# Documentation of a Corporate Acquisition

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# DOCUMENTATION OF A CORPORATE ACQUISITION*

by

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A CORPORATE acquisition may consist of anything from the purchase of a box of pencils to the acquisition of a multi-million dollar business. The documents required for an acquisition may likewise range from a purchase order, invoice, and check in the case of a simple purchase, to literally hundreds of agreements, certificates, and related documents in a major acquisition. Even in the case of acquisitions of a substantial nature there may be varying degrees of documentation depending upon a number of factors such as the nature of the property acquired and the amount and type of the consideration.

This Article relates to the more complicated type of acquisition involving complete documentation from inception through consummation. To the extent that circumstances of a particular acquisition warrant, various of the steps or documents can be omitted, and the documents themselves can be shortened or otherwise modified.

## I. INTRODUCTION

The typical corporate acquisition involves a merger or consolidation, an acquisition of substantially all of the assets of a going business, or an acquisition of stock of an existing corporation. The documentation of all these types of acquisitions is very similar, although there are, of course, distinguishing features. Frequently the acquisition is structured to be tax free to the parties and their stockholders. Although the tax consequences of these transactions are beyond the scope of this Article, it is obvious that all of the documents involved in an acquisition must be reviewed from a tax standpoint.

### A. *The Lawyer's Role*

A merger or corporate acquisition is much like a marriage. There is a period of courtship in which corporations considering merger survey the field seeking likely partners with which to join. Following serious courtship negotiations comes an agreement to marry, accompanied by an announcement of the engagement, frequently to the surprise of rejected suitors. A period of preparation and activity for the ultimate marriage ensues, usually accomplished with great ceremony and gladness. After the marriage there is a period of adjustment, at the end of which those joined may live happily ever after or may find themselves the victims of an unwise union, in which event a separation may occur.

The lawyer's role is much like that of anxious parents, offering guidance and counsel to the betrothed, serving as a level-headed advisor dur-

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ing preparations for the union, and ultimately playing a material part in the ceremony itself. In the planning stage the role of the lawyer is primarily that of a lawyer, and not that of a maker of business decisions. The lawyer is, however, forced to a greater or lesser extent depending upon the relationship between him and his client, to become involved in business decisions. At the very least, the lawyer must be certain that his client makes business decisions with knowledge of the legal and business consequences. On the other hand, he should recognize that it is his client who should make business decisions. The lawyer should not impose his will or judgment on the client. Except in areas involving violations of law, the lawyer should not allow himself to say: "I will not permit my client to do this."

During all stages of negotiations the lawyer should play a vital role. Some clients tend to conduct negotiations on their own until a preliminary agreement has been reached. Generally, this is unwise since the guidance and counsel of an experienced lawyer can often enable the client to negotiate a better deal at the outset. Once an agreement in principle has been reached, it is increasingly difficult to inject new ideas.

In drafting documents, each lawyer develops his own techniques and procedures. There are pros and cons to drafting papers by marking up documents used in a previous transaction. If done by an inexperienced lawyer this can be a dangerous procedure, but any drafting by an inexperienced lawyer is dangerous. Even with a markup of documents the lawyer must be aware of what he is doing and make a proper adaptation of the documents to the new transaction. It is certainly important to avoid the embarrassment of failing to change all of the names, an error difficult to blame on one's secretary.

Which party is to assume responsibility for preparing first drafts is a matter of agreement. Some lawyers feel that their client is better served if they prepare the initial drafts. Even among lawyers and even as to preliminary drafts there is some sanctity to the printed or typed word. Actually, with experienced lawyers representing both parties the final documents will be very much the same no matter who does the initial drafting.

Counsel will encounter several types of lawyers in connection with drafting of documents. One is the grammarian who is more concerned with commas and split infinitives than he is with content. Although it is frequently frustrating to deal with a grammarian, one will find that he will permit inclusion of almost any substantive provision as long as it is grammatically correct. Another type loves to change provisions simply for the sake of changing. His standard approach is that although there is nothing wrong with the original wording, he would like to try to improve on it. Another lawyer may resist strongly any attempt to change anything he has written. This type can be easily identified early in the negotiations by his frequent statements that he has no pride of authorship. It is a fortunate lawyer who has the good luck of dealing with another

lawyer experienced in acquisition matters. Nothing is more frustrating than working with counsel who has had no experience with the complicated documentation of a corporate acquisition. In fact, it is not unusual for a company acquiring another company to require that the company being acquired retain special counsel experienced in this field.

Another subtlety is discerning which party most wants to consummate the transaction. The more anxious party is not necessarily the larger of the two, and the determination is frequently hampered by some bluffing and dramatics. The problem may be further obscured by the business broker who has brought the parties together. His fee is usually conditioned upon consummation of the transaction.

The lawyer's problems are not all with counsel representing the other parties, but are frequently with his own client. This is generally in the area of getting decisions necessary for preparation of documents and for finalizing negotiations. It is sometimes difficult to get factual information required for various schedules and other purposes.

As with the analogy to marriage, the ultimate purpose of counsel is to be certain that the parties enter into the union with adequate knowledge of each other and that they bring to the altar essentially the same party to whom they became engaged.

### B. *Organizing the Effort*

The first duty of the lawyer is to be certain that there is an understanding among all concerned of the work that needs to be done and an assignment of responsibility for the various tasks. This includes such matters as gathering information, providing financial statements and audits, drafting and review of documents, and other matters leading to a consummation of the transaction. Typically, the lawyer will prepare a checklist showing all steps and documents believed necessary, together with an assignment of responsibility and a tentative time schedule for the various events. The lawyer's role in this area may vary from virtually complete responsibility to a strictly legal role with experienced business people assuming major responsibility in other areas.

## II. Preliminary Documents

*Letter of Intent.* In the typical transaction discussions between the parties leads at some point to a preliminary agreement in principle which needs to be reduced to writing. This agreement serves as a memorandum of the agreement then existing and as the authority for a public announcement of the proposed acquisition. It is usually called a letter of intent or memorandum of agreement. Unless there exists some prior authorization, the letter of intent should be approved by the boards of directors of the corporations involved. Premature disclosure of discussions may require either a disclosure of the preliminary negotiations themselves or an acceleration of the execution of a letter of intent.

The letter of intent is essentially a summation of the proposed acquisi-

tion including the consideration to be given for the property acquired. This can be either a reference to cash or securities being paid or, if it is a merger, an exchange ratio. It is also desirable to include in the letter of intent any important special conditions to be met before consummation, such as obtaining a tax ruling, an audit, or a computation of minimum net worth or minimum earnings. If these conditions are not made a part of the transaction in the early stages, it becomes increasingly difficult to bring them in at a later date. The letter of intent should be clear as to what obligations it is intended to create. Is it an agreement which itself creates obligations and liabilities subject only to satisfaction of conditions, or is it intended to evidence only a preliminary understanding, not creating any liabilities or obligations, and subject to the execution of definitive agreements? The lawyer should keep in mind that one of the parties may be more anxious than the other to complete a transaction and may want to have the letter of intent create an obligation which the other party is not ready to undertake at that time. The letter of intent should also provide that the obligations of the parties are, if necessary, subject to approval of definitive agreements by the boards of directors and the stockholders.

*Approval by Board of Directors.* Even at this preliminary stage it is important that the board of directors be kept advised of the negotiations, approve the agreement in principle, and authorize the execution of the letter of intent. It is also important for the board of directors to understand the scope of the letter of intent and the extent to which it is intended to be the basis of a binding obligation. The board should also authorize the officers of the corporation to proceed to negotiate and finalize the transaction. It is not unusual for the board to authorize the executive committee or a special committee of the board to work with the officers of the corporation responsible for negotiating the transaction.

*Public Announcement.* If any of the parties are publicly owned, there should be a public announcement of the proposed acquisition no later than at the time the letter of intent is signed. As indicated previously, prior public announcement of the discussions may be called for if there has been some premature leak or disclosure of the negotiations. The content of the public announcement or press release is, in effect, a summary of the letter of intent and includes the salient features of that document. Frequently a press release is the result of the joint effort of the lawyer and the public relations adviser. The public announcement is disseminated to the stock exchange if any of the corporations are listed and is also disseminated through Dow Jones (the *Wall Street Journal*), and the newspapers published in the localities where the principal offices and plants of the constituent corporations are located. Consideration should also be given to sending a copy of the announcement to the stockholders of the various companies.

## III. The Acquisition Documents

The basic document is an acquisition agreement that sets forth the entire terms of the transaction, including the property being acquired, the consideration paid, and the other terms and conditions upon which such acquisition is being made. This format is applicable to a statutory merger, an acquisition of assets, or an acquisition of corporate stock. If the transaction involves a statutory merger, the merger document or the articles of merger that are required to be filed with the secretaries of state of the incorporation states of the constituent corporations may be included in the basic acquisition agreement or may be a separate document. Since the merger agreement or articles of merger are filed with the secretary of state and become a part of the charter documents of the surviving corporation, it is frequently desirable to have the merger agreement separate from the acquisition agreement. If this is done, various matters that need to be included in the acquisition agreement do not become a part of the corporation's charter documents.

### A. *Acquisition Agreement*

The acquisition agreement is, of course, between the parties to the transaction, typically, the party making the acquisition and the party or parties making the sale or being acquired. Frequently the acquisition agreement is dated "as of" the date upon which the parties reached an agreement in principle. The acquisition agreement will typically include recitals identifying the parties, summarizing the transaction, and containing various definitions.

*The Acquisition.* The definitive provisions of the acquisition agreement set forth the essence of the transaction. If the acquisition is a statutory merger, the surviving corporation and the disappearing corporation or corporations will be identified, and provisions will be made for the exchange of stock of the disappearing corporation. In a statutory merger some state statutes authorize the surviving corporation to deliver stock or securities of some other corporation. Provision should be made for handling of fractional shares. The typical options are to issue scrip, to pay cash in lieu of fractional shares, or to provide for buying or selling fractional shares on behalf of the shareholder entitled to receive the stock.

If the transaction involves an acquisition of assets, the acquisition agreement will identify the assets or property to be acquired and any property, such as cash to pay expenses, to be retained by the seller, as well as the consideration being paid for such assets. The most common consideration would be cash and/or stock or other securities of the acquiring corporation. In addition, the acquiring corporation may assume liabilities of the seller. The assumption of liabilities may be phrased in several ways. An assumption of "all liabilities" includes unknown liabilities and is rather dangerous from the standpoint of the acquiring corporation, although representations and warranties as to what liabilities exist do give certain

protection in this area. An assumption of liabilities is frequently cast in terms of all liabilities shown on a balance sheet of a given date, plus additional liabilities incurred since such date in the usual and ordinary course of business. In addition to providing for the assumption of liabilities for money owed, provision should be made for the assumption of various contractual obligations by the acquiring corporation. Here again the problem is one of identifying the obligations to be assumed.

If the transaction involves an acquisition of stock, the acquisition agreement will describe the stock being acquired, including the names of the parties selling stock and the number of shares being sold. If there is more than one seller, provisions should be drafted to cover the situation of one or more of the sellers being in default under the agreement. As with the other types of acquisitions, the consideration to be paid for the stock, whether cash and/or stock or other securities, should be set forth.

*Closing.* The next definitive provisions of the acquisition agreement can be the provisions relating to the closing of the transaction. These include a date, time, and place for the closing and should recognize that the parties may mutually agree on a different date, time, or place. If there are conditions to be satisfied prior to closing, the closing date may be keyed to a certain number of business days (which should be defined) after such conditions have been satisfied. In any event, it is desirable to provide some date by which the transaction is to be closed, if at all. At this point there should be some general description of the closing events and procedure, such as execution, delivery and filing of merger agreements or articles of merger, or closing of a purchase, including delivery or conveyance; and transfer of the property acquired and payment of the purchase price.

*Representations and Warranties.* One of the most important sections of the acquisition agreement is that containing representations and warranties made by the various parties. The purpose of these provisions is to furnish information about the corporations involved in order to enable all parties to determine whether they should consummate the transaction, and also to provide assurance as to what has actually been purchased. Properly prepared representations and warranties should protect a corporation from surprise when it discovers what it has purchased.

The general provisions of this section should identify the parties making the representations and warranties and should also cover such matters as the effect of investigations made by the parties, the extent to which the representations and warranties survived the closing, the repeating of the representations and warranties as of the closing date, and the consequences of a breach of a representation or warranty. In an acquisition from a closely held corporation, the acquiring corporation will frequently require the principal stockholders to make the same representations and warranties made by the selling corporation. In the instance of a sale of stock by several selling shareholders, consideration should be given to whether the

selling shareholders are to make joint and several representations regarding the corporation. Generally, the selling shareholders will be asked to make only a several representation and warranty with regard to the ownership of their own stock. In a merger, the representations and warranties of a disappearing corporation will not survive the closing (or technically will be assumed by the surviving corporation) and are, therefore, of value mainly in determining whether to consummate the merger. If the principal shareholders of a disappearing corporation can be induced to make similar representations and warranties, these may survive the closing. This provision will frequently cover the consequence of a breach of the representations and warranties, and will provide that the measure of liability is the money required to put the acquiring corporation in the same position it would be in if there had been no breach of the representation and warranty. The selling corporation will often ask for some reasonable cushion in the event of a breach of a representation or warranty. This is a provision to the effect that unless the aggregate amount of such liability exceeds some agreed dollar figure there is to be no liability for a breach of representations and warranties. This is intended to avoid disputes and payments for minor and inconsequential errors in the representations and warranties.

Although the representations and warranties naturally must be tailored to the specific transaction, there are a number of fairly common representations and warranties that should be considered by counsel. The basic criterion for selecting representations and warranties should be whether the matter is important to the particular transaction. Some of the more common representations and warranties are described below.

There is usually a representation and warranty as to corporate existence, good standing, and the right and power to conduct business in the state of incorporation. Frequently covered are the qualification and good standing of the corporation in other states in which it is doing business. However, counsel should be cautious in connection with this representation and warranty since a corporation may inadvertently or on purpose fail to qualify as a foreign corporation in a state in which such qualification is or might be required. There should be representations as to the existence of subsidiaries of the corporation, including the names and states of incorporation of any subsidiary corporations and the extent of ownership. A very important representation and warranty relates to the authorized capital of the corporation and the number of shares of stock of various classes that are issued and outstanding. Also included is a description of any securities convertible into stock and outstanding options, warrants, and rights to acquire stock. This provision is especially important if the transaction is intended to result in an acquisition of all of the stock of a corporation. Usually there is a representation of the accuracy of financial statements which have been furnished and a representation that the corporation has no liabilities except as disclosed in the financial statements as of a specified date or incurred subsequently in the ordinary course of

business. If this provision is included, counsel for the seller should be certain that the obligations for contracts are disclosed in the financial statements or otherwise disclosed in writing to the acquiring corporation. Representations should be made to the effect that all required state and federal income tax returns have been filed and taxes shown to be due have been paid. There should be a statement of the last year through which the returns have been audited by the various taxing authorities and the result of such audit. It is customary to include a representation that there has been no material adverse change in the financial condition or business of the seller since the date of the financial statement, as well as representations of good title to properties and assets free of liens and encumbrances except as disclosed in the financial statement or otherwise disclosed. Counsel should keep in mind that an encumbrance is not limited to an obligation to repay borrowed money, but may include a lease, easement, or similar matter.

The representations and warranties may include schedules containing business information, such as real and personal property owned, plants, liens, mortgages and encumbrances, leases, written or oral contracts, insurance, bonus, pension, profit-sharing and retirement plans, stock purchase, stock option and other executive or employee compensation plans, notes payable, notes receivable, accounts receivable (with aging analysis), and any amount of other pertinent information. The preparation of such schedules can be a time consuming and expensive task, and the parties should not require any such schedule unless the information contained is of importance in the particular transaction. The schedules can either be attached to the acquisition agreement or furnished separately and identified as the schedule provided for in the acquisition agreement.

Other representations and warranties can include: the collectibility of accounts receivable, which is to be distinguished from the existence and the validity of the receivable; a description of any property used in the business but not owned or leased by the corporation; the method of stating inventory and the method, if any, used for adjustments to inventory for obsolescence. An important representation and warranty relates to actions, suits, or proceedings pending or threatened—including those by any governmental agency. Other representations and warranties include: (1) the absence of a default respecting any order, writ, injunction, or decree; (2) the accuracy of balance sheet reserves; (3) the performance of contractual obligations and compliance with statutes and regulations applicable to the corporation; (4) a schedule of patents or copyrights owned and the representation that the corporation is not infringing on any patent or copyright of another party; (5) that consummation of the transaction will not violate any existing agreements; (6) the absence of any restrictive agreements and contracts; (7) approval or consents of regulatory boards or bodies; and (8) accuracy of information furnished by the corporation for proxy statements or registration statements relating to the transaction. There is sometimes included a catchall representation

to the effect that no certificate or statement contains any untrue statement of a material fact or fails to state any material fact necessary to keep the statements made from being misleading.

It is appropriate that all parties to the transaction make representations and warranties although the acquiring or surviving corporation frequently makes only a very minimum number of representations and warranties compared to the corporation selling assets or being acquired.

*Conduct of Parties Pending Closing.* This provision is intended to maintain the status quo until the closing and is generally in the context of continuing to conduct business in the usual and customary manner except as otherwise expressly authorized. Generally, these provisions are more applicable to the corporation being acquired, but certain provisions of this type may also properly be imposed upon the acquiring corporation. Certain typical provisions are set forth below.

A corporation usually agrees to limit its activities to the ordinary course of its business as previously conducted. Except as necessary for consummating the transaction, a corporation may agree not to amend its articles of incorporation or bylaws. Frequently there is imposed a restriction on the issuance of any additional stock, or securities convertible into stock, or giving a right to purchase stock, except to satisfy specified existing obligations. Likewise, a corporation may agree not to redeem, purchase, or acquire any of its own stock. There is usually a prohibition against being involved in any other merger or any other acquisition or disposition of assets except in the ordinary course of business. Frequently a corporation is prohibited from prepaying or refinancing existing indebtedness and from declaring or paying dividends in cash or property. However, if a corporation has a history of reasonable dividend payments, it is usually desirable to permit the continued declaration and payment of these dividends. If this is done, consideration should be given to the effect of the closing date on regular dividend payments. The timing of the closing might very well affect the payment of these dividends. Other similar provisions with regard to the conduct of the parties prior to closing may be added at this point. As with representations and warranties, the lawyer should include only those conditions that are necessary for the particular transaction.

*Conditions to Closing.* These provisions are intended to assure that the transaction will not be consummated unless the status quo has been maintained and unless matters to be accomplished prior to closing have in fact been accomplished. These conditions are typically related to all parties to the acquisition agreement, although the conditions imposed on each will naturally be somewhat different. The party for whose benefit the conditions are imposed should have the right to waive compliance with the conditions, but any waiver should be in writing. Typical conditions are described below.

The representations and warranties should be true as of the closing

date and as of the date initially made unless not applicable to both dates. The boards of directors should have approved the transaction and, if necessary, there should also be approval of the requisite percentage of the shareholders. Any necessary permits, licenses, and approvals which are required shall have been obtained. This includes federal and state regulatory agencies as well as consents of third parties to transfer of leases and contracts. A typical condition is that the business or properties of the acquired corporation not be adversely affected by disaster, technological changes, or other events. This condition might also be logically applied to the acquiring corporation. If a tax ruling is to be applied for, the extent to which a favorable ruling is a condition to closing should be specified. Frequently the ruling received is not exactly as requested and the rights of the parties to be satisfied with the ruling actually received should be set forth. If important, evidence of title to real and personal property being acquired should be furnished. If a no-action letter is being requested from the Securities and Exchange Commission, the receipt of a satisfactory response should be a condition to closing. Another common condition is that the parties shall have furnished to the other parties necessary information for stockholder meetings, proxy statements, or registration statements. It is frequently desirable to have an opinion from the auditors for the surviving corporation regarding accounting treatment of the transaction, and this may be the subject of a condition. Another condition to be considered is a requirement that shareholders claiming dissenter's rights granted under state law not exceed a specified percentage of the shares outstanding. The reason for such a condition is that the necessity of paying such shareholders the value of their stock might have a substantially adverse affect on the cash position of the surviving corporation.

A major condition to closing of the acquisition is the receipt of opinions from counsel. Generally, counsel for both the acquiring corporation and for the acquired corporation will render opinions to the parties on various aspects of the transaction. These will include such matters as due organization, existence and good standing, corporate power and authority, and, possibly, qualification in states other than the state of incorporation. The opinion should state that the corporate proceedings necessary to consummate the transaction shall have been duly obtained. Counsel should opinionate that the various agreements have been duly authorized, executed, and delivered, and are valid and binding obligations enforceable except to the extent enforcement is limited by the operation of any debtor relief laws. Counsel should also give its opinion that the consummation of the transaction will not violate any provisions of the articles of incorporation or bylaws of the corporation, and may also include an opinion that, to the best knowledge of such counsel, completing the transaction will not violate any agreements to which the corporation is a party. If stock or other securities are being issued or delivered in connection with the acquisition, the opinion should state that such securities have been duly

authorized and issued and are fully paid and non-assessible—except as corporate stock may be assessible under certain conditions under state statutes. If the acquisition is a merger, the opinion should cover the filing of the merger agreement or articles of merger and the effect of such filing. If the acquisition involves real property, the opinion may cover such matters as execution and delivery of conveyances and the condition of title, although the parties may agree to obtain other evidence of title such as title insurance. If the acquisition involves stock, counsel should opinionate that the stock being acquired is validly issued, fully paid, and non-assessible. If approval of other parties is required, the opinion may cover the fact that such approval has been obtained.

In many instances counsel rendering opinions will not be sufficiently expert in certain fields to be able to render the entire opinion. In this situation it is appropriate for the acquisition agreement to permit counsel to rely upon other counsel or authorities in such areas.

A final condition would be that other documents and events related to the acquisition shall have been executed and delivered or shall have occurred. This pertains not only to events collateral to a single acquisition, but to a situation in which a corporation may be simultaneously making two or more acquisitions.

*Termination Provisions.* The parties should recognize that certain events may occur which will make desirable the termination of the agreement and the cancellation of the proposed acquisition. Provisions for termination might include all or some of the following. The parties should be able to terminate the agreement by mutual consent. Failure of the shareholders to give any necessary approval by a specified date should be grounds for termination at the election of either party. In addition, if the conditions to the consummation of the transaction have not been satisfied by a specified date, the agreement should be subject to termination.

It is desirable to detail the manner in which the termination provisions are to be exercised and the particular corporate officers having authority to terminate the agreement. This section should also include a provision on the effect of termination. Even though the acquisition is called off, the entire acquisition agreement may not be terminated. Provisions for payment of expenses, promises to keep confidential information furnished in connection with the acquisition, and similar agreements should survive a "termination" of the agreement.

*Post-Closing Matters.* The acquisition agreement will contain a general provision whereby the acquired party agrees to make any further conveyances necessary to consummate the transaction and to assist in collecting accounts receivable and in performing contracts. To a certain extent these provisions are included to provide for conveyances and documents overlooked at the time of closing, but they are also necessary to insure an orderly transfer of the business previously conducted.

*Other Provisions.* Each acquisition contains certain unique aspects that will require special documentation, and provisions for these should be included in the acquisition agreement. Following are some that should be considered.

If the parties desire some specific accounting treatment, such as pooling or purchase, it certainly does no harm to express their intention, although prior approval of the acquiring corporation's auditors is the most desirable protection. Where there are other agreements relating to the acquisition, they should be referred to in the acquisition agreement. If the acquired corporation has a stock option plan, provision may be made for the assumption of existing options by the acquiring corporation. This may require that the acquiring corporation adopt a new stock option plan or amend its existing plan. Not all stock option plans are broad enough to include the assumption of options in connection with a corporate acquisition. If employees of the acquired corporation are to continue as employees of the acquiring corporation, there may be a general statement regarding continuity of employment. If there are specific employment contracts outstanding, these should be assigned or arrangements made for termination. In an acquisition of all of the stock of an existing corporation it is desirable to make arrangements for the transfer and reissuance of such stock at the closing. In this type of transaction it is frequently provided that all or a portion of the officers and directors of the acquired corporation will resign and be replaced by new officers and directors. The acquisition agreement should provide that the officers, agents, and representatives of the acquiring corporation have free access to the books and records, plants, and property of the acquired corporation. This provision typically requires that any information so obtained be kept confidential except as must be disclosed in connection with the transaction, and that any documents containing such information be returned in the event the acquisition is not consummated. If stock or other securities are being issued or delivered in connection with an acquisition, the status of these securities should be made clear. The parties acquiring the securities may be required to make an investment representation, in which event provision should be made for restrictive legends and stop transfer orders. If the parties have agreed that any of these securities be registered, this should be set forth in the agreement. The registration provisions should refer not only to the Securities Act of 1933 but also to applicable state securities acts. If any of the securities are listed on a stock exchange, provision should be made for the listing of the additional securities upon notification of issuance.

If the agreement provides for the issuance of any additional securities based upon future earnings or other contingencies, provision should be made for the subsequent issuance of the securities with specific reference to those persons entitled to the additional securities. An alternative to issuing additional securities later is to issue the maximum amount of securities at the closing with a portion being held in escrow to be returned to the acquiring corporation upon certain contingencies.

In an acquisition of substantially all the assets of an existing corporation the acquisition agreement may frequently provide that the acquiring corporation may use the name of the acquired corporation. This will require the acquired corporation to change its name even though its liquidation is planned to take place relatively shortly thereafter. Provision should be made for the payment of expenses to be incurred by all parties, including payment of fees and commissions of brokers and finders. If any state bulk transfer laws are applicable to the transaction, they should be complied with or waived by the parties. Provision should be made for the payment of any applicable state sales and use taxes.

Since notices may be required to be given under the acquisition agreement, there should be a provision specifying to whom and in what manner notices are to be given and when they are deemed to have been received.

The acquisition agreement is concluded with customary provisions regarding binding effect on successors and assigns and possibly the designation of a state whose laws are to be deemed applicable to the agreement. Any exhibits referred to in the acquisition agreement are, of course, attached to the document.

### B. *Related Agreements*

In addition to the matters covered in the basic acquisition agreement other portions of the transaction are frequently better handled in separate documents.

*Merger Agreement.* If the transaction involves a statutory merger, and if the necessary provisions of a merger document are not included in the acquisition agreement, it is necessary to have a separate merger agreement and to provide for the articles of merger, which is the document filed in the states of incorporation of the constituent corporations. If there is a separate merger agreement, the form of such agreement should be attached as an exhibit to the acquisition agreement and provision made for the separate execution and delivery of the merger agreement. The merger agreement should identify the parties, and state which corporations are the disappearing corporations and which corporation is the surviving corporation. It should set out the provisions for exchange of stock or securities on the same basis as provided in the acquisition agreement, and include provisions on fractional shares.

The merger agreement may contain amendments to the articles of incorporation and bylaws of the surviving corporation. It should identify the officers and directors of the surviving corporation, as there is frequently considerable politicking if one or more former directors of a disappearing corporation are to be members of the board of directors of the surviving corporation. The articles of merger should include the certifications and execution paragraphs required by state statutes and provisions covering the filing and recording of the articles of merger. It is wise counsel who sub-

mits the merger agreement to the secretary of state for approval prior to its execution and delivery.

*Agreement with Controlling Shareholders.* In some acquisitions the shareholders controlling one or more of the corporations, but typically those controlling the corporation being acquired, will have certain agreements with the acquiring corporation related to the transaction. Although these may be included in the acquisition agreement and these persons added as parties to that agreement, it is frequently desirable to incorporate the agreement with controlling shareholders in a separate document. If this is done, the form of the agreement will generally be atttached as an exhibit to the acquisition agreement.

Among the matters that might be covered in an agreement with controlling shareholders is their agreement which limits sales of securities acquired in the transaction in order to insure a continuity of ownership. It is often wise to cause the controlling shareholders to agree to vote their stock in the acquired corporation in favor of the proposed transaction, and to use their best efforts to cause a consummation of the acquisition. If this is not done, the controlling shareholders may be able to prevent the acquisition by failing to vote their stock for the transaction. Generally, this would only occur if they had a change of heart after the initial negotiations had been concluded. If the controlling shareholders are to give an investment representation with respect to the securities being received, it can be included in this agreement. This should include their consent for legends on the securities and stop transfer orders.

If the acquiring corporation has agreed to register any of the securities being issued or delivered in the transaction, such provisions can be contained in this separate document. This would include such matters as agreeing to file a registration statement with the Securities and Exchange Commission, possibly specifying the form to be used, and designating the securities to be registered. The registrant would agree to file post-effective amendments and to keep available prospectuses meeting the requirements of the Securities Act of 1933. The time during which such registration is to be maintained should be specified. These provisions should provide for qualification or registration of the securities in a reasonable number of states. Who is to pay the various expenses incurred in the registration should also be stated. Although a typical registration of this nature is of the "shelf" variety, it is possible that the controlling shareholders might desire to have an underwriting with respect to all or a part of the securities involved. This can pose an increased burden on the registrant, and if the controlling shareholders desire to be able to have an underwriting, they should be certain this is expressly provided for. This agreement will typically include cross-indemnifications similar to those contained in an underwriting agreement. The registrant may request that the controlling shareholders agree to forego any sales under such a registration statement during certain periods before and after an offering of securities by the registrant.

This agreement may also include representations and warranties regard-

ing the acquired corporation, guarantees as to payment of indebtedness, and other agreements depending upon the circumstances.

*Other Agreements.* The nature of the transaction will dictate the need for other agreements relating to the acquisition agreement. These might include an employment agreement whereby one or more key employees of the acquired corporation agrees to become an employee of the acquiring corporation. Also personnel of the acquired corporation who are not to become employees of the acquiring corporation may enter into noncompetition agreements. These agreements should, of course, be limited as to time and geographical area to insure their validity.

### C. *Other Documents and Events*

*Action of Board of Directors.* The board of directors of the corporations involved in the transaction should approve all definitive documents and authorize their execution and delivery. It is not uncommon for the board to meet just prior to the closing to determine that all conditions have been satisfied and authorize the closing of the transaction. Any necessary amendments to the articles of incorporation should be initiated by the board of directors. The board should also call any required special meetings of the shareholders.

*Shareholders Meetings.* Depending upon the nature of the transaction, it may be necessary to obtain the approval of the shareholders of one or more of the constituent corporations. Even if shareholder approval is not required under state law, the rules of a stock exchange on which securities are listed may require such approval.

If a shareholders' meeting is necessary, it should be held in compliance with the corporation's articles of incorporation and bylaws and in compliance with state and federal laws. The documents preceding the meeting will include a notice of meeting and probably a president's letter, stating in general terms the purpose of the meeting and his general enthusiasm for the transaction. The notice of meeting will be accompanied by a proxy statement and a proxy. If a corporation is subject to the proxy rules under the Securities Act of 1934, all of these documents must be prepared in compliance with such rules. The parties should consider using a joint proxy statement with a separate notice and cover page for each corporation. If such a procedure is practicable, there can be a considerable saving in printing costs and the proxy statement may be more suitable for use in an S-14 registration statement.

To the extent necessary, the corporations should arrange for proxy solicitation to insure that the required number of shares of stock is represented at the meeting and that the requisite vote can be obtained. The usual procedures for the tabulation of proxies and the holding of the shareholders' meeting should be followed.

*Amendments to Articles of Incorporation.* Unless any necessary amendments to the articles of incorporation of the surviving corporation are included in the merger agreement, they must be provided for. Amendments which may be necessary include a change of name of the corporation, an expansion of the purpose clause to include the authority to engage in additional kinds of business, and an increase in the number of shares of authorized stock. If part of the consideration for the acquisition is the issuance of a special class of stock, it may be necessary to amend the articles of incorporation to authorize this stock. This would include the designation of the class or series of stock, the number of shares authorized, dividend provisions, redemption provisions, liquidation provisions, voting rights, conversion rights, if any, anti-dilution provisions, and other similar provisions.

*Other Matters.* If a tax ruling is to be obtained, there should probably be a conference with the Internal Revenue Service at the time of the filing of the request for the ruling, and, after the request is filed, there should be follow-up with the Internal Revenue Service until the ruling has been issued. Any necessary approval of state or federal regulatory agencies should be obtained. These may include a no-action letter from the Securities and Exchange Commission or may involve a registration of securities issued in the acquisition. Counsel should also be certain that the securities laws of the various states involved are complied with. If the transaction involves an assumption of the debt securities of the acquired corporation, it may be necessary to obtain a consent of the security holders and a supplemental indenture will probably also be required. Employee compensation or benefit plans should be studied for any necessary changes. Counsel should remind the parties to arrange for necessary insurance coverages or changes in existing coverages. If any of the securities involved in the transaction are listed on a stock exchange or traded in the over-the-counter market, arrangements should be made with the stock exchange or the National Association of Securities Dealers for trading in the stock and the date as of which trading goes "x" the transaction. In a merger, the acquired corporation ceases to exist on the effective date of the merger, and its stock transfer books are closed as of that date.

## IV. The Closing

In a properly documented acquisition the closing is truly an anticlimax. Hopefully, all of the documents will have been prepared and approved in advance, and there should be no surprises on the day of closing. Counsel should prepare a closing memorandum setting forth all of the documents and events necessary to consummate the transaction. All agreements should be prepared and approved and, generally, signed in advance of closing. All conditions to the closing of the transaction should be satisfied or waived in writing. In a major acquisition the boards of directors of the corporations

involved should meet and give their final approval to the closing of the transaction.

At the closing itself counsel involved should agree that all documents are delivered conditionally until the closing has been completed. The documents delivered at the closing will include certified copies of articles of incorporation, bylaws, and corporate resolutions. There should also be certificates of the correctness of the representations and warranties and compliance with conditions that are to be satisfied prior to closing. Depending upon the nature of the transaction, there will be a merger agreement or articles of merger executed and filed, or the execution and delivery of conveyances, or transfer and delivery of stock, and the payment of the agreed consideration. The opinions of counsel and other documents are also delivered at this time. As a part of the closing, arrangements should be made for any necessary filings of merger agreements, deeds, or conveyances. It is not uncommon to have such documents predated, executed, and in the hands of an agent at the place of filing so that the filing can be completed at the time of closing. If necessary, a stock exchange should be given notice of the issuance of securities listed on such exchange.

## V. Post-Closing

Although a number of events and documents are classified as post-closing matters, they should be provided for in advance of closing to prevent undue time delays. If there is to be an exchange of stock, as with a merger agreement, arrangements with the transfer agent should be made in advance for the issuance and delivery of the securities involved. This will include the delivery to the transfer agent of a final list of shareholders entitled to receive the new securities, showing the securities to be received by each such shareholder. These shareholders should receive a letter giving instructions for the exchange of securities and be furnished a letter of transmittal with which they can send in their old securities to be exchanged for the new securities. If the shareholders of any corporation have dissenter's rights under state laws, the acquiring corporation should receive a list of the shareholders who have taken the necessary steps to perfect these rights.

The acquiring corporation will generally want to send a letter of welcome to its new security holders. Upon the closing of the transaction a public announcement that the acquisition has been completed should be made. The content and distribution of this announcement is similar to the original press release.

Counsel should advise various parties of their responsibilities under the federal securities laws that may result from the acquisition, including reporting requirements, insider trading, and registration requirements.

In a transaction for a sale of substantially all of the assets of the corporation, the selling corporation will typically be liquidated and dissolved. This may involve distribution of the consideration received from the sale of these assets to the shareholders of the corporation.

As a final duty, counsel should see that copies of all documents relating

to the transaction are furnished to necessary parties. Frequently this is accomplished by preparing impressive leather-bound black volumes that lead some clients to believe they are being charged by the pound for this legal work.

With the transaction and its documentation thus completed, the corporate lawyer is ready for half-a-day's vacation before facing the next client who has been waiting impatiently for him to get busy on the next acquisition.