



THIS IS ONE EXAMPLE OF A SET OF SELLERS' DISCLOSURE SCHEDULES. WE PROVIDE THIS EXAMPLE FOR TRAINING PURPOSES. YOU SHOULD NOT USE THIS DOCUMENT FOR DIY LAWYERING OR RELY ON THIS SAMPLE DOCUMENT OR OUR COMMENTS TO IT AS ANY TYPE OF LEGAL OR OTHER PROFESSIONAL ADVICE. BRAATEN WOODS, LLC IS NOT A LAW FIRM, AND YOU ARE NOT OUR CLIENT. KNOW WHEN TO HIRE AN EXPERIENCED LAWYER.

SELLERS' DISCLOSURE SCHEDULES

Overview

The Sellers' Disclosure Schedules (sometimes called just "Disclosure Schedules" or the "Schedules") form an integral part of the final merger & acquisition (M&A) transaction documents. Disclosure Schedules are an addendum to whatever main transaction agreement the parties use—typically called an Asset Purchase Agreement, Stock Purchase Agreement, or Merger Agreement (the "Primary Agreement").

Disclosure Schedules are created in Microsoft Word or other word processing software (like any other legal document) and they are made up of many individual schedules (i.e., lists).

Each individual schedule that makes up the Disclosure Schedules references a section of the Primary Agreement and typically accomplishes one of two main goals: (a) communicating information about the business being sold and its owners or (b) qualifying the representations and warranties in the Primary Agreement.

An example of the first goal—communicating information about the business and its owners—is a table that lists all the employees of the business (the selling company), along with their name, title, start date, compensation, and other information that the buyer wants the sellers to disclose in a list that forms part of the overall deal documentation.

The contents of each schedule are determined by the language of the section in the Primary Agreement to which the schedule relates. For example, the Primary Agreement may contain a section that reads as follows:

Section 3.20 Employees. *Schedule 3.20 contains a complete and accurate list of all of the employees (including officers) of Selling Company, listing for each such employee their position or title, whether they are classified as exempt or non-exempt for wage and hour purposes, their annualized base salary or hourly wage, commission opportunity or bonus potential, average scheduled hours per week, date of hire, business location, status (i.e., active or inactive and if inactive, the type of leave and estimated duration), accrued vacation, and the total amount of bonus, severance, and other amounts, if any, owed to such employee as of the Closing or otherwise in connection with the transactions contemplated hereby.*

Concerning the second goal, representations and warranties are statements of fact as of a specific time (usually the closing date). In a Primary Agreement, most representations and warranties (or just “reps & warranties”) are statements that the selling company or its owners make to the buyer about the selling company. For example, a representation and warranty around litigation might read as follows:

Section 3.6 Litigation. *Except as set forth in Schedule 3.6, there is no litigation, arbitration, or similar proceedings underway that involve the Selling Parties and relate in any way to the business of Selling Company. Further, to the Selling Parties’ Knowledge, no Person is threatening to initiate any such litigation, arbitration, or similar proceeding.*

Reps & warranties are highly negotiated terms in M&A deal documents because they form the basis for a buyer’s ability to come back to the sellers for compensation after closing (i.e., to carve back some of the purchase price by asking the sellers to make a payment to buyer or make a deduction from any amount of the purchase price that buyer held back for post-closing claims).

If you think about the two different types of disclosures (i.e., the two different goals that Disclosure Schedules are intended to accomplish)—information and qualification, you can see that Disclosure Schedules simultaneously protect and expose the sellers. The protection benefit flows from the qualifications to the representations and warranties. In many cases, by “scheduling” an issue that the selling company is facing (or faced), the risk associated with it shifts to the buyer. The exposure risk arises from the lists of information. If any information provided is incorrect, the buyer may be able to make a post-closing claim against the sellers.

Each schedule is typically titled with reference to the number and title of the section in the Primary Agreement to which the schedule relates (e.g., *Schedule 3.6* refers to *Section 3.6* of the Primary Agreement).

While Disclosure Schedules are custom-built and unique to each M&A deal, this example of Disclosure Schedules will give you a broad overview of how Disclosure Schedules work and their overall role in the M&A deal documentation.

As a reminder, we provide legal documents for your education and not with an expectation that you will use them for DIY lawyering. Be smart, be careful, and know when to hire an experienced lawyer.

SELLERS' DISCLOSURE SCHEDULES

These Disclosure Schedules are made pursuant to that certain Asset Purchase Agreement among ABC LLC, a STATE limited liability company ("Purchaser"), XYZ Inc., a STATE corporation ("Selling Company"), and JOHN SMITH, an individual resident of STATE ("Sole Shareholder," and collectively with Selling Company, each a "Seller Party" and collectively, "Seller Parties"), dated as of MONTH DAY, YEAR (the "Agreement").

The representations and warranties of Seller Parties in Section 3 of the Agreement are made subject to the exceptions and qualifications set forth herein. These Disclosure Schedules are qualified in their entirety by reference to specific provisions of the Agreement and are not intended to constitute separate or additional representations or warranties of Seller Parties.

The inclusion of any information (including dollar amounts) in any section of these Disclosure Schedules is not an admission by Seller Parties that such information is required to be listed in that section or that it is material to or outside the ordinary course of business of Selling Company. Further, the inclusion of such information may not be used to establish a standard of materiality (and the actual standard of materiality may be higher or lower than the matters disclosed by such information).

Matters reflected in these Disclosure Schedules are not necessarily limited to matters that are required to be reflected in these Disclosure Schedules per the Agreement. Such additional matters are included for informational purposes only and do not necessarily include other matters of a similar nature.

The information in these Disclosure Schedules is provided solely to make the disclosures to Purchaser under the Agreement. Seller Parties do not assume any responsibility for the accuracy of any information herein to any Person that is not a party to the Agreement. The information was not prepared or disclosed with a view to its potential disclosure to others. Subject to applicable law, this information is disclosed in confidence for the purposes contemplated in the Agreement and is subject to any confidentiality provisions between the parties. In disclosing this information, Seller Parties expressly reserve any attorney-client privilege associated with such information or any protection afforded by the work-product doctrine concerning any of the matters disclosed herein.

SCHEDULE 1.7

Purchase Price Payments and Allocation

[For all tax-related purposes, the Closing Payments, the First Year Earnout Payment, and the Second Year Earnout Payment, the True-Up Amount, the assumption by Purchaser of the Assumed Liabilities, and all indemnity payments (if any) made hereunder, are each a portion of, and collectively constitute, the “Total Purchase Price.” The \$[XXX],000 paid to SELLING COMPANY Supply in consideration of the Purchased Assets is further allocated according to Schedule 1.7.]¹

¹ The bracketed language is taken from the relevant section of the Primary Agreement. It is there to guide the individuals who are responsible for preparing the Disclosure Schedules, and it will be removed when it is no longer needed (i.e., the bracketed language is only used in early draft versions of the Disclosure Schedules). To further help clients and non-lawyers who work on the Disclosure Schedules, it is helpful for an experienced attorney to simplify the bracketed language to make it read less like a contract, while being careful not to lose any substance.

SCHEDULE 3.2

Ownership of Selling Company

None.²

² If there are no exceptions or other information to list in a schedule, we typically write, "None."

SCHEDULE 3.4

No Conflicts

[Except as set forth in Schedule 3.4, Seller Parties' execution and performance of this Agreement and the Ancillary Agreements and completing the related transactions do not and will not (with or without the giving of notice or the lapse of time or both) result in a material violation or breach of or default under, or result in the creation of any material Lien (or any obligation to create any Lien) upon the Purchased Assets under (a) any Law applicable to Selling Company, (b) the Organizational Documents of Selling Company, or (c) any Contract listed in Schedule 3.10 (Material Contracts)].

1. Supply Agreement between Selling Company and GREAT COMPANY, dated MONTH DAY, YEAR requires the approval of GREAT COMPANY to assign it.³
2. Loan Agreement between Selling Company and GREAT BANK, dated MONTH DAY, YEAR requires the approval (which may not be unreasonably withheld) of GREAT BANK to assign it.

³ Items 1 and 2 in this schedule show how items (information or exceptions) are typically listed (i.e., the formatting and overall style).

SCHEDULE 3.6

Financial Statements

[Seller Parties gave Purchaser access to true and complete copies of the Financial Statements. The Financial Statements were derived from the financial books and records of account of Selling Company. Except as set forth in Schedule 3.6, the Financial Statements were prepared in accordance with the normal accounting policies and procedures of Selling Company applied on a consistent basis. The financial books and records of account of Selling Company were maintained in the ordinary course of business and accurately and fairly reflect in all material respects, the transactions, assets, and Liabilities of Selling Company and such other information as contained therein. The balance sheets included in the Financial Statements present fairly in all material respects the financial position of Selling Company as of the respective dates thereof, and the statements of income included in the Financial Statements present fairly in all material respects the results of operations of Selling Company for the respective periods indicated.]

SCHEDULE 3.7

Absence of Changes

[Except as set forth in Schedule 3.7, since the Balance Sheet Date, (a) each Selling Company has carried on its business in the ordinary course consistent with past practice, and (b) there has been no event, occurrence, change or development that is materially adverse to any Selling Company.]

SCHEDULE 3.8(A)

Tax Returns

[Except as set forth in Schedule 3.8(a), (i) all Tax Returns of Selling Company that were required to be filed on or before the Closing Date have been duly and timely filed and are correct and complete in all material respects, and (ii) no Selling Company is currently the beneficiary of any extension of time within which to file any Tax Return.]

SCHEDULE 3.8(B)

No Open Claims or Audits

[Any pending actions (other than ones that have been finally settled and fully paid) concerning any possible liability for Taxes of Selling Company asserted, raised, or threatened by the IRS or any other taxing authority. There are no pending audits or examinations by the IRS or any other taxing authority concerning any Tax Returns that have been filed.]

SCHEDULE 3.9

Real Property and Real Estate Leases

[Selling Company does not own any real property. Selling Company is not a party to any Contract providing for the purchase or sale of, or a right to purchase or sell, any real property. Schedule 3.9 contains a true and complete list of all Contracts⁴ pursuant which Selling Company is currently the lessee, sublessee, licensee, user or occupant of any real property.]

⁴ To help the individuals who are preparing the Disclosure Schedules, a defined term, such as “Contracts,” should be defined within the brackets, so that it is not necessary to consult the Primary Agreement to understand what should be included in a particular schedule—that is the point of including the bracketed language in the first place.

SCHEDULE 3.10

Material Contracts

[Except as set forth in Schedule 3.10, no Selling Company is a party to, nor is any Selling Company or any of its assets bound by, any Contract: (a) relating to (i) the employment or engagement or termination of employment or engagement of any Person as an employee, consultant, representative, or agent that may not be terminated by such Selling Company without penalty or other obligation (including any severance, termination or indemnification payment required under such Contract), or (ii) the payment to any Person by such Selling Company of any bonus, award, payment or other remuneration of any kind that is contingent on a sale of such Selling Company or any of its assets or any change in control of such Selling Company, (b) that contains restrictions with respect to the payment of dividends or any other distribution in respect of such Selling Company's capital stock, (c) relating to Indebtedness, (d) limiting the ability of such Selling Company to engage in any line of business or to compete with any Person, or (e) that is a collective bargaining agreement or for which the counterparty thereto is a labor union or employee organization.]

SCHEDULE 3.11

Intellectual Property

[A true and complete list of all Owned Intellectual Property and a complete and accurate list of all Licensed Intellectual Property.]

SCHEDULE 3.12

Insurance

[List each insurance policy, binder, Contract and bond maintained by or on behalf of Selling Company (other than life insurance policies and group insurance policies). Except as set forth in Schedule 3.12, (a) Selling Company has notified its insurance carriers of all litigation and Claims, all of which are set forth in Schedule 3.12, and (b) Selling Company has not received oral or written notice that any insurer under any policy listed in Schedule 3.12 is denying liability concerning a Claim thereunder or defending under a reservation of rights clause.]

SCHEDULE 3.13

Litigation

[Except as set forth in Schedule 3.13, to Seller Parties' Knowledge, (a) in the three years before the Closing Date, there has not been any litigation by or before any court, tribunal, arbitrator or other Governmental Authority, either pending or threatened, by or against Seller, or any of its assets, and (b) there are currently no outstanding Orders against Seller.]

SCHEDULE 3.14

Compliance with Laws

[Except as set forth in Schedule 3.14, in the three years before the Closing Date, Selling Company has complied, to Seller Parties' Knowledge, with all Laws applicable to Selling Company or any of its assets or operations.]

SCHEDULE 3.15

Environmental Matters

[To Seller Parties' Knowledge, Selling Company has all Permits that are required to conduct its business under applicable Environmental Laws. All such Permits are valid and current and are listed in Schedule 3.15, and no revocation, cancellation, or withdrawal therefrom has occurred or, to Seller Parties' Knowledge, been threatened. In the three years prior to the Closing Date, Selling Company has complied, in all material respects, with applicable Environmental Laws. There is no pending nor, to Seller Parties' Knowledge, threatened Claim against Selling Company for violation of any Environmental Law.]

SCHEDULE 3.16

Affiliate Transactions

[List of all Contracts, arrangements, understandings, transfers of assets or Liabilities or other commitments or transactions, to or by which a Selling Company, on the one hand, and Sole Shareholder or any director or officer of a Selling Company or any Affiliate of Sole Shareholder or a Selling Company, on the other hand, are each a party or are otherwise bound or affected, and that are currently in effect.]

SCHEDULE 3.17(A)

Schedule of Employees

[For each employee of each Selling Company (including any employee who is on a leave of absence or temporary layoff status subject to recall) the name, title, and compensation of such employee.]

SCHEDULE 3.18(A)

Employee Benefit Plans

[List all Employee Benefit Plans maintained by Seller. Concerning each Employee Benefit Plan, true and complete copies of (i) the plan document, trust agreement and any other document governing such Employee Benefit Plan, (ii) the summary plan description, (iii) all Form 5500 annual reports and attachments, and (iv) the most recent IRS determination letter, if any, for such plan were made available to Purchaser.]

SCHEDULE 3.18(D)

Contributions and Premiums

[All contributions and payments of insurance premiums required to be made concerning the Employee Benefit Plans have been fully paid in such a manner as not to cause any interest, penalties or other material amounts to be assessed against Selling Company with respect thereto, except for amounts that have been satisfied or discharged.]

SCHEDULE 3.19

Vendors

[List the names of the 10 largest vendors (excluding landlords) of Selling Company, measured collectively, based on the total value of products or services ordered by Selling Company from such vendors. Selling Company has not received a notice that any such vendor will cease selling products or providing services to Selling Company in the future.]

SCHEDULE 3.20

Customers

[List the names of the 10 largest customers of Seller, measured on a collective basis. Selling Company has not received a notice that any such customer intends to terminate their relationship with Selling Company.]