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Emerging Life Sciences Companies  
second edition

Chapter 31

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Key Contract Provisions for  
Asset Purchase Agreements

## Chapter 31

# KEY CONTRACT PROVISIONS FOR ASSET PURCHASE AGREEMENTS

The following outline sets forth key contract provisions the parties should consider when negotiating and drafting asset purchase agreements.

### **Assets to Be Transferred at Closing**

- A. IP assets
  - 1. Patents and know-how
  - 2. Trademarks
  - 3. Internet domain names
- B. Regulatory approvals/filings and other regulatory documentation
- C. Existing inventories of product already in distribution network (including samples)
- D. Existing stocks of training and promotional materials
- E. Sales force personnel
- F. Warehousing/distribution agreements/GPO contracts
- G. License/settlement/research agreements
- H. Certain accounts payable and receivables
- I. Stock of any subsidiary
- J. Any other assets necessary to conduct the business

### **Manufacturing Inventory Assets (sometimes retained for at least a transition period in pharma product deals)**

- A. Manufacturing facility
- B. Existing inventories of raw materials/work-in-process
- C. Manufacturing process documentation (e.g., batch records)
- D. Manufacturing facility personnel

- E. Facility permits and licenses
- F. Facility equipment/vehicles and equipment/vehicle leases
- G. Facility service agreements
- H. Software license agreements
- I. Raw material supply agreements
- J. Tolling agreements
- K. Certain accounts payable and receivables
- L. Any other assets necessary to conduct the business

### **Retained Liabilities**

- A. Permitted encumbrances
- B. Preclosing employee benefits/workers' compensation matters
- C. Preclosing contract obligations/liabilities
- D. Preclosing product liability actions/damages
- E. Liabilities for preclosing violations at the manufacturing facility
- F. Preclosing taxes and tax liabilities

### **Purchase Price**

- A. Timing/method of payment (first vs. second closing)
- B. Allocation of purchase price; accounting treatment
  - 1. Allocation assets transferred at first closing
- C. Adjustments for pre- and postclosing product sales
- D. Adjustments for pre- and postclosing raw materials and product inventories
- E. Adjustment for employee benefits/workers' compensation liabilities
- F. Adjustment for prepaid taxes and permit fees

### **Preclosing Covenants**

- A. Delivery of property transfer documentation
- B. Hart-Scott-Rodino Act filing
- C. Governmental consents to assignment obtained
  - 1. Regulatory approvals
  - 2. Facility permits and licenses

- D. Required third-party consents to assignment obtained
  - 1. Warehousing/distribution agreements/GPO contracts
  - 2. License/settlement agreements
  - 3. Facility equipment/vehicle leases
  - 4. Facility service agreements
  - 5. Software license agreements
  - 6. Raw material supply agreements
  - 7. Tolling agreements
- E. Ongoing access to information (e.g., financials, regulatory documents)
- F. Further due diligence re: manufacturing facility
  - 1. Environmental testing
  - 2. ADA compliance audit
- G. Conduct business as previously conducted
- H. Notice of changes in circumstances
- I. No transactions other than in the ordinary course
- J. No competing solicitations or negotiations
- K. Pay all indebtedness on assets to be transferred
- L. Effort to retain key employees/offers of employment made
- M. Insurance maintained
- N. Compliance with bulk transfer laws
- O. Compliance with WARN Act requirements

### **Conditions to Closing**

- A. Hart-Scott-Rodino Act clearance
- B. Board approvals
- C. Representations and warranties true at closing
- D. No material changes since date of signing
- E. No pending or threatened litigation or restraints on transaction
- F. Delivery of purchase price
- G. Delivery of all necessary consents to assignment

1. Governmental/regulatory
  2. Third parties
- H. Delivery of IP assignments
1. Patents and know-how
  2. Trademarks
  3. Internet domain names
- I. Delivery of license agreement
- J. Delivery of manufacturing and supply agreement
- K. Escrow of manufacturing process documentation; delivery of escrow agreement
- L. Sufficient number of sales force personnel that have agreed to work for purchaser
- M. Delivery of transition services agreement
1. Warehousing and distribution
  2. Sales force management
  3. Technical support
- N. Delivery of outsourcing agreement for sales force personnel
- O. Delivery of stock purchase agreement for subsidiary
- P. Delivery of bill of sale; assignment and assumption agreement
- Q. Delivery of domain name transfer agreement
- R. Delivery of appropriate certificates
1. Charter documents, bylaws, and so forth
  2. Good standing
  3. Board resolutions
  4. Bring-down
- S. Delivery of legal opinions
1. For seller
  2. For purchaser
- T. Delivery of seller's fairness opinion
- U. All other necessary actions taken by seller

## **Other Covenants and Rights**

- A. Noncompete
  - 1. Restrictions on seller
  - 2. Restrictions on purchaser
- B. Option or right of first refusal/negotiation rights of purchaser
  - 1. To obtain rights outside of the territory if offered for sale by seller
  - 2. To obtain rights in the territory to next-generation products that are developed by seller
  - 3. To obtain license rights to use the technology with other products
- C. Procedures for handling payments, invoices, and unpaid accounts
- D. Referrals of customer questions/requests/complaints
- E. Transition license to use purchaser's name, marks, and so forth
  - 1. At the manufacturing facility
  - 2. On packaging and promotional materials
- F. Severance benefits payable by purchaser
- G. Ongoing maintenance of insurance by purchaser
- H. Payment of transfer taxes; filing of tax returns
- I. Confidentiality/Publicity
  - 1. Mutual obligations
  - 2. Existence and terms of transaction documents
  - 3. SEC filings
  - 4. Press releases
- J. Nonsolicitation
- K. Further assurances

## **Representations and Warranties of Seller**

- A. Basic corporate warranties
  - 1. Due incorporation
  - 2. Good standing
  - 3. Due execution

4. No conflict with charter or bylaws
  5. No conflict with other agreements/understandings
  6. Legally binding and enforceable obligation
  7. All necessary authorizations, consents, and approvals obtained
- B. Transferred assets
1. Include all necessary assets of seller
  2. Seller has good title; no liens and encumbrances
  3. No undisclosed liabilities
  4. No conflicting rights granted to any third party
  5. Inventories usable
- C. IP
1. All IP has been properly scheduled
  2. Seller owns or has sufficient rights to all IP necessary to conduct seller's business
  3. Seller has the right to transfer/license all IP to purchaser
  4. No conflicting rights granted to any third party
  5. No other IP of seller used/useful for manufacture or sale of product
  6. Sale of product/use of IP will not infringe/misappropriate third-party rights
  7. No known infringement of IP by third parties
  8. No royalties or other amounts due to third parties
  9. Not in breach of any agreements re: third-party rights being licensed through to purchaser
  10. All patents valid and enforceable; all maintenance fees paid
  11. No reason to believe that pending patent applications will not be issued
  12. No known dominant patents of third parties
  13. No known third-party patent applications that, if issued, would have a material adverse effect
  14. All trademarks registered; all maintenance fees paid
  15. No governmental rights; no third-party liens, encumbrances, and so forth
  16. No pending or threatened reexamination, reissue, opposition, interference, or cancellation proceedings

17. No pending or threatened litigation
- D. Regulatory matters
    1. All FDA approvals have been obtained
    2. No violation of applicable FDA requirements in obtaining FDA approvals
    3. All clinical trials conducted in accordance with applicable FDA requirements
    4. All FDA correspondence, communications, meeting minutes, and so forth, have been disclosed
    5. No failure to disclose material facts to FDA
  - E. Contracts
    1. All material contracts have been properly scheduled
    2. All in full force and effect
    3. No defaults or events that would constitute a default; no notices of breach
    4. All appropriate consents received and notices given
    5. No outstanding liabilities
  - F. Financial statements; accounting practices
  - G. Accounts payable and receivable
  - H. Taxes and tax returns
  - I. Employee matters
  - J. Real property
  - K. Environmental matters
  - L. Governmental permits
  - M. Litigation
  - N. Insurance
  - O. Compliance with laws
  - P. Absence of certain changes
  - Q. Complete and accurate information; no failure to disclose material facts
  - R. Assets sufficient to conduct business as presently conducted
  - S. No other negotiations; no brokers' fees
  - T. No affiliate transactions



- U. Seller will be solvent immediately after transaction

### **Representations and Warranties of Purchaser**

- A. Basic corporate warranties
  - 1. Due incorporation
  - 2. Good standing
  - 3. Due execution
  - 4. No conflict with charter or bylaws
  - 5. No conflict with other agreements/understandings
  - 6. Legally binding and enforceable obligation
  - 7. All necessary authorizations, consents, and approvals obtained
- B. Litigation
- C. Complete and accurate information; no failure to disclose material facts
- D. No brokers' fees

### **Indemnification**

- A. Breach of representations and warranties
- B. Product liability/personal injury claims
- C. Environmental claims associated with the manufacturing facility
- D. Threshold/basket
- E. Cap/limitation on liability
- F. Time limitations
- G. Effect of investigation, knowledge, or scheduled disclosures
- H. Procedures for third-party claims

### **Miscellaneous**

- A. Protections if seller goes bankrupt
  - 1. Prior to first closing
  - 2. Prior to second closing
- B. Termination rights; remedies
  - 1. Termination for breach
  - 2. Break-up fees

- 3. Expense reimbursement
- C. Return of documents and information
- D. Choice of law; dispute resolution
- E. Survival

**Alternative Deal Structures**

- A. Stock purchase (add representations relating to stock ownership)
- B. Merger (consider impact of dissenters' rights)