receive any resulting Tax Benefit under this Agreement.

“Distributing Federal Consolidated Return” means any United States federal Tax Return for the affiliated group (as that term is defined in Code Section 1504) that includes Distributing Co. as the common parent and includes any member of the Controlled Group or Distributing Co.

“Distributing Group” means Distributing Co. and its Affiliates, excluding any entity that is a member of the Controlled Group.

“Distribution Agreement” means the agreement, as amended from time to time, setting forth the corporate transactions required to effect the distribution to Distributing Co. shareholders of Controlled Co. Common Shares, and to which this Tax Sharing Agreement is attached as an exhibit.

“Distribution Date” means the Distribution Date as that term is defined in the Distribution Agreement.

“Distribution” means the distribution to Distributing Co. shareholders on the Distribution Date of all of the outstanding stock of Controlled Co. owned by Distributing Co.

“Federal Allocation Method” shall have the meaning provided in Section 2.02(a).


“Federal Tax Adjustment” shall have the meaning provided in Section 2.02(b).

“Foreign Income Tax” means any Tax imposed by any foreign country or any possession of the United States, or by any political subdivision of any foreign country or United States possession, which is an income tax as defined in Treasury Regulation Section 1.901-2.

“Group” means the Distributing Co. Group or the Controlled Co. Group, as the context requires.


“Joint Adjustment” means any proposed adjustment by a Tax Authority or claim for refund asserted in a Tax Contest which is neither a Controlled Adjustment nor a Distributing Adjustment.
“Payment Date” means (i) with respect to any Distributing Co. Federal Consolidated Return, the due date for any required installment of estimated taxes determined under Code Section 6655, the due date (determined without regard to extensions) for filing the return determined under Code Section 6072, and the date the return is filed, and (ii) with respect to any Tax Return for any Consolidated or Combined State Income Tax, the corresponding dates determined under the applicable Tax Law.

“Post-Distribution Period” means any Tax Period beginning after the Distribution Date, and, in the case of any Straddle Period, the portion of such Straddle Period beginning the day after the Distribution Date.

“Pre-Distribution Period” means any Tax Period ending on or before the Distribution Date, and, in the case of any Straddle Period, the portion of such Straddle Period ending on the Distribution Date.

“Prime Rate” means the base rate on corporate loans charged by Citibank, N.A., New York, New York from time to time, compounded daily on the basis of a year of 365 or 366 (as applicable) days and actual days elapsed.

“Prior Intercompany Tax Allocation Agreements” means any written or oral agreement or any other arrangements relating to allocation of Taxes existing between or among the Distributing Group and the Controlled Group as of the Distribution Date (other than this Agreement and other than any such agreement or arrangement between or among persons who are members of a single Group).

“Prohibited Action” shall have the meaning provided in Section 11.

“Responsible Company” means, with respect to any Tax Return, the Company having responsibility for preparing and filing such Tax Return under this Agreement.

“Restructuring Tax” means the Taxes described in Sections 2.06(a)(ii) or 2.06(a)(iii) (relating to Tax resulting from any income or gain recognized as a result of the Transactions).

“Ruling Request” means the letter filed by Distributing Co. with the Internal Revenue Service requesting a ruling from the Internal Revenue Service regarding certain tax consequences of the Transactions (including all attachments, exhibits, and other materials submitted with such ruling request letter) and any amendment or supplement to such ruling request letter.

“Separate Company Tax” means any Tax computed by reference to the assets and activities of a member or members of a single Group.

“Straddle Period” means any Tax Period that begins on or before and ends after the Distribution Date.
“State Income Tax” means any Tax imposed by any State of the United States or by any political subdivision of any such State which is imposed on or measured by net income, including state and local franchise or similar Taxes measured by net income.

“Tax” or “Taxes” means any income, gross income, gross receipts, profits, capital stock, franchise, withholding, payroll, social security, workers compensation, unemployment, disability, property, ad valorem, stamp, excise, severance, occupation, service, sales, use, license, lease, transfer, import, export, value added, alternative minimum, estimated or other similar tax (including any fee, assessment, or other charge in the nature of or in lieu of any tax) imposed by any governmental entity or political subdivision thereof, and any interest, penalties, additions to tax, or additional amounts in respect of the foregoing.

“Tax Authority” means, with respect to any Tax, the governmental entity or political subdivision thereof that imposes such Tax, and the agency (if any) charged with the collection of such Tax for such entity or subdivision.

“Tax Benefit” means any refund, credit, or other reduction in otherwise required Tax payments (including any reduction in estimated tax payments).

“Tax Contest” means an audit, review, examination, or any other administrative or judicial proceeding with the purpose or effect of redetermining Taxes of any of the Companies or their Affiliates (including any administrative or judicial review of any claim for refund) for any Tax Period ending on or before the Distribution Date or any Straddle Period.

“Tax Contest Committee” shall have the meaning provided in Section 9.02(b).

“Tax Item” means, with respect to any Income Tax, any item of income, gain, loss, deduction, and credit.

“Tax Law” means the law of any governmental entity or political subdivision thereof relating to any Tax.

“Tax Period” means, with respect to any Tax, the period for which the Tax is reported as provided under the Code or other applicable Tax Law.

“Tax Records” means Tax Returns, Tax Return workpapers, documentation relating to any Tax Contests, and any other books of account or records required to be maintained under the Code or other applicable Tax Laws or under any record retention agreement with any Tax Authority.

“Tax Return” means any report of Taxes due, any claims for refund of Taxes paid, any information return with respect to Taxes, or any other similar report, statement, declaration, or document required to be filed under the Code or other Tax Law, including any attachments, exhibits, or other materials submitted with any of the foregoing, and including any amendments or supplements to any of the foregoing.

“Transactions” means the transactions contemplated by the Distribution Agreement.
“Treasury Regulations” means the regulations promulgated from time to time under the Code as in effect for the relevant Tax Period.

Section 2. Allocation of Tax Liabilities. The provisions of this Section 2 are intended to determine each Company's liability for Taxes with respect to Pre-Distribution Periods. Once the liability has been determined under this Section 2, Section 5 determines the time when payment of the liability is to be made, and whether the payment is to be made to the Tax Authority directly or to the other Company.

2.1 General Rule

(1) Distributing Co. Liability. Distributing Co. shall be liable for Taxes not specifically allocated to the Controlled Co. under this Section 2. Distributing Co. shall indemnify and hold harmless the Controlled Group from and against any liability for Taxes for which Distributing Co. is liable under this Section 2.01(a).

(2) Controlled Co. Liability. Controlled Co. shall be liable for, and shall indemnify and hold harmless the Distributing Group from and against any liability for, Taxes which are allocated to Controlled Co. under this Section 2.01(b).

2.2 Allocation of United States Federal Income Tax. Except as provided in Section 2.06:

(1) Allocation of Tax Relating to Federal Consolidated Returns Filed After the Distribution Date. With respect to any Distributing Co. Federal Consolidated Return filed after the Distribution Date, the Consolidated Tax Liability shall be allocated among the Groups in accordance with the method prescribed in Treasury Regulation Section 1.1552-1(a)(1) (as in effect on the date hereof) determined by treating each Group as a single member of the consolidated group (the “Federal Allocation Method”). For purposes of such allocation, the excess, if any, of (i) Consolidated Tax Liability over (ii) Consolidated Tax Liability determined without regard to any alternative minimum tax liability under Code Section 55, shall be allocated among the Groups in accordance with their respective amounts of alternative minimum taxable income, and any corresponding alternative minimum tax credit shall be allocated in accordance with the allocation of such alternative minimum tax liability. Any amount so allocated to the Controlled Group shall be a liability of Controlled Co. to Distributing Co. under this Section 2. Amounts described in Code Section 1561 (relating to limitations on certain multiple benefits) shall be divided equally among the Distributing Group and Controlled Group to the extent permitted by the Code.

(2) Allocation of Federal Consolidated Return Tax Adjustments. If there is any adjustment to the reported Tax liability with respect to any Distributing Co. Federal Consolidated Return, or to such Tax liability as previously adjusted, Controlled Co. shall be liable to Distributing Co. for the excess (if any) of--

(i) the Consolidated Tax Liability of the Controlled Group computed as if all members of the Controlled Group included in the Tax Return had filed a consolidated Tax Return for such members based on the Tax Items of such members as so adjusted (the Controlled Co. Group Recomputed Federal Tax Liability”); over
(ii) the Consolidated Tax Liability of the Controlled Group computed as if such members of the Controlled Group had filed a consolidated Tax Return for such members based on the Tax Items of such members as reported (or, if applicable, as previously adjusted) (the “Controlled Group Prior Federal Tax Liability”).

If the Controlled Group Prior Federal Tax Liability exceeds the Controlled Group Recomputed Federal Tax Liability, Distributing Co. shall be liable to Controlled Co. for such excess. For purposes of this Section 2.02(b), if the Controlled Group has a net operating loss after taking into account the adjustments allocable to such group, the Recomputed Federal Tax Liability of the group shall be less than zero to the extent such net operating loss produces a Tax Benefit in consolidation for the applicable taxable year.

2.3 Allocation of State Income Taxes. Except as provided in Sections 2.04 and 2.06, State Income Taxes shall be allocated as follows:

1) Separate Company Taxes. In the case of any State Income Tax which is a Separate Company Tax, Controlled Co. shall be liable for such Tax imposed on any members of the Controlled Group.

2) Consolidated or Combined State Income Taxes. In the case of any Consolidated or Combined State Income Tax, the liability of Controlled Co. with respect to such Tax for any Tax Period shall be computed as follows:

1) Allocation of Tax Reported on Tax Returns Filed After the Distribution Date. In the case of any Consolidated or Combined State Income Tax reported on any Tax Return filed after the Distribution Date (excluding any amended return), Controlled Co. shall be liable to Distributing Co. for the State Income Tax liability computed as if all members of the Controlled Group included in the computation of such Tax had filed a consolidated or combined Tax Return for such Controlled Group members based on the income, apportionment factors, and other items of such members.

2) Allocation of Combined or Consolidated State Income Tax Adjustments. If there is any adjustment to the amount of Consolidated or Combined State Income Tax reported on any Tax Return (or as previously adjusted), the liability of the Controlled Group shall be recomputed as provided in this subparagraph. Controlled Co. shall be liable to Distributing Co. for the excess (if any) of--

   (A) the State Income Tax liability computed as if all members of the Controlled Group included in the Tax Return had filed a consolidated or combined Tax Return for such members based on the income, apportionment factors, and other items of such members as so adjusted (the “Controlled Group Recomputed State Tax Liability”); over

   (B) the State Income Tax liability computed as if such members of the Controlled Group had filed a consolidated or combined Tax Return for such
members based on the income, apportionment factors, and other items of such members as reported (or, if applicable, as previously adjusted) (the “Controlled Group Prior State Tax Liability”).

If the Controlled Group Prior State Tax Liability exceeds the Controlled Co. Group Recomputed State Tax Liability, Distributing Co. shall be liable to Controlled Co. for such excess. For purposes of this paragraph, the determination and payment of estimated Taxes (including the determination and payment of any Tax required to be paid with a request for an extension of time to file a Tax Return) shall not be treated as an adjustment to the related Consolidated or Combined State Income Tax.

2.4 Allocation of Other Taxes. Except as provided in Section 2.06, all Taxes other than those specifically allocated pursuant to Section 2.03 shall be allocated based on the legal entity on which the legal incidence of the Tax is imposed. As between the parties to this Agreement, Controlled Co. shall be liable for all Taxes imposed on any member of the Controlled Group. The Companies believe that there is no Tax not specifically allocated pursuant to Section 2.03 which is legally imposed on more than one legal entity (e.g., joint and several liability); however, if there is any such Tax, it shall be allocated in accordance with past practices as reasonably determined by the affected Companies, or in the absence of such practices, in accordance with any allocation method agreed upon by the affected Companies.

2.5 [Intentionally Omitted]

2.6 Transaction and Other Taxes

(1) **Distributing Co. Liability.** Except as otherwise provided in this Section 2.06, Distributing Co. shall be liable for, and shall indemnify and hold harmless the Controlled Group from and against any liability for, all Taxes resulting from the Transactions, including:

   (1) Any sales and use, gross receipts, or other transfer Taxes imposed on the transfers occurring pursuant to the Transactions;

   (2) any Tax resulting from any income or gain recognized under Treasury Regulation Sections 1.1502-13 or 1.1502-19 (or any corresponding provisions of other applicable Tax Laws) as a result of the Transactions; and

   (3) any Tax resulting from any income or gain recognized as a result of any of the transactions contemplated by the Distribution Agreement failing to qualify for tax-free treatment.

(2) **Indemnify for Inconsistent Acts.** Controlled Co. shall be liable for, and shall indemnify and hold harmless the Distributing Group from and against any liability for, any Restructuring Tax (described in subparagraphs (ii) and (iii) above) to the extent arising from any breach of Controlled Co.’s representations or covenants under Section 11.

(3) **Indemnity for Representations.** Controlled Co. shall be liable for, and shall indemnify and hold harmless the Distribution Group from and against any liability for, any
Restructuring Tax to the extent arising from the inaccuracy of any factual statements or representations in connection with the Ruling Request but in each case only to the extent such inaccuracy arises from facts in existence prior to the Distribution Date and excluding any inaccuracy with respect to any statements or representations relating to Distributing Co. and its Affiliates or any plan or intention on the part of Distributing Co. and its Affiliates as to actions to be taken at or subsequent to the Distribution Date.

Section 3. Proration of Taxes for Straddle Periods

3.1 General Method of Proration. In the case of any Straddle Period, Tax Items shall be apportioned between Pre-Distribution Periods and Post-Distribution Periods in accordance with the principles of Treasury Regulation Section 1.1502-76(b) as reasonably interpreted and applied by the Companies. No election shall be made under Treasury Regulation Section 1.1502-76(b)(2)(ii) (relating to ratable allocation of a year's items). If the Distribution Date is not an Accounting Cutoff Date, the provisions of Treasury Regulation Section 1.1502-76(b)(2)(iii) will be applied to ratably allocate the items (other than extraordinary items) for the month which includes the Distribution Date.

3.2 Transaction Treated as Extraordinary Item. In determining the apportionment of Tax Items between Pre-Distribution Periods and Post-Distribution Periods, any Tax Items relating to the Transactions shall be treated as extraordinary items described in Treasury Regulation Section 1.1502-76(b)(2)(ii)(C) and shall be allocated to Pre-Distribution Periods, and any Taxes related to such items shall be treated under Treasury Regulation Section 1.1502-76(b)(2)(iv) as relating to such extraordinary item and shall be allocated to Pre-Distribution Periods.

Section 4. Preparation and Filing of Tax Returns

4.1 General. Except as otherwise provided in this Section 4, Tax Returns shall be prepared and filed when due (including extensions) by the person obligated to file such Tax Returns under the Code or applicable Tax Law. The Companies shall provide, and shall cause their Affiliates to provide, assistance and cooperate with one another in accordance with Section 7 with respect to the preparation and filing of Tax Returns, including providing information required to be provided in Section 7. As used in this Section 4, the terms "domestic" and "foreign" have the meanings ascribed to such terms in Code Section 7701.

4.2 Distributing Co.’s Responsibility. Distributing Co. has the exclusive obligation and right to prepare and file, or to cause to be prepared and filed:

(1) Distributing Co. Federal Consolidated Returns for any Periods ending on, before or after the Distribution Date.

(2) Tax Returns for State Income Taxes (including Tax Returns with respect to State Income Taxes that are Separate Company Taxes) which the Companies reasonably determine, in accordance with Distributing Co.’s past practices, are required to be filed by the Companies or any of their Affiliates for Tax Periods ending on or before the Distribution Date other than Tax Returns with respect to State Income Taxes that are Separate Company Taxes of the Controlled Group for Tax Periods beginning on or after the Distribution Date.
4.3 **Controlled Co. Responsibility.** Controlled Co. shall prepare and file, or shall cause to be prepared and filed, all Tax Returns required to be filed by or with respect to members of the Controlled Group other than those Tax Returns which Distributing Co. is required to prepare and file under Section 4.02. The Tax Returns required to be prepared and filed by Controlled Co. under this Section 4.03 shall include (a) the Controlled Co. Federal Consolidated Return for Tax Periods ending after the Distribution Date and (b) Tax Returns for Consolidated or Combined State Income Taxes which the Companies reasonably determine, in accordance with Distributing Co.’s past practices, are required to be filed by the Companies or any of their Affiliates for Tax Periods ending after the Distribution Date.

4.4 **Tax Accounting Practices**

1. **General Rule.** Except as otherwise provided in this Section 4.04, any Tax Return for any Pre-Distribution Period or any Straddle Period, and any Tax Return for any Post-Distribution Period to the extent items reported on such Tax Return might reasonably affect items reported on any Tax Return for any Pre-Distribution Period or any Straddle Period, shall be prepared in accordance with past Tax accounting practices used with respect to the Tax Returns in question (unless such past practices are no longer permissible under the Code or other applicable Tax Law), and to the extent any items are not covered by past practices (or in the event such past practices are no longer permissible under the Code or other applicable Tax Law), in accordance with reasonable Tax accounting practices selected by the Responsible Company.

2. **Reporting of Transaction Tax Items.** The tax treatment reported on any Tax Return of Tax Items relating to the Transactions shall be consistent with the treatment of such item in the IRS Ruling Letter (as such term is defined in the Distribution Agreement) (unless such treatment is not permissible under the Code). To the extent there is a Tax Item relating to the Transactions which is not covered by the IRS Ruling Letter, the Companies shall agree on the tax treatment of any such Tax Item reported on any Tax Return. For this purpose, the tax treatment of such Tax Items on a Tax Return shall be determined by the Responsible Company with respect to such Tax Return and shall be agreed to by the other Company unless either (i) there is no reasonable basis for such tax treatment, or (ii) such tax treatment is inconsistent with the tax treatment contemplated in the Ruling Request. Such Tax Return shall be submitted for review pursuant to Section 4.06(a), and any dispute regarding such proper tax treatment shall be referred for resolution pursuant to Section 15, sufficiently in advance of the filing date of such Tax Return (including extensions) to permit timely filing of the return.

4.5 **Consolidated or Combined Returns.** The Companies will elect and join, and will cause their respective Affiliates to elect and join, in filing consolidated, unitary, combined, or other similar joint Tax Returns, to the extent each entity is eligible to join in such Tax Returns, if the Companies reasonably determine that the filing of such Tax Returns is consistent with past reporting practices, or in the absence of applicable past practices, will result in the minimization of the net present value of the aggregate Tax to the entities eligible to join in such Tax Returns.

4.6 **Right to Review Tax Returns**

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General. The Responsible Company with respect to any Tax Return shall make such Tax Return and related workpapers available for review by the other Companies, if requested, to the extent (i) such Tax Return relates to Taxes for which the requesting party may be liable, (ii) such Tax Return relates to Taxes for which the requesting party may be liable in whole or in part for any additional Taxes owing as a result of adjustments to the amount of Taxes reported on such Tax Return, (iii) such Tax Return relates to Taxes for which the requesting party may have a claim for Tax Benefits under this Agreement, or (iv) the requesting party reasonably determines that it must inspect such Tax Return to confirm compliance with the terms of this Agreement. The Responsible Company shall use its reasonable best efforts to make such Tax Return available for review as required under this paragraph sufficiently in advance of the due date for filing such Tax Returns to provide the requesting party with a meaningful opportunity to analyze and comment on such Tax Returns and have such Tax Returns modified before filing, taking into account the person responsible for payment of the tax (if any) reported on such Tax Return and the materiality of the amount of Tax liability with respect to such Tax Return. The Companies shall attempt in good faith to resolve any issues arising out of the review of such Tax Returns.

Execution of Returns Prepared by Other Party. In the case of any Tax Return which is required to be prepared and filed by one Company under this Agreement and which is required by law to be signed by another Company (or by its authorized representative), the Company which is legally required to sign such Tax Return shall not be required to sign such Tax Return under this Agreement if there is no reasonable basis for the tax treatment of any material items reported on the Tax Return.

Claims for Refund, Carrybacks, and Self-Audit Adjustments (“Adjustment Requests”)

Consent Required for Adjustment Requests Related to Consolidated or Combined Income Taxes. Except as provided in paragraph (b) below, each of the Companies hereby agrees that, unless each of the other Companies consents in writing, which consent shall not be unreasonably withheld, (i) no Adjustment Request with respect to any Consolidated or Combined Income Tax for a Pre-Distribution Period shall be filed, and (ii) any available elections to waive the right to claim in any Pre-Distribution Period with respect to any Consolidated or Combined Income Tax any Carryback arising in a Post-Distribution Period shall be made, and no affirmative election shall be made to claim any such Carryback. Any Adjustment Request which the Companies consent to make under this Section 4.07 shall be prepared and filed by the Responsible Company under Section 4.02 for the Tax Return to be adjusted. The Company requesting the Adjustment Request shall provide to the Responsible Company all information required for the preparation and filing of such Adjustment Request in such form and detail as reasonably requested by the Responsible Company.

Exception for Adjustment Requests Related to Audit Adjustments. Controlled Co. shall be entitled, without the consent Distributing Co., to require Distributing Co. to file an Adjustment Request to take into account any net operating loss, net capital loss, deduction, credit, or other adjustment attributable to such Controlled Co. or any member of its Group corresponding to any adjustment resulting from any audit by the Internal Revenue Service or other Tax Authority with respect to Consolidated or Combined Income Taxes for any Pre-Distribution Tax Period. For
example, if the Internal Revenue Service requires Controlled Co. to capitalize an item deducted for the taxable year 1993, Controlled Co. shall be entitled, without the consent of Distributing Co., to require Distributing Co. to file an Adjustment Request for the taxable year 1994 (and later years) to take into account any depreciation or amortization deductions in such years directly related to the item capitalized in 1993.

(3) **Other Adjustment Requests Permitted.** Nothing in this Section 4.07 shall prevent any Company or its Affiliates from filing any Adjustment Request with respect to Income Taxes which are not Consolidated or Combined Income Taxes or with respect to any Taxes other than Income Taxes. Any refund or credit obtained as a result of any such Adjustment Request (or otherwise) shall be for the account of the person liable for the Tax under this Agreement.

(4) **Payment of Refunds.** Any refunds or other Tax Benefits received by any Company (or any of its Affiliates) as a result of any Adjustment Request which are for the account of another Company (or member of such other Company's Group) shall be paid by the Company receiving (or whose Affiliate received) such refund or Tax Benefit to such other Company in accordance with Section 6.

Section 5. **Tax Payments and Intercompany Billings**

5.1 Payment of Taxes With Respect to Distributing Co. Federal Consolidation Returns Filed After the Distribution Date. In the case of any Distributing Co. Federal Consolidated Return the due date for which (including extensions) is after the Distribution Date:

(1) **Computation and Payment of Tax Due.** At least three business days prior to any Payment Date, the Responsible Company shall compute the amount of Tax required to be paid to the Internal Revenue Service (taking into account the requirements of Section 4.04 relating to consistent accounting practices) with respect to such Tax Return on such Payment Date and, if Distributing Co. is not the Responsible Company with respect to such Tax Return, shall notify Distributing Co. in writing of the amount of Tax required to be paid on such Payment Date. Distributing Co. will pay such amount to the Internal Revenue Service on or before such Payment Date.

(2) **Computation and Payment of Controlled Co. Liability With Respect to Tax Due.** Within 30 days following any Payment Date, Controlled Co. will pay to Distributing Co. the excess (if any) of--

(1) the Consolidated Tax Liability determined as of such Payment Date with respect to the applicable Tax Period allocable to the members of the Controlled Group as determined by the Responsible Company in a manner consistent with the Section 2.02(a) (relating to allocation of the Consolidated Tax Liability in accordance with the Federal Allocation Method) (the “Allocated Federal Tax Liability”), over

(2) the cumulative net payment with respect to such Tax Return prior to such Payment Date by the members of the Controlled Group (the “Cumulative Federal Tax Payment”).
If the Controlled Group Cumulative Federal Tax Payment is greater than the Controlled Group Allocated Federal Tax Liability as of any Payment Date, then Distributing Co. shall pay such excess to Controlled Co. within 30 days of Distributing Co.’s receipt of the corresponding Tax Benefit (i.e., through either a reduction in Distributing Co.’s otherwise required Tax payment or a refund of prior tax payments).

(3) **Deemed Cumulative Federal Tax Payment for First Payment Date After the Distribution Date.** For purposes of Sections 5.01(b)(ii) with respect to the Distributing Co. Federal Consolidated Tax Return for the taxable year ended [prior to the year in which the distribution occurs], the Distributing Co. Group’s Cumulative Federal Tax Payment shall be equal to $__________.

(4) **Interest on Intergroup Tax Allocation Payments.** In the case of any payments to Distributing Co. required under paragraphs (b) of this subsection 5.01, Controlled Co. shall also pay to Distributing Co. an amount of interest computed at the Prime Rate on the amount of the payment required based on the number of days from the applicable Payment Date to the date of payment. In the case of any payments by Distributing Co. required under paragraphs (b) of this subsection 5.01, Distributing Co. shall also pay to Controlled Co. an amount of interest computed at the Prime Rate on the amount of the payment required based on the number of days from the date of receipt of the Tax Benefit to the date of payment of such amount to Controlled Co.

5.2 Payment of Federal Income Tax Related to Adjustments

(1) **Adjustments Resulting in Underpayments.** Distributing Co. shall pay to the Internal Revenue Service when due any additional Federal Income Tax required to be paid as a result of adjustment to the Tax liability with respect to any Distributing Co. Federal Consolidated Return for any Pre-Distribution Period. The Responsible Company shall compute the amount attributable to the Controlled Group in accordance with Section 2.02(b) and Controlled Co. shall pay to Distributing Co. any amount due Distributing Co. under Section 2.02(b) within 30 days from the later of (i) the date the additional Tax was paid by Distributing Co. or (ii) the date of receipt by Controlled Co. of a written notice and demand from Distributing Co. for payment of the amount due, accompanied by evidence of payment and a statement detailing the Taxes paid and describing in reasonable detail the particulars relating thereto. Any payments required under this Section 5.02(a) shall include interest computed at the Prime Rate based on the number of days from the date the additional Tax was paid by Distributing Co. to the date of the payment under this Section 5.02(a).

(2) **Adjustments Resulting in Overpayments.** Within 30 days of receipt by Distributing Co. of any Tax Benefit resulting from any adjustment to the Consolidated Tax Liability with respect to any Distributing Co. Federal Consolidated Return for any Pre-Distribution Period, Distributing Co. shall pay to Controlled Co., or Controlled Co. shall pay to Distributing Co. (as the case may be), their respective amounts due from or to Distributing Co. as determined by the Responsible Company in accordance with Section 2.02(b). Any payments required under this Section 5.02(a) shall include interest computed at the Prime Rate based on the number of days from the date the Tax Benefit was received by Distributing Co. to the date of payment to Controlled Co. under this Section 5.02(a).
5.3 Payment of State Income Tax With Respect to Returns Filed After the Distribution Date

(1) Computation and Payment of Tax Due. At least three business days prior to any Payment Date for any Tax Return with respect to any State Income Tax, the Responsible Company shall compute the amount of Tax required to be paid to the applicable Tax Authority (taking into account the requirements of Section 4.04 relating to consistent accounting practices) with respect to such Tax Return on such Payment Date and --

(1) If such Tax Return is with respect to a Consolidated or Combined State Income Tax, the Responsible Company shall, if Distributing Co. is not the Responsible Company with respect to such Tax Return, notify Distributing Co. in writing of the amount of Tax required to be paid on such Payment Date. Distributing Co. will pay such amount to such Tax Authority on or before such Payment Date.

(2) If such Tax Return is with respect to a Separate Company Tax, the Responsible Company shall, if it is not the Company liable for the Tax reported on such Tax Return, notify the Company liable for such Tax in writing of the amount of Tax required to be paid on such Payment Date. The Company liable for such Tax will pay such amount to such Tax Authority on or before such Payment Date.

(2) Computation and Payment of Controlled Co. Liability With Respect To Tax Due. Within 120 days following the due date (including extensions) for filing any Tax Return for any Consolidated or Combined State Income Tax (excluding any Tax Return with respect to payment of estimated Taxes or Taxes due with a request for extension of time to file), (i) Controlled Co. shall pay to Distributing Co. the tax liability allocable to the Controlled Group as determined by the Responsible Company under the provisions of Section 2.03(b)(i), plus interest computed at the Prime Rate on the amount of the payment based on the number of days from the due date (including extensions) to the date of payment by Controlled Co. to Distributing Co., and (ii) the Responsible Company shall notify Distributing Co. (if Distributing Co. is not the Responsible Company with respect to such Tax Return).

5.4 Payment of State Income Taxes Related to Adjustments

(1) Adjustments Resulting in Underpayments. Distributing Co. shall pay to the applicable Tax Authority when due any additional State Income Tax required to be paid as a result of any adjustment to the tax liability with respect to any Tax Return for any Consolidated or Combined State Income Tax for any Pre-Distribution Period. Controlled Co. shall pay to Distributing Co. its respective share of any such additional Tax payment determined by the Responsible Company in accordance with Section 2.03(b)(ii) within 120 days from the later of (i) the date the additional Tax was paid by Distributing Co. or (ii) the date of receipt by Controlled Co. of a written notice and demand from Distributing Co. for payment of the amount due, accompanied by evidence of payment and a statement detailing the Taxes paid and describing in reasonable detail the particulars relating thereto. Controlled Co. shall also pay to Distributing Co. interest on its respective share of such Tax computed at the Prime Rate based on the number of days from the date the additional Tax was paid by Distributing Co. to the date of its payment to Distributing Co. under this Section 5.04(a).
(2) **Adjustments Resulting in Overpayments.** Within 120 days of receipt by Distributing Co. of any Tax Benefit resulting from any adjustment to the tax liability with respect to any Tax Return for any Consolidated or Combined State Income Tax for any Pre-Distribution Period, Distributing Co. shall pay to Controlled Co. its respective share of any such Tax Benefit determined by the Responsible Company in accordance with Section 2.03(b)(ii). Distributing Co. shall also pay to Controlled Co. interest on its respective share of such Tax Benefit computed at the Prime Rate based on the number of days from the date the Tax Benefit was received by Distributing Co. to the date of payment to Controlled Co. under this Section 5.04(b).

5.5 **Payment of Separate Company Taxes.** Each Company shall pay, or shall cause to be paid, to the applicable Tax Authority when due all Separate Company Taxes owed by such Company or a member of such Company's Group.

5.6 **Indemnification Payments.** If any Company (the “payor”) is required to pay to a Tax Authority a Tax that another Company (the “responsible party”) is required to pay to such Taxing Authority under this Agreement, the responsible party shall reimburse the payor within 30 days of delivery by the payor to the responsible party of an invoice for the amount due, accompanied by evidence of payment and a statement detailing the Taxes paid and describing in reasonable detail the particulars relating thereto. The reimbursement shall include interest on the Tax payment computed at the Prime Rate based on the number of days from the date of the payment to the Tax Authority to the date of reimbursement under this Section 5.06.

**Section 6. Tax Benefits**

6.1 **General Rule.** If a member of one Group receives any Tax Benefit with respect to any Taxes for which a member of another Group is liable hereunder, the Company receiving such Tax Benefit shall make a payment to the Company who is liable for such Taxes hereunder within 30 days following receipt of the Tax Benefit in an amount equal to the Tax Benefit (including any Tax Benefit realized as a result of the payment), plus interest on such amount computed at the Prime Rate based on the number of days from the date of receipt of the Tax Benefit to the date of payment of such amount under this Section 6.01.

**Section 7. Assistance and Cooperation**

7.1 **General.** After the Distribution Date, each of the Companies shall cooperate (and cause their respective Affiliates to cooperate) with each other and with each other’s agents, including accounting firms and legal counsel, in connection with Tax matters relating to the Companies and their Affiliates including (i) preparation and filing of Tax Returns, (ii) determining the liability for and amount of any Taxes due (including estimated Taxes) or the right to and amount of any refund of Taxes, (iii) examinations of Tax Returns, and (iv) any administrative or judicial proceeding in respect of Taxes assessed or proposed to be assessed. Such cooperation shall include making all information and documents in their possession relating to the other Companies and their Affiliates available to such other Companies as provided in Section 8. Each of the Companies shall also make available to each other, as reasonably requested and available, personnel (including officers, directors, employees and agents of the Companies or their respective Affiliates) responsible for preparing, maintaining, and interpreting information and documents relevant to Taxes, and
personnel reasonably required as witnesses or for purposes of providing information or documents in connection with any administrative or judicial proceedings relating to Taxes. Any information or documents provided under this Section 7 shall be kept confidential by the Company receiving the information or documents, except as may otherwise be necessary in connection with the filing of Tax Returns or in connection with any administrative or judicial proceedings relating to Taxes.

7.2 Income Tax Return Information. Each Company will provide to each other Company information and documents relating to their respective Groups required by the other Companies to prepare Tax Returns. The Responsible Company shall determine a reasonable compliance schedule for such purpose in accordance with Distributing Co.’s past practices. Any additional information or documents the Responsible Company requires to prepare such Tax Returns will be provided in accordance with past practices, if any, or as the Responsible Company reasonably requests and in sufficient time for the Responsible Company to file such Tax Returns timely.

Section 8. Tax Records

8.1 Retention of Tax Records. Except as provided in Section 8.02, each Company shall preserve and keep all Tax Records exclusively relating to the assets and activities of their respective Groups for Pre-Distribution Tax Periods, and Distributing Co. shall preserve and keep all other Tax Records relating to Taxes of the Groups for Pre-Distribution Tax Periods, for so long as the contents thereof may become material in the administration of any matter under the Code or other applicable Tax Law, but in any event until the later of (i) the expiration of any applicable statutes of limitation, and (ii) seven years after the Distribution Date. If, prior to the expiration of the applicable statute of limitation and such seven-year period, a Company reasonably determines that any Tax Records which it is required to preserve and keep under this Section 8 are no longer material in the administration of any matter under the Code or other applicable Tax Law, such Company may dispose of such records upon 90 days prior notice to the other Company. Such notice shall include a list of the records to be disposed of describing in reasonable detail each file, book, or other record accumulation being disposed. The notified Company shall have the opportunity, at its cost and expense, to copy or remove, within such 90-day period, all or any part of such Tax Records.

8.2 State Income Tax Returns. Tax Returns with respect to State Income Taxes and workpapers prepared in connection with preparing such Tax Returns shall be preserved and kept, in accordance with the guidelines of Section 8.01, by the Company responsible for preparing and filing the applicable Tax Return.

8.3 Access to Tax Records. The Companies and their respective Affiliates shall make available to each other for inspection and copying during normal business hours upon reasonable notice all Tax Records in their possession to the extent reasonably required by the other Company in connection with the preparation of Tax Returns, audits, litigation, or the resolution of items under this Agreement.

Section 9. Tax Contests

9.1 Notice. Each of the parties shall provide prompt notice to the other parties of any pending or threatened Tax audit, assessment or proceeding or other Tax Contest of which it becomes aware related to Taxes for Tax Periods for which it is indemnified by other party hereunder. Such
notice shall contain factual information (to the extent known) describing any asserted Tax liability in reasonable detail and shall be accompanied by copies of any notice and other documents received from any Tax Authority in respect of any such matters. If an indemnified party has knowledge of an asserted Tax liability with respect to a matter for which it is to be indemnified hereunder and such party fails to give the indemnifying party prompt notice of such asserted Tax liability, then (i) if the indemnifying party is precluded from contesting the asserted Tax liability in any forum as a result of the failure to give prompt notice, the indemnifying party shall have no obligation to indemnify the indemnified party for any Taxes arising out of such asserted Tax liability, and (ii) if the indemnifying party is not precluded from contesting the asserted Tax liability in any forum, but such failure to give prompt notice results in a monetary detriment to the indemnifying party, then any amount which the indemnifying party is otherwise required to pay the indemnified party pursuant to this Agreement shall be reduced by the amount of such detriment.

9.2 Control of Tax Contests

(1) Separate Company Taxes. In the case of any Tax Contest with respect to any Separate Company Tax, the Company having liability for the Tax shall have exclusive control over the Tax Contest, including exclusive authority with respect to any settlement of such Tax liability.

(2) Consolidated or Combined Income Taxes. In the case of any Tax Contest with respect to any Consolidated or Combined Income Tax, (i) Distributing Co. shall control the defense or prosecution of the portion of the Tax Contest directly and exclusively related to any Distributing Adjustment, including settlement of any such Distributing Adjustment and (ii) Controlled Co. shall control the defense or prosecution of the portion of the Tax Contest directly and exclusively related to any Controlled Adjustment, including settlement of any such Controlled Adjustment, and (iii) the Tax Contest Committee shall control the defense or prosecution of Joint Adjustments and any and all administrative matters not directly and exclusively related to any Distributing Adjustment or Controlled Adjustment. The Tax Contest Committee shall be comprised of two persons, one person selected by Distributing Co. (as designated in writing to Controlled Co.) and one person selected by Controlled Co. (as designated in writing to Distributing Co.). Each person serving on the Tax Contest Committee shall continue to serve unless and until he or she is replaced by the party designating such person. Any and all matters to be decided by the Tax Contest Committee shall require the unanimous approval of both persons serving on the committee. In the event the Tax Contest Committee shall be deadlocked on any matter, the provisions of Section 15 of this Agreement shall apply. A Company shall not agree to any Tax liability for which another Company may be liable under this Agreement, or compromise any claim for any Tax Benefit which another Company may be entitled under this Agreement, without such other Company’s written consent (which consent may be given or withheld at the sole discretion of the Company from which the consent would be required).

Section 10. Effective Date; Termination of Prior Intercompany Tax Allocation Agreements. This Agreement shall be effective on the Distribution Date. Immediately prior to the close of business on the Distribution Date (i) all Prior Intercompany Tax Allocation Agreements shall be terminated, and (ii) amounts due under such agreements as of the Distribution Date shall be settled as of the Distribution Date (including capitalization or distribution of amounts due or receivable under such agreements). Upon such termination and settlement, no further payments by or to Distributing Co. or by or to the Controlled Co., with respect to such agreements shall be made,
and all other rights and obligations resulting from such agreements between the Companies and their Affiliates shall cease at such time. Any payments pursuant to such agreements shall be ignored for purposes of computing amounts due under this Agreement.

Section 11. No Inconsistent Actions. Each of the Companies covenants and agrees that it will not take any action, and it will cause its Affiliates to refrain from taking any action, which is inconsistent with the Tax treatment of the Transactions as contemplated in the Ruling Request (any such action is referred to in this Section 11 as a “Prohibited Action”), unless such Prohibited Action is required by law, or the person acting has obtained the prior written consent of each of the other parties (which consent shall not be unreasonably withheld). With respect to any Prohibited Action proposed by a Company or the Acquiror (the “Requesting Party”), each of the other parties (the “Requested Parties”) shall grant its consent to such Prohibited Action if the Requesting Party obtains a ruling with respect to the Prohibited Action from the Internal Revenue Service or other applicable Tax Authority that is reasonably satisfactory to each of the Requested Parties (except that the Requesting Party shall not submit any such ruling request if a Requested Party determines in good faith that filing such request might have a materially adverse effect upon such Requested Party). Without limiting the foregoing:

(1) No Inconsistent Plan or Intent

Controlled Co. and Distributing Co. each represents and warrants that neither it nor any of its Affiliates has any plan or intent to take any action which is inconsistent with any factual statements or representations in the Ruling Request. Regardless of any change in circumstances, Controlled Co. and Distributing Co. each covenant and agree that it will not take, and it will cause its Affiliates to refrain from taking, any such inconsistent action on or before the last day of the calendar year ending after the second anniversary of the Distribution Date other than as permitted in this Section 11.

(2) Amended or Supplemental Rulings. Each of the Companies covenants and agrees that it will not file, and it will cause its Affiliates to refrain from filing, any amendment or supplement to the Ruling Request subsequent to the Distribution Date without the consent of the other Companies, which consent shall not be unreasonably withheld.

Section 12. Survival of Obligations. The representations, warranties, covenants and agreements set forth in this Agreement shall be unconditional and absolute and shall remain in effect without limitation as to time.

Section 13. Employee Matters. Each of the Companies agrees to utilize, or cause its Affiliates to utilize, the alternative procedure set forth in Revenue Procedure 96-60, 1996-2 C.B. 399, with respect to wage reporting.

Section 14. Treatment of Payments; Tax Gross Up
14.1 *Treatment of Tax Indemnity and Tax Benefit Payments.* In the absence of any change in tax treatment under the Code or other applicable Tax Law,

(1) any Tax indemnity payments made by a Company under Section 5 shall be reported for Tax purposes by the payor and the recipient as distributions or capital contributions, as appropriate, occurring immediately before the distribution of the Controlled Co. Common Shares to Distributing Co. shareholders on the Distribution Date, but only to the extent the payment does not relate to a Tax allocated to the payor in accordance with Treasury Regulation Section 1.1502-33(d) (or under corresponding principles of other applicable Tax Laws), and

(2) any Tax Benefit payments made by a Company under Section 6, shall be reported for Tax purposes by the payor and the recipient as distributions or capital contributions, as appropriate, occurring immediately before the distribution of Controlled Co. Common Shares to Distributing Co. shareholders on the Distribution Date, but only to the extent the payment does not relate to a Tax allocated to the payor in accordance with Treasury Regulation Section 1.1502-33(d) (or under corresponding principles of other applicable Tax Laws).

14.2 *Tax Gross Up.* If notwithstanding the manner in which Tax indemnity payments and Tax Benefit payments were reported, there is an adjustment to the Tax liability of a Company as a result of its receipt of a payment pursuant to this Agreement, such payment shall be appropriately adjusted so that the amount of such payment, reduced by the amount of all Income Taxes payable with respect to the receipt thereof (but taking into account all correlative Tax Benefits resulting from the payment of such Income Taxes), shall equal the amount of the payment which the Company receiving such payment would otherwise be entitled to receive pursuant to this Agreement.

14.3 *Interest Under This Agreement.* Anything herein to the contrary notwithstanding, to the extent one Company (“indemnitor”) makes a payment of interest to another Company (“indemnitee”) under this Agreement with respect to the period from the date that the indemnitee made a payment of Tax to a Tax Authority to the date that the indemnitor reimbursed the indemnitee for such Tax payment, or with respect to the period from the date that the indemnitor received a Tax Benefit to the date indemnitor paid the Tax Benefit to the indemnitee, the interest payment shall be treated as interest expense to the indemnitor (deductible to the extent provided by law) and as interest income by the indemnitee (includible in income to the extent provided by law). The amount of the payment shall not be adjusted under Section 14.02 to take into account any associated Tax Benefit to the indemnitor or increase in Tax to the indemnitee.

Section 15. Disagreements. If after good faith negotiations the parties cannot agree on the application of this Agreement to any matter, then the matter will be referred to a nationally recognized accounting firm acceptable to each of the parties (the “Accounting Firm”). The Accounting Firm shall furnish written notice to the parties of its resolution of any such disagreement as soon as practical, but in any event no later than 45 days after its acceptance of the matter for resolution. Any such resolution by the Accounting Firm will be conclusive and binding on all parties to this Agreement. In accordance with Section 17, each party shall pay its own fees and expenses (including the fees and expenses of its representatives) incurred in connection with the referral of the matter to the Accounting Firm. All fees and expenses of the Accounting Firm in connection with such referral shall be shared equally by the parties affected by the matter.
Section 16. Late Payments. Any amount owed by one party to another party under this Agreement which is not paid when due shall bear interest at the Prime Rate plus two percent, compounded semiannually, from the due date of the payment to the date paid. To the extent interest required to be paid under this Section 16 duplicates interest required to be paid under any other provision of this Agreement, interest shall be computed at the higher of the interest rate provided under this Section 16 or the interest rate provided under such other provision.

Section 17. Expenses. Except as provided in Section 15, each party and its Affiliates shall bear their own expenses incurred in connection with preparation of Tax Returns, Tax Contests, and other matters related to Taxes under the provisions of this Agreement.

Section 18. General Provisions

18.1 Addresses and Notices. Any notice, demand, request or report required or permitted to be given or made to any party under this Agreement shall be in writing and shall be deemed given or made when delivered in party or when sent by first class mail or by other commercially reasonable means of written communication (including delivery by an internationally recognized courier service or by facsimile transmission) to the party at the party’s address as follows:

If to Distributing Co.: Director, Taxes
____________________
____________________

If to Controlled Co.: Director, Taxes
____________________
____________________

A party may change the address for receiving notices under this Agreement by providing written notice of the change of address to the other parties.

18.3 Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their successors and assigns.

18.4 Waiver. No failure by any party to insist upon the strict performance of any obligation under this Agreement or to exercise any right or remedy under this Agreement shall constitute waiver of any such obligation, right, or remedy or any other obligation, rights, or remedies under this Agreement.

18.5 Invalidity of Provisions. If any provision of this Agreement is or becomes invalid, illegal or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained herein shall not be affected thereby.

18.6 Further Action. The parties shall execute and deliver all documents, provide all information, and take or refrain from taking action as may be necessary or appropriate to achieve the purposes of this Agreement, including the execution and delivery to the other parties and their
Affiliates and representatives of such powers of attorney or other authorizing documentation as is reasonably necessary or appropriate in connection with Tax Contests (or portions thereof) under the control of such other parties in accordance with Section 9.

18.7 Integration. This Agreement constitutes the entire agreement among the parties pertaining to the subject matter of this Agreement and supersedes all prior agreements and understandings pertaining thereto. In the event of any inconsistency between this Agreement and the Distribution Agreement or any other agreements relating to the transactions contemplated by the Distribution Agreement, the provisions of this Agreement shall control.

18.8 Construction. The language in all parts of this Agreement shall in all cases be construed according to its fair meaning and shall not be strictly construed for or against any party.

18.9 No Double Recovery; Subrogation. No provision of this Agreement shall be construed to provide an indemnity or other recovery for any costs, damages, or other amounts for which the damaged party has been fully compensated under any other provision of this Agreement or under any other agreement or action at law or equity. Unless expressly required in this Agreement, a party shall not be required to exhaust all remedies available under other agreements or at law or equity before recovering under the remedies provided in this Agreement. Subject to any limitations provided in this Agreement (for example, the limitation on filing claims for refund in Section 4.07), the indemnifying party shall be subrogated to all rights of the indemnified party for recovery from any third party.

18.10 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, and all of which taken together shall constitute one and the same instrument.

18.11 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware applicable to contracts executed in and to be performed in that State.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by the respective officers as of the date set forth above.

DISTRIBUTING CO.
By: _________________________________
Its: _________________________________

CONTROLLED CO.
By: _________________________________
Its: _________________________________