WALKING TOUR OF AN ASSET PURCHASE AGREEMENT

By Vaughn Buffalo

In general, the business portion of the transaction—what is being sold, for how much, how and when payment shall be made, assumed liabilities, excluded liabilities, payoff of loans and the document to be signed and exchanged at closing and post-closing adjustments—is in the front. In other legal stuff—representations and warranties, covenants, indemnities, survival and miscellaneous terms—is in the back.

This article essentially lists out the section typically found in an asset purchase agreement and describes what they are and what they do. It does not discuss the relative importance of each, the main concerns or the interplay of some sections with others. This article is a general map that merely shows you where you are and the particular provisions function. Think of it as "cliff notes" for an APA.

Also, bear in mind that APA may have different titles or sections, but will probably have something that will cover the concepts listed below. If, however, you run across an APA that does not address the concepts in these sections below, I think it would be appropriate to ask why.

Purchased Assets. This is formulated as a *general transfer* which includes a list of the assets that the buyer will buy from the seller. The lead in generally says something like "all assets and rights owned, leased or held by the Seller or in connection with the Business, wherever located…", including, but not limited to: And then the list of assets follows.

Excluded Assets. This is a list of what will not be transferred. Please note that as the Purchased Assets is a general transfer. Thus, anything not specifically listed on the Excluded Assets, if owned or used in connection with the business, will be transferred.

In the typical APA, the Buyer is only buying assets and walking away. No liabilities are being taken on, so the following two provisions are not really needed in an APA, but everyone has them just to be sure.

Assumed Liabilities. This is a specific list of costs that Buyer will take on at the closing. Thus, Buyer will be very picky about adding anything to this section or making the assumed liabilities list less concrete.

Excluded Liabilities. On the other hand, Buyers want the list of excluded liabilities to go on forever. Again, it is not necessary with an APA because the deal is only with regarding to the assets but Buyers want to this section anyway.

Deliveries at Closing. This is a list of the documents, certificates, and other matters that will be exchanged at the Closing. Usually the list is longer for the Sellers as compared to the Buyer because the main thing the Buyer needs to deliver at closing is the consideration.

Allocation Schedule. Both buyer and Seller will decide how the purchase price will be allocated to the assets of the business. This will have major tax consequences for both sides. It's usually a zero sum game so the two sides negotiate what location to use.

Purchase Price. Obviously this very important number must be somewhere along with any other payments, such as installment payments or contingent payments. The payments should also be located in the same place for convenience.

Post-Closing Adjustments. Often in the case of an ongoing business, Buyer and Seller will close assuming that there is a certain amount of receivables, inventory and payables. Tis amount is called the "peg". The problem is that those numbers can't be determined definitively until later on. That called the "true-up" and depending upon whether the true-up comes in below the peg or above the peg determines whether there will be addition consideration exchanged between the parties.

Representations and Warranties. This is usually a long section whereby the Buyer wants the Seller to stand by its assets and business stating that these things are true as of the date of the agreement. These are NOT continuing commitments. For example, the seller often states that it is duly incorporated and that they have authority to do business as previously conducted. Buyer will also make reps and warranties but theirs is usually much shorter as its main burden is bringing the consideration. For more information about reps and warranties, click here.

Covenants. These are continuing commitments that are usually fulfilled after the closing. They may concern publicity after the transaction, tax matters, changing the name of the corporation or cooperation between the parties after the deal. Two important ones are confidentiality and non-competition and non-solicitation clauses.

Survival and Indemnification. Survival essentially tell you how you have to find out if someone lied to you or didn't fulfill a covenant. After 1-3 years, buyer need to accept that the reins are in their hands and they can't go after the seller. Obviously, here are lots of nuances here with what get indemnified, whether there are baskets or deductibles and whether a large number of small breaches can be added up to create a material indemnification.

Definitions and Miscellaneous. These are not throwaway provisions. They are just as enforceable as the provisions in the front so they need to be read carefully. They address things such as how to notify the other party if there is a suit, whether jury are available, whether disputes need to be sent to arbitration and what state's law will govern the parties.

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