802 Mini-MBA for the Corporate Practitioner

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Faculty Biographies

William A. Barnett

William A. Barnett currently holds the positions of vice president, general counsel, corporate risk manager, head of human resources, and secretary/treasurer for State Industrial Products Corporation based in Cleveland. He is responsible for providing legal advice to the corporation and all of its business subsidiaries as well as representing the corporation in all legal matters. The corporate legal practice has included a significant emphasis on alternative dispute resolution. Mr. Barnett actively practices in a broad based general corporate law environment that includes litigation. Over the past 16 years, he has focused on employment law, product liability issues including pro-active programs and litigation.

Prior to joining State, he was an associate with the Cleveland law firm of McCarthy, Lebit, Crystal & Haiman, Co. L.P.A.

Mr. Barnett is president of ACCA's Northeastern Ohio Chapter and is a member of the Northern Ohio Regional Commercial Advisory Committee of the American Arbitration Association.

Mr. Barnett received his BS from Northwestern University and JD from Case Western Reserve University.

Jennifer H. Gorman

Jennifer H. Gorman is senior attorney for State Industrial Products Corporation, a privately held company with headquarters in Cleveland. State Industrial Products manufacturers and sells a full line of industrial maintenance products. Ms. Gorman is responsible for providing legal advice to the corporation and all of its business subsidiaries, as well as representing the corporation in all legal matters. Her focus is on litigation involving the company, including employment matters, product liability, contract enforcement, and intellectual property.

Previously, Ms. Gorman was with the Cleveland law firm of Ulmer & Berne LLP for eight years where she was a member of the firm's business litigation and employment law groups. While at Ulmer & Berne, Ms. Gorman gained extensive experience in state and federal courts in all aspects of business litigation.

Ms. Gorman currently serves on the Board of ACCA's Northeast Ohio Chapter. Her pro bono activities include serving as a guardian ad litem for the Cuyahoga County, Ohio Juvenile Court program. She is also involved with The Free Clinic of Greater Cleveland, a nonprofit agency that provides free health services.

Ms. Gorman received a BA from Miami University of Ohio and her JD cum laude from Cleveland-Marshall School of Law.

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Frederick M. Lowther

Frederick M. Lowther joined Dickstein Shapiro Morin & Oshinsky LLP nearly 30 years ago, and focuses his practice on domestic and international energy and water supply projects and transactions, and general counseling of energy companies in all sectors of the industry, as well as energy technology companies. He heads the Firm's Energy Practice. Previously, Mr. Lowther also served as in-house general counsel of KeySpan Corporation, a large New York and Boston-based utility company created by the merger of Brooklyn Union Gas, Long Island Lighting Company and Eastern Enterprises.

Mr. Lowther has devoted his career in large part to the development of large energy and natural resource projects in the United States and abroad. Since 1972, when he served as a member of the U.S. Government Mission to negotiate the 1972 U.S.-U.S.S.R. Trade Agreement, Mr. Lowther has been active in business matters in the Soviet Union and Eastern Europe. Mr. Lowther is general counsel and a director of Poseidon Resources Corporation, a water project development company.

Mr. Lowther is a member of the Dickstein Shapiro's Executive Committee and is chairman of its Compensation Committee. He has also served as managing partner of the firm and chairman of the Management Committee. Mr. Lowther is currently serving as counsel to the chairman of KeySpan Corporation and previously served as general counsel of KeySpan. He serves as a member of the Board of Directors of EEX Corporation, Poseidon Resources Corporation, Northeast Gas Markets, Inc., and KeySpan Energy Development Corporation. Mr. Lowther is a member of the ABA, District of Columbia Bar Association, and Energy Bar Association.

Mr. Lowther received his BA magna cum laude from Brown University and his JD with honors from Yale Law School. He was elected to Phi Beta Kappa.

Howard Schiffman

Howard Schiffman joined Dickstein Shapiro Morin & Oshinsky LLP over 20 years ago and has focused his practice on investigations and enforcement proceedings brought by various exchanges and government agencies, including the Securities and Exchange Commission (SEC), the Department of Justice (DOJ), and the National Association of Securities Dealers Regulation, Inc. (NASDR), as well as on diverse civil litigation (including securities class actions). He also has served as special internal investigative counsel to public companies. Mr. Schiffman is cohead of the firm's 100-member corporate and finance group and the head of the firm's securities litigation and regulatory practice.

Before entering practice with Dickstein Shapiro, Mr. Schiffman was a trial attorney in the SEC Division of Enforcement. Mr. Schiffman also served on the adjunct faculty of the Washington College of Law, American University, where he conducted seminars on white collar crime.

As a member of the ABA, Mr. Schiffman participates in the litigation, corporation, finance, and securities law sections. Mr. Schiffman has served as president of the Association of Securities and Exchange Commission Alumni, Inc. (ASECA) and has served for several years as a director of this organization.

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Mr. Schiffman is a cum laude graduate of Colgate University and Fordham University Law School, where he was a member of the *Fordham Law Review*.

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ACCA PRESENTATION:
Mini-MBA for the Corporate Practitioner
ENTERPRISE RISK MANAGEMENT

Frederick M. Lowther
Dickstein Shapiro Morin & Oshinsky LLP

"ENTERPRISE RISK MANAGEMENT" OR "ERM" IS A RELATIVE NEWCOMER TO THE CORPORATE LEXICON

- UNTIL RECENTLY, VERY FEW COMPANIES TREATED ERM AS A FORMAL CORPORATE DISCIPLINE.
- EVEN TODAY, VERY FEW COMPANIES HAVE A "CHIEF RISK OFFICER" OR "CHIEF COMPLIANCE OFFICER."
- RISK MANAGEMENT FUNCTIONS WERE WIDELY SPREAD THROUGHOUT THE COMPANY, OFTEN NOT COORDINATED.

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ERM'S INTRODUCTION TO THE CORPORATE LEXICON, *continued*

- THE CONCEPT OF ERM AS A CORPORATE DISCIPLINE BEGAN PICKING UP STEAM ABOUT FIVE YEARS AGO.
- IN THE PAST YEAR, WITH THE ADVENT OF ENRON, TYCO, WORLDCOM, ADELPHIA AND OTHER CALAMITIES, NOT TO MENTION THE SARBANES-OXLEY BILL, ERM HAS BECOME A MAJOR NATIONAL MOVEMENT.
- THE RESULT IS NEW RULES AND NEW ROLES.

IN SIMPLE TERMS

ERM IS THE DAY-TO-DAY MANAGEMENT OF THE BASKET OF RISKS FACED BY EVERY COMPANY OF SUBSTANCE

INCLUDING:

- FINANCIAL AND ACCOUNTING RISKS AND EXPOSURES

  ESPECIALLY COMPUTER / IT SECURITY RISKS
- ENVIRONMENTAL RISKS

  LITIGATION RISKS INCLUDING LAW ENFORCEMENT RISKS
- INTELLECTUAL PROPERTY RISKS

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THE GOALS OF ERM ARE:

- ESTABLISH AND MAINTAIN A COORDINATED APPROACH TO RISK IDENTIFICATION.

  "THE FIRST STEP IN MANAGING A RISK IS KNOWING THAT IT EXISTS." IF THERE ARE "BET YOUR BUSINESS" RISKS FOR A PARTICULAR COMPANY, THE COMPANY SHOULD KNOW WHAT THEY ARE.

- ENABLE THE COMPANY TO ANTICIPATE EVENTS IN WAYS WHICH MINIMIZE EXPOSURE.

  A GOOD EXAMPLE IS WHERE A MAJOR CUSTOMER OR SUPPLIER IS ABOUT TO DECLARE BANKRUPTCY.

THE GOALS OF ERM, *continued*

- ENSURE THE CONSISTENT AND RESPONSIBLE USE OF RISK MANAGEMENT TOOLS.

  INSURANCE, FINANCIAL INSTRUMENTS, INTERNAL CONTROLS, ETC.

- IDENTIFY CLEAR ROLES WITHIN THE COMPANY SO THAT THE RISK MANAGEMENT PROCESS "HAS MANY EYES AND EARS."

- PROVIDE PROPER COORDINATION DURING PEAK RISK PERIODS.

  CIVIL OR CRIMINAL INVESTIGATIONS, INDUSTRY MELT-DOWNS, ETC.

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FINANCIAL AND ACCOUNTING RISK MANAGEMENT IS THE MOST VISIBLE AND MOST DIFFICULT PART OF ERM

- THE ROLE OF THE BOARD AUDIT COMMITTEE HAS BEEN SUBSTANTIALLY REDEFINED, ESPECIALLY POST-ENRON. THE CRO AND ERM STAFF MUST PROVIDE PROPER SUPPORT (WITHIN THE CONTEXT OF THE AUDIT COMMITTEE'S INDEPENDENCE).
- MOST COMPANIES DO (AND MOST WHO DON'T, SHOULD) USE FINANCIAL TOOLS FOR RISK MANAGEMENT (HEDGES, SWAPS, OPTIONS, COLLARS, ETC.). THE CRO AND ERM STAFF MUST HAVE MORE THAN RUDIMENTARY UNDERSTANDING OF THESE COMPLEX INSTRUMENTS.

FINANCIAL AND ACCOUNTING RISK MANAGEMENT DIFFICULTIES, *continued*

- ENRON, TYCO, WORLDCOM AND SARBANES-OXLEY ILLUSTRATE THE IMPORTANCE OF ACCOUNTING RISK MANAGEMENT. INDEED, IN THE CASE OF ENRON, THE FAILURE OF THE CRO TO NIX THE CREATION OF EXTERNAL PARTNERSHIPS IS VIEWED WIDELY AS A BREACH OF THE LAST LINE OF DEFENSE.
- MANAGING BANKRUPTCY RISKS (I.E., THE RISKS ASSOCIATED WITH SUPPLIERS OR CUSTOMERS DECLARING BANKRUPTCY) IS A CRITICAL FUNCTION OF THE CRO AND ERM STAFF.

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SECURITY RISKS ARE INCREASINGLY DIFFICULT TO MANAGE BUT THE NEED FOR BROAD MANAGEMENT AT THE ERM LEVEL HAS NEVER BEEN GREATER

- THERE ARE FEW BUSINESSES TODAY WHICH ARE NOT SUBSTANTIALLY INDEPENDENT ON INFORMATION TECHNOLOGY. THE CRO AND THE CIO SHOULD HAVE A STRONG WORKING RELATIONSHIP.
- ONE OF THE BEST EXAMPLES OF ERM IS THE WAY MOST COMPANIES HANDLED THE Y2K RISKS. THAT WAS TRULY AN “ENTERPRISE RISK” FOR MOST INDUSTRIES.
- OTHER SECURITY RISKS INCLUDE EMPLOYEE MISCONDUCT (THEFT, EMBEZZLEMENT, IMPROPER USE OF COMPANY FACILITIES) AND PHYSICAL SECURITY OF COMPANY PROPERTY AND PERSONNEL.

ENVIRONMENTAL RISKS ARE GREATER OR LESSER FOR A COMPANY DEPENDING ON THE BUSINESS SECTOR, BUT ALMOST EVERY SIGNIFICANT COMPANY FACES SOME ENVIRONMENTAL RISK

- FOR EXAMPLE, AN ECONOMIC CONSULTING FIRM OCCUPYING A BUILDING WITH ASBESTOS INSULATION FACES AN ENVIRONMENTAL RISK.
- IN SOME INDUSTRIES, ENVIRONMENTAL RISKS ARE DOMINANT AND REQUIRE DAY-TO-DAY MANAGEMENT.

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LITIGATION RISKS, ESPECIALLY IN THE U.S., REQUIRE CONSTANT MANAGEMENT

- LITIGATION RISKS ARE INHERENTLY LEGAL IN NATURE, BUT THE ERM FUNCTION MUST LOOK AT LITIGATION RISKS IN THE OVERALL CORPORATE CONTEXT:

  HOW WILL LITIGATION AFFECT OUR ABILITY TO OBTAIN FINANCING; ARE WE ADEQUATELY INSURED FOR D&O, E&O LIABILITIES; HOW DOES OUR LITIGATION PROFILE COMPARE TO OUR PEER COMPANIES?

- MOST GENERAL COUNSELS FAIL TO SEE LITIGATION RISKS AS “ENTERPRISE” RISKS, BUT THEY ARE -- AND THE GENERAL COUNSEL IS WELL ADVISED TO COORDINATE CLOSELY WITH THE CRO.

INTELLECTUAL PROPERTY RISKS ARE OFTEN IGNORED IN ENTERPRISE RISK ASSESSMENT, BUT VERY FEW COMPANIES CAN DISREGARD IP RISKS

- IP IS AN EXTREMELY BROAD FIELD AND GETTING BROADER EVERY YEAR.
- PROTECTION OF TRADEMARKS, SERVICE MARKS, COPYRIGHTS, URLS, DOMAIN NAMES, NOT TO MENTION PATENTS, SHOULD BE A HIGH PRIORITY ITEM FOR MOST COMPANIES.
- IP RISK MANAGEMENT REQUIRES A 360 DEGREE PERSPECTIVE:

  IS SOMEONE ENCROACHING ON MY IP, OR AM I ENCROACHING ON SOMEONE ELSE’S? ARE MY ACTIVITIES CREATING IP, AND IF I’M ENGAGED IN ACTIVITIES JOINTLY WITH OTHERS, WHAT RIGHTS DO I HAVE VERSUS MY JOINT VENTURE?

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WHAT IS THE ROLE OF CORPORATE COUNSEL IN THE ERM PROCESS?

- FOR COMPANIES WITHOUT FORMAL ERM FUNCTIONS AND WITHOUT A CRO, THE GENERAL COUNSEL IS THE LOGICAL OFFICER TO OVERSEE THE ERM FUNCTION.
- FOR COMPANIES WITH CRO'S, THE CRO OFTEN REPORTS TO THE GENERAL COUNSEL BUT, REGARDLESS OF THE REPORTING RELATIONSHIPS, THE CRO AND THE GENERAL COUNSEL SHOULD WORK HAND-IN-HAND.

CORPORATE COUNSEL'S ROLE IN THE ERM PROCESS, *continued*

- THE CRO'S SINGLE MOST DIFFICULT JOB IS GETTING INFORMATION AND KEEPING IT CURRENT. CORPORATE COUNSEL IS:

  A) A SIGNIFICANT (INDEED CRUCIAL) SOURCE OF INFORMATION

  B) AN IMPORTANT PROMOTER AND PROTECTOR OF THE INFORMATION GATHERING PROCESS

  C) A SOURCE OF LEGAL ADVICE TO THE CRO

  D) ALWAYS AN ESSENTIAL MEMBER OF ANY CRISIS MANAGEMENT TEAM.

  IN INSTANCES WHERE INVESTIGATIONS ARE REQUIRED, CORPORATE COUNSEL MUST DETERMINE WHETHER THE INVESTIGATION SHOULD BE "INTERNAL" OR "INDEPENDENT," AND IN EITHER EVENT CORPORATE COUNSEL SHOULD MANAGE THE PROCESS IN CONJUNCTION WITH THE CRO.

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ACCA PRESENTATION:

Mini-MBA for the Corporate Practitioner

Mergers and Acquisitions

Frederick M. Lowther
Dickstein Shapiro Morin & Oshinsky LLP

"M&A" IS A UNIVERSALLY RECOGNIZED TERM

NOT EVERYONE KNOWS OR APPRECIATES THE SCOPE AND COMPLEXITY OF THE CONCEPT

IN BRIEF, THE TERM INCLUDES:

MERGERS/BUSINESS COMBINATIONS

- MERGERS OF EQUALS
- FORWARD MERGERS
- REVERSE MERGERS
- REVERSE TRIANGULAR MERGERS

ACQUISITIONS

- ASSET ACQUISITIONS
- STOCK ACQUISITIONS

DIVESTITURES

- SALES OF ASSETS
- SALE OF STOCK
- IPO'S
- SPIN-OFFS
- ABANDONMENT OR DISCONTINUANCE OF A BUSINESS

BUSINESS FORMATION (START-UPS)

- ESPECIALLY WHERE THIRD PARTIES ARE INVOLVED

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PRIMARY MESSAGE:

IN ANY M&A TRANSACTION OF SUBSTANCE IT IS ALWAYS USEFUL THAT A COMPANY HAVE QUALIFIED "DEAL" COUNSEL AND QUALIFIED TAX COUNSEL. IF SUCH CAPACITY DOES NOT EXIST IN-HOUSE, YOU SHOULD LOOK TO OUTSIDE COUNSEL FOR SUPPORT.

SECONDARY MESSAGE:

THERE IS NOT ONE SINGLE STATEMENT I WILL MAKE IN THIS PRESENTATION WHICH DOES NOT HAVE AN EXCEPTION OR EXCEPTIONS. THIS TOPIC DOES NOT LEND ITSELF TO BROAD GENERALIZATIONS.

WHAT IS THE DIFFERENCE BETWEEN A MERGER AND AN ACQUISITION?

NOT A SIMPLE QUESTION BECAUSE MERGERS ARE A FORM OF ACQUISITION, AND MOST ACQUISITIONS INVOLVE MERGERS.

THE MAIN DIFFERENCE

- **IN AN ACQUISITION, THE BUYER AND THE SELLER ARE CLEARLY IDENTIFIED.**
- **IN A MERGER THE DISTINCTION BETWEEN BUYING AND SELLING IS OFTEN ERASED.**

IN ADDITION

A MERGER ALWAYS RESULTS IN COMPLETE OWNERSHIP OF THE MERGING ENTITIE(S), WHEREAS IN AN ACQUISITION, PARTIAL OWNERSHIP CAN BE ACCOMPLISHED.

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THERE ARE MANY FORMS OF MERGERS

COMPANY A AND COMPANY B WISH TO COMBINE.

- COMPANY A CAN MERGE INTO COMPANY B
- COMPANY B CAN MERGE INTO COMPANY A
- COMPANIES A AND B CAN MERGE INTO NEWLY CREATED COMPANY C
- ONE COMPANY CAN CREATE A SUBSIDIARY AND MERGE THE SUBSIDIARY INTO THE OTHER COMPANY (THE REVERSE TRIANGULAR MERGER)

THE CHOICE OF MERGER FORMS IS DRIVEN LARGELY BY BUSINESS OBJECTIVES AND TAX CONSIDERATIONS.

BUSINESS CONSIDERATIONS IN CHOOSING A MERGER FORM INCLUDE (BUT ARE BY NO MEANS LIMITED TO):

- NAME AND STATURE OF THE SURVIVING COMPANY (THE “SUCCESSOR COMPANY” ISSUE).
- WHETHER THE SURVIVING COMPANY WILL BE PUBLICLY TRADED OR PRIVATELY HELD.

  ONE CONVENIENT MEANS OF “GOING PUBLIC” OR “GOING PRIVATE” IS TO MERGE A COMPANY INTO AN ENTITY WITH THE DESIRED CHARACTERISTICS.

  WHETHER THE OBJECTIVE IS 100% OWNERSHIP, OR LESS THAN 100% OWNERSHIP.

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TAX CONSIDERATIONS ARE INVARIABLY COMPLEX AND *ALWAYS* REQUIRE EXPERTISE

TAX CONSIDFERATIONS INCLUDE:

- AVOIDING OR MINIMIZING RECOGNITION OF CAPITALGAINS
- AVOIDING UNNECESSARY CREATION OF A TAXABLE EVENT
- AVOIDING UNNECESSARY CREATION OF TAXABLE INCOME FOR INDIVIDUALS (EMPLOYEES, OFFICERS, SHAREHOLDERS)

TWO MAIN FORMS OF ACQUISITIONS:

ASSET AND STOCK

BUYERS **ALMOST ALWAYS WANT TO ACQUIRE** ***ASSETS***

SELLERS **ALMOST ALWAYS WANT TO ACQUIRE** ***STOCK***

THE KEY DIFFERENCE:

WHEN YOU ACQUIRE STOCK, YOU ARE ACQUIRING THE ENTIRE COMPANY -- ASSETS, LIABILITIES AND CONTINGENT RISKS.

WHEN YOU ACQUIRE ASSETS, YOU CAN EXCLUDE LIABILITIES AND CONTINGENT RISKS NOT SPECIFICALLY ASSOCIATED WITH THE ASSETS.

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IN AN ASSET ACQUISITION, THE BUYER HAS THE OPPORTUNITY TO STEP UP THE BASIS IN THE ASSETS.

IN A STOCK ACQUISITION, THE OPPORTUNITY TO STEP UP THE BASIS IN ASSETS IS MUCH MORE LIMITED.

THE INTERNAL REVENUE CODE CONTAINS A PROVISION CALLED SECTION 338(h)(10) WHICH PERMITS A BUYER, IN EFFECT, TO TREAT A STOCK ACQUISITION AS AN ASSET ACQUISITION FOR TAX (AND ASSET BASIS) PURPOSES.

SECTION 338(h)(10) ELECTIONS ARE COMPLEX; YOU SHOULD BE CERTAIN YOU HAVE PROPER TAX EXPERTISE.

WHAT IS THE TYPICAL M&A PROCESS?

THERE ARE THREE BROAD STEPS IN THE M&A PROCESS.

THE COURTSHIP

THE NEGOTIATIONS

CONCLUDING THE DEAL

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TRANSACTIONAL COURTSHIPS ARE NOT UNLIKE HUMAN COURTSHIPS – THERE ARE MANY DIFFERENT APPROACHES.

TYPICALLY, TWO PARTIES TO A TRANSACTION ARE BROUGHT TOGETHER BY A THIRD PARTY – USUALLY AN INVESTMENT BANKER, A VENTURE CAPITALIST, A BROKER OR AN ATTORNEY.

INDEED, INVESTMENT BANKERS AND VENTURE CAPITALISTS ARE IN THE BUSINESS OF CREATING MARRIAGES.

AS WITH HUMANS, SOME COURTSHIPS ARE SHORT-LIVED AND SOME GO ON FOREVER.

MOST TRANSACTIONS BEGIN WITH A "TERM SHEET" – AN OFTEN COMPLICATED DOCUMENT WHICH SETS FORTH THE MAIN ELEMENTS OF THE PROPOSED TRANSACTION.

> I'VE INCLUDED A SAMPLE TERM SHEET IN YOUR BOOKS, JUST SO YOU SEE WHAT A TERM SHEET LOOKS LIKE.
>
> THERE ARE OTHER NAMES FOR A TERM SHEET – LETTER OF INTENT ("LOI"), MEMORANDUM OF UNDERSTANDING ("MOU"), ETC. THEY ALL SERVE THE SAME PURPOSE.

IN A PROPERLY MANAGED TRANSACTION, THE PRIMARY NEGOTIATIONS OCCUR AT THE TERM SHEET STAGE.

IN MY EXPERIENCE, THE MORE MATERIAL DETAILS WHICH ARE LEFT OPEN IN A TERM SHEET, THE LESS LIKELY THE DEAL IS TO BE CONSUMMATED.

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TERM SHEETS SHOULD ADDRESS BUSINESS ISSUES, FINANCIAL ISSUES AND SOCIAL ISSUES.

IT IS ALWAYS ADVISABLE TO HAVE PRINCIPALS INVOLVED IN THE NEGOTIATIONS, AND NOT JUST AGENTS (BANKERS, ACCOUNTANTS AND ATTORNEYS).

IN THE TYPICAL TRANSACTION, THE FOUR BIGGEST ISSUES ARE PRICE, FORM OF CONSIDERATION, SOCIAL ISSUES AND DUE DILIGENCE.

PRICE AND FORM OF CONSIDERATION CAN BE COMPLICATED FOR TWO REASONS.

REASON ONE

THERE HAS TO BE AGREEMENT ON MAGNITUDE – WHAT IS THE PRICE, THE VALUE WHICH WILL BRING THE TWO PARTIES TOGETHER.

REASON TWO

THERE IS INVARIABLY PASSGE OF TIME BETWEEN AGREEMENT ON PRICE AND CONSIDERATION AND CLOSING.

THERE MUST BE MECHANISMS TO TAKE INTO ACCOUNT CHANGES IN THE VALUE OF THE COMPANIES AS WELL AS CHANGES IN THE VALUE OF THE CONSIDERATION (ESPECIALLY IF THE CONSIDERATION IS STOCK VS. CASH).

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SOCIAL ISSUES CAN BE ENORMOUS STUMBLING BLOCKS IN BUSINESS COMBINATIONS, AND WHILE THE TEMPTATION IS TO ADDRESS THEM LAST ("AFTER WE KNOW WE HAVE A DEAL"), EXPERIENCE SAYS THEY SHOULD BE DEALT WITH AT THE FRONT OR, AT WORST, IN THE MIDDLE OF THE NEGOTIATIONS.

IN A BUSINESS COMBINATION, THE CRITICAL SOCIAL ISSUES ARE:

- **LEADERSHIP AT THE TOP**
- **SELECTION OF SURVIVING DIRECTORS**
- **POSITIONS OF SURVIVING OFFICERS**
- **ELIMINATING FUNCTIONAL REDUNDANCIES**

  (MERGING IT, LEGAL, CORPORATE SERVICE ACTIVITIES)
- **WORKFORCE REDUCTIONS**
- **IMPACTS ON RETIREMENT PLANS AND OTHE BENEFITS**

DUE DILIGENCE

- **DUE DILIGENCE FALLS BROADLY INTO TWO CATEGORIES: BUSINESS DUE DILIGENCE AND LEGAL DUE DILIGENCE.**
- **BUSINESS DUE DILIGENCE INVOLVES THE EXAMINATION OF THE FINANCIAL AND STRATEGIC ASPECTS OF THE BUSINESS BEING ACQUIRED, OR THE BUYER OF A BUSINESS BEING SOLD.**
- **LEGAL DUE DILIGENCE INVOLVES THE EXAMINATION OF THE BUSINESS' LEGAL OBLIGATIONS AND RISKS: CONTRACTS, CONTRACT OBLIGATIONS, CONTINGENT LIABILITIES, LITIGATION EXPOSURES, ETC.**
- **I HAVE INCLUDED IN MY MATERIALS A TYPICAL "PRELIMINARY" CHECK LIST FOR DUE DILIGENCE. AS YOU WILL SEE, IT IS QUITE COMPREHENSIVE AND COVERS BOTH BUSINESS AND LEGAL DUE DILIGENCE ISSUES.**

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THE TIMING OF DUE DILIGENCE IS IMPORTANT

- ANY TENDENCY TO POSTPONE DUE DILIGENCE SHOULD BE RESISTED; OTHERWISE THERE IS THE DANGER THAT DUE DILIGENCE WILL BECOME A FORMALITY.
- DUE DILIGENCE, HOWEVER, IS NO SUBSTITUTE FOR LEGAL PROTECTIONS, GENERALLY IN THE FORM OF REPRESENTATIONS AND WARRANTIES.
- I HAVE ALSO INCLUDED IN MY COURSE MATERIALS AN EXAMPLE OF REPS AND WARRANTIES FROM A SPECIFIC TRANSACTION. AGAIN, YOU WILL SEE THAT THEY ARE QUITE COMPREHENSIVE.

ONE AREA OF DUE DILIGENCE WHICH REQUIRES GREAT CARE IS REVIEWING FINANCIAL STATEMENTS.

- HOWARD SCHIFFMAN WILL TALK IN SOME DETAIL ABOUT FINANCIAL STATEMENTS AND REPORTS. I WILL TOUCH ON A FEW HIGHLIGHTS.
- A CARDINAL RULE FOR REVIEWING FINANCIAL STATEMENTS IS "READ THE NOTES." THAT FACT THAT A MATTER HAD TO BE NOTED IN A FINANCIAL STATEMENT MAY BE AN IMPORTANT FLAG IN THE M&A CONTEXT.
- THE PRINCIPAL FINANCIAL STATEMENT ARE THE BALANCE SHEET, INCOME STATEMENT AND STATEMENT OF CASH FLOWS.
- SOME COMPANIES MAY ALSO HAVE A STATEMENT OF OPERATIONS AND A STATEMENT OF STOCKHOLDER EQUITY.

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ASIDE FROM THE GENERAL OVERVIEW OF COMPANY FINANCIAL HEALTH, THE AREAS OF PRINCIPAL FOCUS DURING DUE DILIGENCE SHOULD BE:

BALANCE SHEET
- DEBT-TO-EQUITY RATIO
- CAPITALIZED ASSETS HELD FOR SALE
- GOODWILL AND OTHER INTANGIBLES
- POSTRETIREMENT OBLIGATIONS
- OTHER COMMITMENTS AND CONTINGENT LIABILITIES

INCOME STATEMENT
- NONRECURRING EVENTS
- EXTRAORDINARY ITEMS
- G&A EXPENSES AS A PROPORTION OF REVENUE

STATEMENT OF CASH FLOWS
- ADJUSTMENTS TO RECONCILE NET CASH
- EFFECTS OF CHANGES
- INVESTING ACTIVITIES
- FINANCING ACTIVITIES

WHAT IS THE ROLE OF CORPORATE COUNSEL IN ALL OF THIS?

CORPORATE COUNSEL PLAY SEVERAL CRITICAL ROLES:

HANDS-ON MANAGEMENT OF THE TRANSACTION

SELECTION AND OVERSIGHT OF OUTSIDE COUNSEL

PRIMARY RESPONSIBILITY FOR IDENTIFYING AND MANAGING IMPACTS ON “INTERNAL” FUNCTIONS (PENSION AND BENEFIT PLANS, LABOR AGREEMENTS, RISK MANAGEMENT GUIDELINES, ETC.)

COORDINATION OF INTERFACE BETWEEN OUTSIDE COUNSEL AND PRINCIPALS – ESPECIALLY THE CEO AND BOARD OF DIRECTORS.

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FOR DISCUSSION PURPOSES ONLY **ATTACHMENT A**

XYZ CORP.

Proposed Termsheet

August 3, 2002

I. General

Investors (the "Investors") shall include:
1. ABC Corp. and certain affiliates thereof (collectively, the "Investors").
2. Members of Management (the "Investor Managers").

Management shall include:
1. Mr. X
2. Mr. Y
3. Ms. Z

Commitment: Up to $xxx million from Investors, plus an amount to be determined from Management (the "Commitment"), subject to the terms and conditions set forth below.

The Investor Managers will purchase securities in the same proportion and on the same terms as Investors. The Commitment for Investor Managers is expected to be $yyy million.

Transaction Summary: The Transaction will consist of the following components:

1. Initial Capitalization. At Closing, the Investors will commit to invest $aaa million in the Company to purchase shares of Preferred Stock (at a price of $1,000 per share) and Common Stock (at a price of $0.01 per share) representing RR% of the common equity of the Company on a fully-diluted basis. The Investors will fund the Initial Capitalization on a *pro rata* basis to their Commitment. The initial capital will be contributed (i) $hhh million at closing, and, (ii) $ppp million three (3) months from closing.

2. Subscription Agreement. At Closing, the Investors will enter into a Subscription Agreement whereby each will commit to subscribe for specified capital contributions to the Company (the "Subscription Amount"). The Subscription Amount will equal the Commitment less

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the Initial Capitalization split among the Investors on a *pro rata* basis to their Commitment.

The Investors will purchase additional shares of Preferred Stock when funding Subscription Amounts pursuant to the Additional Investment provisions.

3. Restricted Unit Grant and Unit Option Plan. At Closing, the Company will set aside MM% of the Company's common equity on a fully-diluted basis for restricted share grants to Management and future option grants to non-Management employees (such common equity as may be outstanding from time to time referred to below as the "Initial Management Equity"). At closing, NN% of the Initial Management Equity will be granted to the initial management employees in the amounts set forth on Schedule A attached, in the form of restricted stock.

4. Management Incentive Stock Plan. At closing, management will be granted additional securities (referred to below as the "Incentive Equity") which will be entitled to an additional LL% participation in profits at a Realization (as defined below in Section VI, "Management Incentive Stock Plan")(on a fully diluted basis) after Investors achieve an Internal Rate of Return ("IRR") of 20%. Such restricted stock will be granted to and among the initial management employees in the same proportions as the Initial Management Equity.

II. Preferred Stock

Principal Amount: Equal to the Commitment, less that amount allocated to purchase shares of Common Stock, purchased at $1,000 per unit.

Maturity: 7 years from the Closing date. To the extent cash is available prior to that date for (i) operations of the Company and payment of the Preferred Stock dividend for a period of one (1) year, and (ii) equity anticipated to be needed for any projects to be commenced within six (6) months, the Company may redeem all or any of the outstanding Preferred Stock prior to that date.

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Dividend:	10% cumulative annual dividend, compounding and payable quarterly, and such dividends are payable in cash if, as, and when declared by the Board. Dividends will accrue on unpaid dividends.
Ranking / Preference:	Senior to any future classes of preferred stock and all common stock (collectively, the "Junior Securities"). Upon a sale of the majority of the voting stock of the Company, a merger, or liquidation, each share of Preferred Stock will be entitled to a priority return equal to $1,000 plus accrued but unpaid dividends, before any distributions are made on Junior Securities. . If the Liquidation Preference with respect to the Preferred is not paid in full, the holders of the Preferred will share ratably in any such distribution of assets in proportion to the full liquidation preference to which they are entitled.
Recapitalization:	Upon an IPO, the Company will redeem the Preferred Stock for its Liquidation Preference (in cash, or securities valued at the net value per share received by the Company, at the Investors' option).
Restrictions:	The Preferred Stock will contain provisions that will prohibit the distribution of payments of any kind to the Junior Securities without the approval of the Investors.
Voting:	The Preferred Stock will be non-voting.

III. Common Stock

Securities Purchased:	Par value $0.01 per share purchased at $0.01 per share.
Dividend:	As and when declared by the Board after payment of dividends on Preferred Stock. If dividends are paid on any Common Stock, such dividends will be paid on any vested Initial Management Equity and "Common Units" (as defined in Part V below) issued in the form of restricted stock. Such dividends will not be paid on any Incentive Equity until such time as Investors have achieved a 20% IRR.
Voting:	Each share of outstanding Common Stock is entitled to one vote.

IV. Capital Calls and Default Provisions

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FOR DISCUSSION PURPOSES ONLY **ATTACHMENT A**

Capital Call Period:	Management will have the authority to initiate capital calls for development activities and acquisitions until the earlier of: (i) 5 years from Closing; or (ii) the Commitment has been exhausted.
Funding Procedures:	The Board will recommend capital calls to the Investors on an as-needed basis for acquisitions and project development activities, but will attempt to limit the capital call recommendations to one per quarter. Subject to majority Investor approval (as measured by ownership of the Preferred) of the Board's recommendation, the Board will issue the capital call. After a capital call is issued, the Investors will fund their *pro rata* shares of the capital contribution within 10 business days of the issuance of the capital call.
Cut-Off Rights:	Any Investor shall have the right to cease contributing capital to the Company if: (i) Mr. X has ceased to be actively involved in, or to devote substantially all of his business time to, the management of the Company for a continuous period of at least 90 days; (ii) the Company or any subsidiary thereof defaults under a credit facility; (iii) the Company fails to satisfy the Affirmative Covenants; (iv) the Company or any subsidiary thereof files for protection under the Bankruptcy Code or an equivalent provision of law (each a "Cut-Off Event"). Notwithstanding the foregoing, the Investors will have the right, but not the obligation, to contribute capital to the Company pursuant to any and all future capital calls. The Cut-Off Rights will not terminate the obligation to make capital contributions for pending authorized and committed transactions.
Default Provision:	If any Investor (a "Defaulting Investor") fails to fund any portion of its Subscription Amount pursuant to a capital call, except due to the Cut-Off Rights, the Defaulting Investor will forfeit its Shares. If a member of the Management Team (a "Defaulting Investor Manager") fails to fund any portion of his Subscription Amount pursuant to a capital call, the Defaulting Manager will forfeit his right to fund future capital calls.

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V. Corporate Governance

Board of Directors:	At Closing, the Company will have a 7 member Board of Directors (the "Board") and will include: 4 designees from Investors (expected to be 3 investment professionals and 1 Investor designee), 2 designees from Management, and 1 independent designee to be mutually agreed. The Board will establish a Compensation Committee and an Audit Committee. Investors will be entitled to representatives on the Compensation Committee, Audit Committee, and any other committees that the Board may establish in the future. The Compensation Committee will consist of two Investor directors, one management director, and the independent designee. Actions of the Board will be based on majority vote, which majority must include at least one Investor director.
Board Fees:	After an IPO or significant third party financing, the Investor representatives on the Board will be entitled to reimbursement for out-of-pocket expenses associated with attending Board meetings. Management designees and the independent designee will be entitled to reimbursement for any meetings held from and after closing. Any Board member who are not employed by the Company or an affiliate of Investor shall be entitled to Board compensation, at a level determined by the compensation committee.
Affirmative Covenants:	The Company shall provide to the Investors the following: 1. Consolidated monthly financial statements prepared in accordance with US GAAP (including an income statement, balance sheet, and cash flow statement, with comparisons to budget) within 30 days of month-end, consolidated quarterly financial statements prepared in accordance with US GAAP (including an income statement, balance sheet, and cash flow statement, with comparisons to budget) within 30 days of quarter-end, and annual audited financial statements within 90 days of year-end (certified by a "Big 4" accounting firm).

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2. Consolidated annual Business Plan and Budget no later than 30 days prior to the beginning of the Company's fiscal year.
3. Customary notices of material events (e.g., litigation, Cut-Off Event, etc.).
4. Quarterly meetings of the Board to review the Company's progress; monthly progress reports and meetings.
5. Other information and access as the Investor may reasonably request.

Negative Covenants: Majority approval of the Board will be required for the Company to:

1. Sell or issue any debt or equity securities through public or private transactions, or enter into any guarantees or off-balance sheet financing arrangements.
2. Make any mergers, acquisitions, divestitures, or liquidations.
3. Expand into new lines of business.
4. Enter into any material joint ventures, strategic alliances, or major partnerships.
5. Repurchase any outstanding securities or pay any dividend of any kind, except as contemplated pursuant to agreements between the Company and employees or Investors which are contemplated by this Term Sheet or otherwise approved upon execution by the Board.
6. Amend the Company's organizational documents or major employment agreements.
7. Grant options to acquire equity or other major incentives.
8. Hire or dismiss senior executives, or appoint any additional Board members.
9. Enter into any related-party transactions.
10. Make loans or guarantees of any kind outside the ordinary course of business.
11. Change materially the Company's accounting methods or policies or change the Company's auditors.
12. Adopt the Budget.
13. Enter into any commitments, or incur capital expenditures, development expenditures, or investments, not approved in the annual Budget in amounts greater than $1,000,000, cumulatively.

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	In addition, approval of holders of a majority of the Initial Management Equity will be required for any change in the terms of the Preferred Stock.

VI. Restricted Stock Grant/Option Plan

Size:	At Closing, the Company will establish a Common Stock plan (the "Plan") whereby the Company will set aside KK% of the common equity on a fully-diluted basis for restricted grants and/or options ("Common Units"). The Initial Management Equity, Incentive Equity and Common Units are referred to collectively below as the "Employee Membership Units").
Grant to Management:	At Closing, the Company will grant the Initial Management Equity and the Incentive Equity to the initial Management. By granting shares on a restricted basis, Management will have the ability, if so desired or applicable, to make an §83(b) election in order to attain capital gains treatment on a future sale of such restricted equity.
Vesting:	The Initial Management Equity and the Common Units granted will vest (i) one-fourth on the first anniversary of closing, and (ii) thereafter in 12 equal quarterly installments.
Strike Price:	Common Units granted after closing will have a strike price of fair market value as the Board of Directors determines.
Termination for Cause:	The Company has the right to repurchase all Preferred Shares and vested Employee Membership Units at the lower of cost or fair market value. Unvested Employee Membership Units are forfeited. The right to fund future capital calls is forfeited.
Termination without Cause or Resignation:	The Company has the right to repurchase all Preferred Shares and vested Employee Membership Units at fair market value as determined in good faith by the board. Unvested Employee Membership Units are forfeited upon resignation. The right to fund future capital calls is forfeited in either case.
Employee Dies/Is Disabled:	Vested Employee Membership Units are retained. Unvested Employee Membership Units are accelerated and retained.

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Change in Control:	A "Change of Control" will be deemed to have occurred upon: (i) the transfer of 50% or more of the total outstanding voting rights of the Company, whether by sale or merger; or (ii) a sale of all or substantially all of the assets of the Company. Upon a Change in Control, vested Employee Membership Units are retained. Unvested Employee Membership Units will accelerate and become vested.
Buyback Rights:	If the Company exercises its buyback rights pursuant to the provisions above, the Company will make such purchase within thirty (30) days.

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VII. Management Incentive Stock Plan

Size:	At Closing, the Company will issue the Incentive Equity, entitling the management to an additional KK% participation in proceeds in excess of those required to give Investors a 20% IRR from any of the following: (i) a merger, sale, or liquidation, (ii) an IPO which values Investor's investment at an amount sufficient to give Investors a 20% IRR at the time of the IPO, or (iii) any other event or series of events (including payment of dividends) which gives Investors a 20% IRR on its investment.
Other Terms:	Vesting, buyback, and other terms similar to the Common Units.

VIII. Management Employment Arrangements

Agreements:	Each member of management shall have an employment agreement reflecting the terms in this Section and termination provisions of Section VI.
Annual Base Salary:	For the initial management team, as set forth on Schedule B attached.
Annual Bonus:	To be determined by the Compensation Committee.
Term:	To be discussed.
Base Salary Increases:	Subject to the Compensation Committee.
Benefits and Perquisites:	Usual and customary, to be approved by the Board.
Termination for Cause:	Executive shall be entitled to receive Annual Base Salary earned to date of termination, and payment of reimbursable expenses. All other rights, including any rights to an annual bonus, terminate.
Termination without Cause or Resignation for Good Reason:	Executive shall be entitled to receive Annual Base Salary and Annual Bonus accrued to the date of termination, and payment of reimbursable expenses. Upon Termination without Cause due to a Change of Control, Executive shall be entitled to receive a one-time payment equal to the then current Annual Base Salary, provided that Executive is not

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	employed at the successor company post-Change of Control at the same or higher base salary, for a period of one (1) year following the Change of Control. Upon Termination without Cause or Resignation for Good Reason, Executive shall be entitled to receive a one-time payment equal to the then current Annual Base Salary. Good Reason to be defined.
Employee Dies/Is Disabled:	Annual Base Salary and Annual Bonus accrued to date of death/disability is paid, and reimbursable expenses. All other rights terminate.
Other Provisions:	Usual and customary provisions including non-compete (not to exceed twelve (12) months, and to apply only to industry segments in which the Company has operated prior to termination), confidentiality, and non-solicitation arrangements. Management will agree to allow the Company to purchase key-man life insurance on the CEO. Other provisions may vary from member to member.

IX. Other

Transfer Restrictions:	Customary for a transaction of this type, including (i) rights of first offer to the Company and other shareholders; (ii) no transfers by Management of Employee Membership Units for five years (or a Company sale, Change of Control or IPO, if sooner), except for customary exceptions for transfers to affiliates and family trusts; (iii) no transfers to competitors; (iv) Tag-Along Rights; and (v) Drag-Along Rights.
Tag-Along Rights:	Subject to the foregoing Transfer Restrictions, if any equity holder, including Management, desires to sell more than 20% of its equity securities (either alone or in a series of transactions) to a non-affiliated third-party in a transaction approved by the Board, that equity holder must offer each of the other holders the right to participate in such a sale on a pro rata basis based on the fully-diluted ownership of Common Stock. However, Tag-Along Rights will only apply to approved transfers of units representing at least 1% of the fully-diluted ownership of Common Stock. Tag-Along Rights terminate in the event of an IPO.

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Drag-Along Right:	With respect to a merger, sale, or sale of substantially all of the assets of the Company to a non-affiliated third party (a "Liquidity Event"), more than 50% of Investors (based on relative ownership of the Preferred Shares) will have the ability, subject to applicable laws, to cause all Preferred and Common equity holders to sell their equity securities or vote their equity securities in favor of such Liquidity Event. Such Drag-Along Right terminates in the event of an IPO.
Pre-Emptive Rights:	In the event of any financing (other than an IPO or the issuance of equity for non-cash consideration in an acquisition of a business), each Investor has pre-emptive rights to maintain its respective pro rata interest in the Company (based on fully-diluted ownership of Common Units, including any Employee Membership Units). These rights terminate in the event of an IPO.
Anti-Dilution:	Customary anti-dilution provisions.
Registration Rights:	Two demand and unlimited piggyback registration rights exercisable after the Company's IPO. The Company shall bear all expenses related to registrations.
Initial Public Offering:	An Initial Public Offering ("IPO") will be deemed to have occurred if the offering raises net proceeds of at least $GG million in an underwritten public offering and is listed on the New York Stock Exchange or Nasdaq.
Assignment:	Investors may assign its rights to affiliates.
Exclusivity:	Management, the Company, and any respective Representatives thereto agree to work on an exclusive basis with Investors through and including [date], in order to close the Transaction.
Expenses:	If the Transaction is consummated, the Company will pay for all reasonable out-of-pocket expenses incurred by the Investors and their advisors in connection with the Transaction. If the Transaction is not consummated, the Investors will be responsible for their own fees and expenses.
Timing:	The Parties will seek to enter into a definitive agreement as soon as is practicable. The Parties will seek to close the Transaction by [date].

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FOR DISCUSSION PURPOSES ONLY **ATTACHMENT A**

Binding Provisions and Liability:	The parties understand and acknowledge that, except for the obligations of the Company set forth under “Expenses”, “Exclusivity”, “Assignment” and “Binding Provisions and Liability”, which are intended to be legally binding, this Term Sheet is not a legally binding agreement and the failure to enter into definitive documentation shall impose no liability on Investors or the Company.
Conditions to Closing:	The Closing of the Transaction shall be conditioned upon: 1. Satisfactory completion of due diligence by the Investors in the Investors’ sole discretion. 2. Execution of definitive legal documentation acceptable to the Investors and Management setting forth the terms hereof. 3. Execution of satisfactory employment agreements for certain members of Management, including key-man life insurance. 4. Government approvals, if required. 5. Other customary closing conditions.

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ATTACHMENT B

PRELIMINARY DUE DILIGENCE REQUEST LIST

I. Corporate Matters.

A. Applicable charter documents (Articles of Incorporation, Bylaws, Operating Agreement, By-Laws, etc.) for [Formal Name of Company]. ("Company") and each of its direct and indirect subsidiaries (collectively, the "Company Entities"), including all amendments to date.

B. Minutes of meetings of the Board of Directors or other applicable governing body (and all permanent committees thereof) of each of the Company Entities during the last 3 years.

C. Minutes of meetings of the stockholders or managing members of each of the Company Entities during the last 3 years.

D. Stock or membership interest record books.

E. (i) List of all jurisdictions in which each of the Company Entities conducts business; and (ii) confirmation that such Company Entity is qualified to conduct business as a foreign entity in each such jurisdiction.

F. Copies of all shareholder or partnership agreements, voting trusts, and all other agreements with respect to securities of any of the Company Entities, including, without limitation, agreements or instruments containing restrictions on transfer of securities or material assets of any of the Company Entities.

G. Description of all options (including warrants) to purchase securities of any of the Company Entities and all other interests that are (or upon the occurrence of certain events will be) convertible into or exchangeable for securities or other interests of such entity, including but not limited to any existing or proposed option plan or any other incentive plan or arrangement.

II. Legal Matters.

A. List of all pending litigation to which any Company Entity is a party.

B. List of all material litigation to which any Company Entity was a party which has been settled or concluded in the past 5 years.

C. Any consent decree, supervisory agreement, settlement agreement or other agreement entered into with any governmental agency or third party restricting or otherwise affecting the operations of any of the Company Entities (including any entered into which may have lapsed or terminated, or which are pending, proposed, or under negotiation).

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D. Any resolutions, correspondence or other documents setting forth any voluntary restrictions on business or operations of any of the Company Entities (including those setting forth any restrictions which may have lapsed or terminated, or which are pending, proposed, or under negotiation).

E. List of all claims against any of the Company Entities entailing potential liability in excess of $100,000.

F. List of all grievances of which any of the Company Entities has been notified filed by or on behalf of any employee of such Company Entity during the past 3 years under any grievance procedure or union contract and all records of the resolution or disposition of each grievance.

G. List of all warnings received, and dates and amounts of any fines paid, by any of the Company Entities for violations of any U.S., local or foreign governmental codes.

III. Management and Other Reports.

A. Any reports or studies during the last 3 years relating to any of the Company Entities financial condition, business, operations, management structure or compensation, etc. made by (i) outside management consulting, investment banking or similar firms, (ii) such Company Entity's independent accountants, and (iii) any other independent firm.

B. Any periodic or other reports prepared by management for the Board of Directors (or other governing body) of any of the Company Entities during the last 3 years (e.g., informational packets not annexed to minutes).

C. Any reports or presentations prepared for lenders or investors with respect to any of the Company Entities.

D. Copies of all written corporate policies of any of the Company Entities relating to the employment, personnel, financial, confidentiality, and management compensation policies of any of the Company Entities.

E. Any legal compliance or similar surveys or studies conducted internally by any of the Company Entities or by others at the request of such Company Entity (e.g., environmental law compliance survey, hiring policy survey, product liability insurance survey, etc.).

IV. Contracts.

A. Union and labor contracts and agreements of each of the Company Entities, together with any information as to disputes or negotiations pending or foreseeable.

B. Description of any acquisitions or dispositions of any of the Company Entities’ operations or facilities now pending or under negotiation and those made during the last 5 years.

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C. All contracts with sales representatives and distributors concerning the sale or lease of any of the Company Entities' products.

D. All contracts with suppliers of each of the Company Entities under which payments exceed $100,000 per year or which have a term of more than six (6) months.

E. All customer sales contracts of each of the Company Entities under which payments exceed $100,000 per year or which have a term of more than six (6) months.

F. All contracts of each of the Company Entities regarding obligations or liabilities as guarantor, surety, co-signer, endorser, co-maker, indemnitor or otherwise in respect to the obligations of any other person or entity.

G. All existing or proposed employment, consulting or severance contracts with incumbent management or senior personnel or any retired management or senior personnel of each of the Company Entities.

H. Any confidentiality agreements between any of the Company Entities and its employees.

I. Any contracts or agreements for the provision of data processing or related services to any of the Company Entities.

J. All leases for property, real or personal, relating to the operations of each of the Company Entities under which payments exceed $100,000 per year or which have a term of more than six (6) months.

K. All standard form contracts used by each of the Company Entities.

L. All contracts of each of the Company Entities with agencies of any U.S. or foreign government.

M. All contracts which limit the freedom of any of the Company Entities or any of their respective key employees to engage in any line of business or to compete with any other person.

N. Management or service contracts or arrangements for management, maintenance or servicing of any facilities of any of the Company Entities for which aggregate annual payments by such entity exceed $100,000 or which have a term of more than six (6) months.

O. Any contracts or agreements for the provision of personnel to any of the Company Entities.

P. All contracts or agreements between any of the Company Entities and any of their respective affiliates.

Q. All contracts or agreements between any of the Company Entities and any of their respective customers which provides that a customer shall be sold

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products or services at the lowest price such Company Entity charges its customers for any such products or services or which contains any other "most favored nation" or similar clause.

R. All other contracts which are material to the operation of each of the Company Entities' respective business or which may have a material effect on such Company Entity's assets or properties or the contemplated transaction.

V. Real Estate.

A. List of all real property owned or leased by each of the Company Entities, or which any of the Company Entities has an option to purchase or lease, with a description of structures thereon and all mortgages, liens, easements and other encumbrances to which they are subject.

B. A current copy of the title insurance policy and copies of recent title surveys with respect to such real property.

C. Any reports or appraisals relating to the value or continued use of such real property.

VI. Indebtedness.

A. Loan agreements, indentures and other instruments for or relating to any borrowing effected by any of the Company Entities or to any existing or proposed line of credit.

B. Mortgages, pledge agreements, and other security interests and arrangements affecting property or assets of any of the Company Entities.

VII. Financial Statements and other Financial Data.

A. Audited consolidated financial statements for Company, together with consolidating schedules for each of the Company Entities, for the last five years and most recent interim unaudited consolidated financial statements.

B. All letters or opinions of attorneys submitted to auditors in connection with annual audits conducted by such auditors.

C. All correspondence between Company and its independent accountants, including auditors' management letters relating to internal controls, accounting procedures, etc.

D. Copies of all federal and state income tax returns filed for each of the Company Entities during the past 3 years.

VIII. Employment Matters.

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A. A list of all salaried employees of each of the Company Entities which specifies position, date of employment, salary and bonus (if any), and copies of any contractual arrangements with employees.

B. Copies of any plan and trust documents and any insurance or annuity contracts for all existing, proposed or recently terminated employee benefit plans (including, but not limited to, any retirement or deferred compensation plan, pension, profit-sharing, thrift or savings 401(k), qualified stock bonus, ESOP, SEP, bonus, severance pay or other such plan) covering current or former employees of any of the Company Entities or their dependents, together with copies the most recent IRS determination letter, Form 5500 for each of the last 5 yeas and any actuarial valuations or reports for each such plan.

IX. Insurance.

A list of each of the current insurance policies in effect for each of the Company Entities, including a brief summary of the coverage and limits thereof.

X. Organization.

Organizational chart of each of the Company Entities.

XI. Government Regulation and Licensing.

A. Copies of all permits, licenses, accreditations, governmental clearances, etc. necessary for the conduct of the business of each of the Company Entities.

B. Copies of real property deeds, zoning permits and property tax information.

XII. Environmental Matters.

For each facility currently or previously owned or operated by each of the Company Entities, provide:

A. All citations, notifications, permits, reports, correspondence and related documentation pertaining to any release of hazardous substances to soil or groundwater at the facility. Where such release has occurred, also provide the date and location of the release, a detailed description of any remedial actions undertaken, and a site map indicating the location of the release.

B. A description of any underground storage tanks at the facility, including their age, material with which constructed, what they contain or contained (now or in the past), and whether they have been registered with the U.S. Environmental Protection Agency ("EPA") and/or state agencies.

C. All citations, notifications, reports, requests for information, correspondence and related documentation pertaining to:

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1. hazardous substances generated at, released to or disposed at the facility;

2. any violation or alleged violation of the requirements of the Emergency Planning and Community Right-to-Know Act ("EPCRA") (Title III of SARA);

3. polychlorinated biphenyls ("PCBs") located, used, stored, manufactured, processed or disposed at any facility;

4. asbestos containing materials located, used, stored, manufactured, processed or disposed at the facility;

5. the quality of drinking water at the facility; and

6. Occupational Safety and Health Act ("OSHA") compliance and compliance with state occupational safety and health requirements.

D. If not covered by the specific requests above, copies (insofar as they relate to environmental matters or occupational safety and health) of:

1. all past or present citations, notices, administrative orders and judicial actions (such as judgments for final cases, complaints for pending cases); and

2. all environmental audits, assessments, and other reports on conditions or compliance at the facility, whether conducted internally or by an outside consultant (including any made for insurance purposes).

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ATTACHMENT C

SELLER REPRESENTATIONS AND WARRANTIES

Seller hereby represents and warrants to the Buyer as of the date hereof (except where such representation or warranty is expressly made as of another specific date) that:

1.1 Ownership of Company.

Seller owns of record and beneficially the [equity interests] of Company, as set forth on Schedule [], free and clear of any liens.

1.2 Due Authorization.

Seller has full power and authority to execute and deliver this Agreement, to consummate the transactions contemplated hereby and to perform its obligations hereunder. The Seller's execution, delivery and performance of this Agreement and the transactions contemplated hereby have been duly authorized by all requisite Seller action. This Agreement has been duly executed and delivered by Seller and is a valid and binding obligation of Seller, enforceable against Seller in accordance with its terms (except to the extent that enforcement may be affected by applicable bankruptcy, reorganization, insolvency and similar laws affecting creditors' rights and remedies generally and by general principles of equity (regardless of whether enforcement is sought at law or in equity)).

1.3 Noncontravention.

Except as set forth on Schedule [], the execution, delivery and performance by the Seller of this Agreement and each agreement or instrument executed in connection herewith or delivered pursuant hereto and the consummation of the transactions contemplated herein will not (a) with or without the giving of notice or the passage of time, or both, conflict with, or result in a violation or breach of, or a default, right to accelerate, or result in the creation of any lien under or pursuant to, any provision of (i) the Seller's [charter documents], or (ii) any applicable laws, or any finding, order, judgment, writ, injunction or decree to which the Seller is a party or by which the Seller or its assets may be bound; or (b) require the approval, consent or authorization of, or prior notice to, filing with or registration with, any governmental authority, or any other person or entity, except notices and approvals as may be required under [applicable statutes].

REPRESENTATIONS AND WARRANTIES OF SELLER CONCERNING THE COMPANY ENTITIES

Seller represents and warrants to the Buyer that as of the date hereof (except where such representation or warranty is expressly made as of another specific date) that:

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2.1. Organization.

Company is duly organized, validly existing and in good standing under the laws of the State of []. Company has full power and authority to conduct its business as it is now being conducted and to own its properties and to lease those properties leased by it. Company is duly qualified to do business as a foreign entity and is in good standing in each jurisdiction in which such qualification is necessary under applicable law as a result of the conduct of its business or the ownership of its properties except where the failure to be so qualified and in good standing would not have a material adverse effect on the Company Entities. Each jurisdiction in which Company is qualified to do business as a foreign entity is listed on Schedule []. Seller has delivered to Buyer true, correct and complete copies of Company's [charter documents] (in each case, as amended to date).

2.2 Capitalization of Company

The outstanding equity of Company consists, on the date hereof, of [] of which Seller is the sole owner. There are no outstanding rights, options, warrants, preemptive rights, rights of first refusal or similar rights for the purchase or acquisition of any equity interest in Company.

2.3. Subsidiaries.

(a) Ownership; Capitalization. The Company's subsidiaries and any other entities in which a Company Entity has an equity investment are set forth on Schedule []. Except as set forth in Schedule [], Company has no equity investments in any other entity. Company is the direct, indirect or beneficial owner of all of the [equities] of the Company subsidiaries, and the direct, indirect or beneficial owner of each of the equity investments set forth on Schedule [], in each case, free and clear of all liens. The authorized, issued and outstanding [equity], and the record ownership of all [equity] of the subsidiaries are as set forth on Schedule []. All of the [equities] of the subsidiaries have been duly authorized and validly issued. All of the [equities] of the subsidiaries are fully paid and non-assessable. None of the [equities] of the subsidiaries were issued in violation of any preemptive or other similar rights. Except as set forth in Schedule [], (i) no [equity] of any subsidiary of the Company is outstanding and (ii) there are no commitments or obligations of any kind or character for (x) the issuance of [equities] by any subsidiary of the Company or (y) the repurchase, redemption or other acquisition of any [equities] of any subsidiary of the Company. There are no shareholder agreements, voting trusts, proxies or other agreements or understandings with respect to or concerning the [equities] of any subsidiary of the Company.

(b) Organization. Each subsidiary of the Company is duly organized, validly existing and in good standing under the laws of its state of incorporation or organization, as applicable, and has full [corporate/ limited liability company/partnership] power and authority to conduct its business as it is presently being conducted and to own its properties and to lease those properties leased by it. Each subsidiary of the Company is duly qualified to do business as a foreign [corporation/limited liability company/partnership], and is in good standing in each jurisdiction in which such qualification is necessary under applicable law as a result of the conduct of its business or the ownership of its properties, except where the failure to be so qualified and in good standing would not have a material adverse effect on the Company

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Entities. Each jurisdiction in which each subsidiary of the Company is qualified to do business as a foreign [corporation/limited liability company/partnership] is listed on Schedule []. Seller has delivered to Buyer true, correct and complete copies of the [charter documents] (in each case, as amended to the date hereof) of each subsidiary of the Company and the [charter documents] (as amended to date) of each entity (other than a subsidiary) in which Company has an equity investment. No subsidiary of the Company is in default under or in violation of any provisions of its [charter documents].

2.4. No Violation or Conflict.

Except as set forth on Schedule [], the execution, delivery and performance of this Agreement by Seller and all of the other documents and instruments contemplated hereby to which any of the Company Entities are a party do not (a) conflict with, violate or breach: (i) any laws, judgment, order or decree binding on any of the Company Entities, (ii) the [charter documents] of any of the Company Entities, or (iii) any contract to which any of the Company Entities is a party or by which they are bound, or (b) give any party to any contract to which any of the Company Entities is a party or by which they are bound any right of termination, cancellation, acceleration or modification thereunder, except in the cases of clauses (a)(i), (a)(iii) or (b), any of such occurrences that would not have or be reasonably likely to have a material adverse effect on the Company Entities.

2.5. Financial Statements.

(a) Seller has delivered to the Buyer copies of the Financial Statements. The Financial Statements present fairly in all material respects the consolidated financial position, results of operations and cash flows of the Company Entities, taken as a whole, as of the dates and for the periods indicated, and have been prepared in accordance with GAAP (subject, in the case of unaudited financial statements covering less than a full year, to normal recurring or other year-end adjustments and the lack of notes thereto).

(b) The Company Entities do not have any liabilities or obligations of any kind, whether absolute, accrued, asserted or unasserted, contingent or otherwise, that would be required to be disclosed on a consolidated balance sheet prepared as of such date, in accordance with GAAP consistently applied, except liabilities, obligations and contingencies that are (i) reflected on or accrued or reserved against in the balance sheet included in the Financial Statements, or reflected in the notes thereto, (ii) set forth on Schedule [] or any other Schedule or updated schedule, or (iii) incurred after the date of such balance sheet in the ordinary course of business and consistent with past practices and which have not had nor would be reasonably likely to have, individually or in the aggregate, a material adverse effect on the Company Entities.

2.6. Absence of Change.

Except as set forth in Schedule [] or as contemplated by this Agreement, and except for changes which adversely impact the [sector in which Company operates] generally, since [date], the Company Entities have conducted their business in the ordinary course of business,

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consistent with past practice, and have not suffered any change in business financial condition, or results of operations that has had a material adverse effect on the Company Entities.

2.7. Assets.

(a) The Company Entities have sufficient title to, or sufficient leasehold interest in, all of their properties and assets, whether tangible or intangible, real, personal or mixed, to permit the operation of their businesses as currently conducted, free and clear of all liens, except as set forth on Schedule [] and except for permitted liens.

(b) Except as set forth on Schedule [], except for matters discovered by Buyer or its affiliates during due diligence, subject to ordinary wear and tear and to scheduled or necessary repairs in the ordinary course of business, all tangible assets of the Company Entities necessary to conduct their business as currently conducted are in operating condition, except as would not, individually or in the aggregate, have a material adverse effect on the Company Entities.

(c) Schedule [] attached hereto contains a complete list of the physical assets that are owned by, or leased, licensed, or chartered to, Company or any subsidiary having a net book value greater than $[] on the books of Company or such subsidiary, excluding inventory.

2.8. Intellectual Property.

Schedule [] contains a complete list of the patents, trademarks, registered copyrights and tradenames used in the business (common law or otherwise) that are owned by, licensed to or utilized under common law right by Company or any subsidiary and that are material to the business of Company or such subsidiary (the “Intellectual Property”). As to such Intellectual Property, Company or a subsidiary either (a) owns the entire right, title and interest thereto, or (b) holds such Intellectual Property pursuant to an existing, valid and enforceable license, except for common law rights and except where the failure of Company or such subsidiary to own or have a right to use such Intellectual Property would not, individually or in the aggregate, have a material adverse effect on the Company Entities. Except as set forth on Schedule [], there are no claims or proceedings pending or, to the knowledge of Company , threatened by any third party challenging Company’s or such subsidiary’s use of, or right to use, any of the Intellectual Property. To the knowledge of the Company, the conduct of the business of the Company Entities as currently conducted does not infringe upon any intellectual property rights owned or controlled by any third party.

2.9. Compliance with Law.

To the knowledge of the Company, except as reflected on Schedule [], the Company Entities have obtained all permits, licenses and authorizations required under, and are in compliance with, all applicable laws, except where such failure to obtain or such noncompliance would not, individually or in the aggregate, have a material adverse effect on the Company Entities.

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2.10. Contracts, Agreements, etc.

Schedule [] contains a correct and complete list of the material contracts to which Company or any subsidiary is a party: Seller has provided the Buyer with access to true and materially complete copies of all material contracts, including all amendments, modifications, waivers and elections applicable thereto. Except as set forth in Schedule [], as to the Company Entities, such contracts are valid and binding obligations of Company or the subsidiary, enforceable in accordance with their respective terms (subject to any applicable bankruptcy, insolvency, reorganization, moratorium or other laws affecting generally the enforcement of creditors' rights and subject to general principles of equity), and are in full force and effect. Except as disclosed in Schedule [], there is not, to the knowledge of Company, under any such contract, any existing material breach or material default (or event or condition, which after notice or lapse of time, or both, would constitute a material breach or material default) by Company or any subsidiary with respect thereto. Except as set forth in Schedule [],Company or the subsidiary has performed, and to the knowledge of Company, every other party has performed, each material term, covenant and condition of each of the material contracts that is to be performed at or before the date hereof, except where nonperformance has not had nor would be reasonably likely to have, individually or in the aggregate, a material adverse effect on the Company Entities. Except as set forth on Schedule [], to the knowledge of Company, no event has occurred that would, with the passage of time or compliance with any applicable notice requirements or both, constitute a material default by Company or the subsidiary or, to the knowledge of Company, any other party under any of the material contracts. To the knowledge of Company, no party to any of the material contracts intends to cancel or terminate any of such contracts (except such cancellation or termination occurring through normal expiration of any such contract).

2.11. Litigation.

Except as set forth on Schedule [], there is no claim, legal action, suit, litigation, arbitration, or, to the knowledge of Company, any governmental investigation before any commission or other judicial or administrative authority, or any order, decree or judgment, now pending or in effect, or, to the knowledge of Company, threatened, that if adversely determined, would not be covered by insurance policies held by or in favor of the Company Entities, or, if adversely determined, would likely result in a payment by Company in excess of $[].

2.12. Insurance.

Attached hereto as Schedule [] is a list of all brokerage arrangements and contracts, and insurance policies held by the Company Entities now in force, or held by Seller and providing coverage for the Company Entities now in force, showing for each such policy the current premiums, deductibles or self-insured retentions, policy limits, coverages and expiration dates. The premiums due thereon have been timely paid. Such policies are in full force and effect.

2.13. Employee Benefits.

(a) Seller has made available to the Buyer true and complete copies of each pension, retirement, profit-sharing, bonus, incentive, deferred compensation, equity-based

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compensation, severance pay, change of control, medical or other employee benefit plan, fund, policy, procedure, program or other practice of any description, whether or not described in § 3(3) of ERISA to which Company or the subsidiaries currently contribute for the benefit of any of their employees or as to which Company or any subsidiary may otherwise have any material liability, (individually a "Plan" and collectively the "Plans"), all of which are set forth in Schedule [], together with any trust agreement, annuity or life insurance contract, funding instrument, summary plan description, summary of material modifications or employee handbooks or other communications to employees generally relating thereto that purport to amend any Plan, as well as a complete description of any Plan which is not in writing.

(b) Except as set forth in Schedule [] attached hereto and except for any multi-employer plans that are not administered by Seller, Company or a subsidiary, (i) each Plan that is an "employee pension benefit plan" within the meaning of Section 3(2) of ERISA that is intended to qualify under § 401(a) of the Code has been issued a currently effective favorable determination letter from the Internal Revenue Service (the "IRS") and there are no form defects for any such Plan for which the Code section 401(b) remedial amendment period does not remain open, nor any events, acts or failures to act which could reasonably be expected to result in a loss of tax-qualified status; (ii) each Plan which is subject to ERISA or the Code has been and is being operated and administered in compliance with ERISA and the Code, as applicable, except where any such failure to comply would not have a material adverse effect on the Company Entities; (iii) no prior Plan was a multiemployer plan for which a withdrawal liability exists, except where adequate reserves have been established in the Financial Statements; (iv) except where any such failure to comply would not have a material adverse effect on the Company Entities, there has been no non-exempt "prohibited transaction" within the meaning of § 406 of ERISA or § 4975 of the Code involving any Plan; (v) all required employer contributions by Seller, Company or the subsidiaries to each Plan have been made when due; (vi) Seller has made available to the Buyer as to each Plan a true and complete copy of (A) the two most recent annual reports (Forms 5500) filed with the IRS, if applicable, (B) the most recent actuarial valuation report, if applicable, (C) each plan document, trust agreement, group annuity contract and insurance contract, if any, relating to such Plan; (D) the most recent summary plan description; (E) the most recent determination letter issued by the IRS; (F) any Form 5310 or Form 5330 filed with the IRS; and (G) the most recent nondiscrimination tests performed under ERISA and the Code (including 401(k) and 401(m) tests)**;** (vii) there are no pending or, to the knowledge of Seller or Company, threatened investigations or claims by the IRS, U.S. Department of Labor, PBGC or any other governmental agency relating to any of the Plans; (viii) there are no pending or, to the knowledge of Seller or Company, threatened termination proceedings initiated by the PBGC, claims (except claims for benefits payable in the normal operation of the Plans), suits or proceedings against or involving any Plan or asserting any rights to or claims for benefits under any Plan that would have a material adverse effect on the Company Entities; (ix) there are no group or individual annuity contracts that relate to retirement benefits earned under any Plan that have not been provided to Buyer; and (x) except as provided for in any Plan, no employee of Company or the subsidiaries will be entitled to any additional benefits or any acceleration of the time of payment or vesting of any benefits under any agreement with Seller, Company or its subsidiaries as a result of the transactions contemplated in this Agreement.

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(c) Except as set forth in Schedule [],Company or the subsidiaries do not, and are not required by contract or otherwise, to contribute to any multi-employer pension plans and to the knowledge of Company, no multi-employer pension plan to which it contributes is in an underfunded status.

2.14. Employment Matters.

Except as set forth in Schedule [], neither Company nor any subsidiary is party to, bound by, or negotiating in respect of any collective bargaining agreement or, to the knowledge of Company, any other agreement with any labor union, association or other employee group, nor, to the knowledge of Company , is any employee of Company or the subsidiaries, with respect to their employment with Company or the subsidiaries represented by any labor union or similar association. Except as set forth in Schedule [], no labor union or employee organization has been certified or recognized as the collective bargaining representative of any employees of Company or the subsidiaries. Except as set forth in Schedule [], to the knowledge of Company, there are no formal union organizing campaigns or representation proceedings in process or formally threatened with respect to any employees of Company or the subsidiaries, nor, to the knowledge of Company, are there any existing or threatened labor strikes, work stoppages, organized slowdowns, unfair labor practice charges, or labor arbitration proceedings affecting any employee of Company or the subsidiaries.

2.15. Taxes.

Except as set forth in Schedule []:

(a) The Company Entities have timely filed (taking into account all extensions) tax returns required to be filed by them with respect to all taxes, and all such tax returns are true, correct and complete in all respects, except to the extent failure to be so would not have, alone or in the aggregate, a material adverse effect on the Company Entities;

(b) The Company Entities have paid all taxes that are shown to have become due and payable by them pursuant to such tax returns and have paid, or are contesting in good faith by appropriate proceedings, all other taxes for which they have received a notice of assessment or written demand for payment;

(c) There are no liens for taxes upon the assets or properties of Company or the subsidiaries other than liens for taxes not yet due and payable and those that are being contested in good faith by appropriate proceedings;

(d) There are no outstanding agreements or waivers extending the statutory period of limitations applicable to the assessment of any tax for any currently open taxable period with respect to any of Company or the subsidiaries; and

(e) To the knowledge of Seller or Company, there is no deficiency, examination, claim, litigation or other proceeding with respect to taxes allegedly owed by Company or its subsidiaries pending against Company or its subsidiaries before any governmental authority or threatened against Company or its subsidiaries by any governmental authority.

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2.16. Environmental, Health and Safety Matters.

To the knowledge of Company, except as set forth in Schedule [], and except for such of the following as, individually or in the aggregate, would not have a material adverse effect on the Company Entities: (i) Company and each subsidiary are in compliance with all applicable environmental, health and safety laws; (ii) neither Company nor any subsidiary is aware of, or has received a written notice or report regarding any liabilities (whether accrued, absolute, contingent, unliquidated or otherwise) that have not been satisfied, or any corrective, investigatory or remedial obligations that have not been satisfied, arising under applicable environmental, health and safety laws with respect to its past or present operations or properties, including off-site contamination or liabilities associated with, or arising out of, such past or present operations or properties; (iii) the Company Entities have obtained, and are in compliance with all terms and conditions of, all permits, licenses and other authorizations required pursuant to environmental, health and safety laws for the conduct of their businesses; and (iv) there are no contracts, agreements or understandings, whether by guaranty, indemnity, suretyship or otherwise, whereby Company or the subsidiaries have agreed to assume, retain, indemnify for, or protect against, for the benefit of any third party, any liabilities (whether accrued, absolute, contingent, unliquidated or otherwise) arising under any applicable environmental, health and safety laws. This Section [] contains the sole and exclusive representation and warranty of Seller with respect to environmental, health and safety laws.

2.17. No Broker.

None of the Seller, Company or any of their respective affiliates has retained any broker or other intermediary in connection with the transactions contemplated by this Agreement or otherwise has any liability for any brokers' or finders' fees or any similar fees in connection with the transactions contemplated by this Agreement.

2.18 Creditors.

The Seller represents that the sale of the [equities] of Company and the other transactions contemplated hereby are not intended to hinder, delay, or defraud any creditors of Company.

REPRESENTATIONS AND WARRANTIES OF THE BUYER

The Buyer hereby represents and warrants to Seller that as of the date hereof (except where such representation or warranty is expressly made as of another specific date):

3.1. Organization.

The Buyer is a [form of entity], duly formed, validly existing and in good standing under the laws of the State of []. The Buyer is duly qualified as a foreign [form of entity] in good standing in each jurisdiction in which the conduct of its business requires such qualification, except where the failure to be so qualified would not prevent, materially delay or affect consummation of the transactions contemplated hereby.

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3.2 Due Authorization.

The Buyer has full power and authority to execute, deliver and perform this Agreement and each agreement or instrument (to which it is a party) executed in connection herewith or delivered pursuant hereto and to consummate the transactions contemplated hereby. The Buyer's execution, delivery and performance of this Agreement and all agreements and instruments executed in connection herewith or delivered pursuant hereto and the transactions contemplated hereby have been duly authorized by all requisite action. This Agreement and all agreements or instruments executed by the Buyer in connection herewith or delivered by the Buyer pursuant hereto have been or will be duly executed and delivered by the Buyer, and this Agreement and all agreements and instruments executed by the Buyer in connection herewith or delivered by the Buyer pursuant hereto constitute and will constitute the legal, valid and binding obligations of the Buyer, enforceable in accordance with their respective terms.

3.3. Noncontravention.

The execution, delivery and performance by the Buyer of this Agreement and each agreement or instrument executed in connection herewith or delivered pursuant hereto and the consummation of the transactions contemplated herein will not, with or without the giving of notice or the passage of time, or both, (i) conflict with, or result in a violation or breach of, or a default, right to accelerate or loss of rights under, or result in the creation of any lien under or pursuant to, any provision of the Buyer's [charter documents] or any laws, or any finding, order, judgment, writ, injunction or decree to which the Buyer is a party or by which the Buyer, or its assets may be bound or affected; or (ii) require the approval, consent or authorization of, or prior notice to, filing with or registration with, any governmental authority, or any other person or entity, except notices and approvals as may be required under [applicable statutes].

3.4. No Broker.

Neither the Buyer nor any of its affiliates has retained any broker or other intermediary in connection with the transactions contemplated by this Agreement or otherwise has any liability for any brokers' or finders' fees or any similar fees in connection with the transactions contemplated by this Agreement.

3.5. Sophisticated Investor; Purchase for Investment.

The Buyer is a sophisticated investor, represented by independent legal and investment counsel with experience in the acquisition and valuation of ongoing businesses and acknowledges that it has received, or has had access to, all information which it considers necessary or advisable to enable it to make an informed investment decision concerning its purchase of the [equities] of Company.

The Buyer is acquiring the [equities] of Company for its own account for the purpose of investment and not with a view to or for sale in connection with any distribution thereof. The Buyer acknowledges that the [equity] of Company has not been registered under the Securities Act or any state or foreign securities laws and that the [equity] of Company may not be sold, transferred, offered for sale, pledged, hypothecated or otherwise disposed of unless such transfer, sale, assignment, pledge, hypothecation or other disposition is pursuant to the terms of an

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effective registration statement under the Securities Act and is registered under any applicable state or foreign securities laws or pursuant to an exemption from registration under the Securities Act and any applicable state or foreign securities laws.

3.6 Purchase of [Equity] of Company.

The Buyer is acquiring the [equity] of Company solely in order to acquire the business of the Company Entities; the form of transaction is solely for the convenience of the Parties and does not create in the Buyer any rights or remedies except as and to the extent expressly provided in this Agreement.

3.7 No Knowledge of Misrepresentations or Omissions.

The Buyer has no actual knowledge that the representations and warranties of Seller and/or Company in this Agreement and the Schedules hereto are not true and correct in all material respects, and the Buyer has no actual knowledge of any material errors in, or material omissions from, the Schedules to this Agreement.

3.8 Litigation.

There is no action, proceeding or investigation pending or threatened against the Buyer, which, if adversely determined, would adversely affect the Buyer's performance under this Agreement or the consummation of the transactions contemplated hereby.

3.9 Capital Adequacy; Solvency. The Buyer represents that:

(a) immediately upon consummation of the sale of the [equity] of Company and the other transactions contemplated hereby, Company will not at that time be insolvent as defined under the U.S. Bankruptcy Code ("Bankruptcy Code");

(b) the sale of the [equity] of Company and the other transactions contemplated hereby are not intended to hinder, delay, or defraud any creditors of Company; and

(c) immediately upon consummation of the sale of the [equity] of Company, and within the meaning of Section 548 of the Bankruptcy Code, (i) Company will not at that time have an unreasonably small capital with respect to the business or transactions engaged in or expected to be engaged in; and (ii) Buyer will not at that time have the intent to incur, or believe that Company will incur, debts that would be beyond Company's ability to pay such debts as such debts mature.

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2002 ACCA Presentation: Mini-MBA for the Corporate Practitioner

Recent Accounting Issues

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I. Introduction

A. In recent months, corporations' accounting practices have received unprecedented attention and scrutiny from such diverse sources as:

- **The popular media;**
- **Both houses and both parties of Congress;**
- **Governmental regulators such as the Securities and Exchange Commission (SEC);**
- **Prosecutors;**
- **Plaintiffs Class Action Lawyers.**

B. The mere suggestion that a company might have questionable accounting practices can lead to immediate sell offs of its stock, multiple class actions, intense press inquiries, and government investigations.

C. As corporate counsel, it is important to stay ahead of such developments in order to prevent or, at least, control them. To do that, it is necessary to have some sense both of the general areas in which accounting issues may arise and of the specific accounting issues that have arisen recently.

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D. The past year has produced public accounting scandals, or at least inquiries, relating to each of the three basic types of financial statements that companies file:

- **Income Statement – issues relating to revenue recognition and expense accrual;**
- **Balance Sheet – issues relating to asset valuation, special purpose entities, and the related issue of debt disclosure;**
- **Statement of Cash Flows – issues relating to the recording of cash flows.**

E. The discussion below will focus on the recent accounting issues involving the first two types of financial statements – the income statement and balance sheet.

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II. Income Statement Issues

A. Broadly speaking, the main components of an income statement are revenues, expenses, and the difference between the two – income or loss.

B. Because these items are viewed by many investors as the most important indicators of performance, it is perhaps not surprising that they have been the subject of incalculable examples of accounting fraud, and alleged accounting fraud, over the years.

C. The past year has been no different, as dozens of new cases have emerged involving allegations of improper revenue recognition and improper accrual of expenses.

D. The recent revenue recognition issues fall into several categories:

- **Recognizing revenue unlikely to be collected;**
- **Recognizing revenue never to be received;**
- **Recognizing revenue from "round trip," "swap," or "wash" transactions;**
- **Accelerating revenue recognition.**

E. The most prominent recent expense accrual issues have involved the question of whether to accrue payments immediately or to capitalize them over a longer term.

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III. Income Statement Issues: Recognizing Revenue Unlikely To Be Collected

A. Two requirements generally must be met before recognizing revenue under the accrual basis of accounting:

- **The company must perform at least a substantial portion of the services (including sales) that it anticipates providing; and**
- **The company must have received either cash, a receivable, or another asset that can be priced with reasonable precision.**

B. Additionally, companies are required to adjust downward the amount of recognized revenue for receivables that are expected to be uncollectible.

C. This general principle animates recent issues that have emerged regarding Halliburton and AOL.

D. At the end of 1998, Halliburton changed its accounting practices for claims or change orders relating to cost overruns on construction projects that it performed. While the old policy did not recognize revenue on such claims or change orders unless the customer had approved them, the new policy recognized revenue irrespective of customer approval so long as Halliburton believed that it was likely to collect.

- **Halliburton has said that most construction companies use the same "percentage-of-completion" accounting method that it has been using.**

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- **Nevertheless, press reports about the change earlier this year prompted an SEC inquiry.**

E. AOL's issue, which springs out of the dot-com crash, involves not whether its customers will agree to pay for services that AOL renders, but whether its customers are able to pay for those services.

- **A significant part of AOL's business was and is selling advertising space on its online service, and many of its ad purchasers were dot-com companies.**
- **While everything was fine during the technology/internet boom, when AOL's ad purchasers were flush with cash, a significant danger emerged, when the bubble burst in 2000, that many of the now struggling dot-com companies would go out of business or otherwise be unable to pay their advertising costs.**
- **This circumstance, which has been raised in class actions against AOL, potentially touches on not only revenue recognition, but also on the separate requirement of disclosing adverse trends.**

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IV. Income Statement Issues: Recognizing Revenue Never To Be Received

A. While the previous issue involves the recognition of revenue that the company might not receive, the next issue involves the recognition of revenue that the company definitely will not receive. Specifically, the issue raises the question of whether companies may recognize revenue that is paid only to a third party.

B. Perhaps surprisingly, under certain circumstances it can be, as explained in some recent pronouncements by the Financial Accounting Standards Board's Emerging Issues Task Force.

- **EITF 01-14, "Income Statement Characterization of Reimbursements Received for 'Out-of-Pocket' Expenses Incurred."**
- **EITF 99-19, "Reporting Revenue Gross as a Principal versus Net as an Agent."**

C. The SEC spoke to this issue this past spring in announcing a settlement with Edison Schools, Inc.

- **Edison manages approximately 130 schools under contracts with school boards and charter holders under which Edison receives a fee from the school districts based on the number of pupils enrolled in the Edison-managed schools.**
- **Some of the contracts allow the school districts to withhold from the fee funds that the districts pay directly to, for example, teachers as salary. Edison historically treated those**

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funds as revenue, even though Edison itself never received them, and simultaneously treated them as a corresponding expense.

- The SEC investigated and reached a settlement with Edison. The settlement expressly stated that the SEC did not find Edison's revenue recognition practices to violate GAAP. Edison did agree, however, to disclose the district-paid amounts in the future, and also to exclude from its income statement the district-paid expenses in the handful of cases where Edison could not be considered the primary obligor for the teachers (because the districts, for example, retained some control over the level of teacher salaries or other terms of employment).

D. Merck was sued this summer based on a similar issue. Specifically, over the past three years, Merck (its Medco unit in particular) has recorded $12.4 billion in revenue for insurance co-payments that consumers paid to pharmacies when purchasing Merck drugs. The pharmacies are not affiliated with Merck, which, in addition to not ever receiving the co-payments, also does not bill for them or get billed for them. Merck simultaneously accrues a corresponding expense, so the co-payments have no effect on Merck's earnings.

E. AOL has encountered similar issues in connection with services that it performs as an advertising broker.

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- **In addition to selling advertising space on its own on-line service, AOL has also helped other web-based companies sell advertising on their own websites, in exchange for sales commissions.**
- **For example, AOL performed this function for eBay in 2000 and 2001. Upon selling ad space for eBay, however, AOL recognized as revenue not only its sales commission from eBay, but also the ad fees that eBay received from the advertisers that AOL had found.**
- **Like with Edison and Merck, however, this practice did not affect AOL's bottom line because AOL accrued a corresponding expense for the ad fees that eBay received.**
- **Unlike Edison and Merck, AOL initially received the payments from eBay's advertisers.**
- **A Washington Post investigative report publicized the accounting practice this past July, and a class action complaint filed later that week alleged that it constituted securities fraud.**
- **The issue's resolution may come down to whether AOL can be considered a "principal" in the transactions as opposed to merely eBay's "agent," a question likely to turn, at least in part, on the nature of risk that AOL assumed in the transactions.**

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V. Income Statement Issues: Recognizing Revenue From "Round Trip," "Swap," Or "Wash" Transactions

A. Somewhat similar to the issue of recognizing revenues never received is the recent issue of recognizing revenue from "round trip," "swap," or "wash" transactions. Like with the previous issue, the revenue recognition is often accompanied by a corresponding expense accrual.

B. This issue has been seen most prominently in the power industry, where companies trade energy capacity with each other through private trading markets. In the wake of Enron, several power companies have been investigated and sued for allegedly making simultaneous purchase and sale trades of identical amounts of capacity at identical prices. These companies include Duke Energy, Reliant Resources, Williams, CMS Energy, Xcel Energy, and El Paso Corp.

C. A trade last fall between Dynegy and CMS illustrates the issue.

- **At 10:08 a.m. on November 15, Dynegy sold CMS one month's worth of 15,000 megawatts of energy capacity. At the same time, Dynegy purchased from CMS the same quantity of electricity on the same terms. Twenty minutes later, the two companies engaged in another set of matching trades, for one year's worth of 5,000 megawatts of energy capacity.**
- **Such trades, which are often called round-trip trades, mirror-image swaps, or wash sales, had no effect on the companies'**

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net income because the revenues recognized from the sales were offset by the expenses accrued for the identical purchases. They do have the effect, however, of increasing the companies' revenues. (These types of trades are also alleged by some to create a false impression of liquidity in the energy trading markets.) Dynegy has said that the trades were conducted in order to stress test its trading platform. (Dynegy and CMS have also said that they did not recognize revenue from the trades, although energy companies have allegedly recognized revenue from similar trades.)

D. The telecommunications industry has produced a slightly different species of the round-trip trading issue, this one involving Indefeasible Right of Use leases (IRUs).

- IRUs involve telecommunications carriers purchasing capacity and equipment for extended periods, such as 20-25 years.
- Global Crossing came under scrutiny for its accounting of such transactions last year. For example, at the end of the second quarter 2001, Global Crossing agreed to lease a dozen fiber optic lines from Velocita for $33.6 million. At the same time, Velocita agreed to lease an equal amount of capacity from Global Crossing, also for $33.6 million. Global Crossing recognized a portion of the money it received as revenue immediately, with the balance to be recognized over

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the life of the contract (23 years). Meanwhile, with respect to the money that Global Crossing spent to lease capacity from Velocita, such payments are typically treated as assets (such as property, plant, and equipment or a prepaid expense).

- The accounting issue presented by this transaction is whether it was proper for Global Crossing to recognize the revenue or whether it instead should have treated the transactions as an exchange of assets.
- To be treated as revenue, the network capacities exchanged generally must be dissimilar and must relate to different lines of the company's business. Their fair values must also be reasonably determinable.
- Quest has also come under scrutiny for similar types of transactions.
- Part of the reason that the round-trip telecommunications transactions have raised eyebrows is that most of the largest ones in 2001 appear to have occurred during the last two days of the second quarter. On the other hand, telecom companies have said that such transactions have a valid business purpose in that redundant capacity is necessary to ensure that networks run smoothly.

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VI. Income Statement Issues: Accelerating Revenue Recognition

A. The current climate has also produced allegations of one of the oldest accounting issues – recognizing revenue in periods before it can properly be recognized.

B. This practice is included among the several allegations raised against AOL.

- **At the end of December 2000, AOL quickly concluded an agreement with Spanish telecommunications company Telefonica S.A. to run $15 million in online advertisements, and the ads ran in December, thus allowing AOL to recognize the advertising revenue that quarter.**
- **Although the contract called for the ads to stop running after December, they continued running in January. The unit of AOL that negotiated the deal said that it had orally agreed with Telefonica to continue running the ads beyond December as a bonus.**
- **Absent the bonus, however, Telefonica would have demanded that the ads run over the course of several quarters, which would have required AOL to recognize the advertising fees over the longer period of performance instead of all in December.**
- **AOL's internal accountants, in fact, decided that the deal was actually a longer-term commitment, so they changed the**

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accounting to recognize only $10 million as revenue in December, with the balance recognized the following quarter.

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VII. Income Statement Issues: Expense Accrual

A. Expense accrual is the flip side of revenue recognition. Just as companies generally can recognize revenues only when they earn them, companies must accrue expenses as they are incurred.

B. There are some situations in which esoteric issues can arise regarding whether to treat an item as an expense immediately or whether to capitalize it over a longer period of time.

C. In the case of WorldCom, however, most people, and the company itself, seem to agree that clear expense items were, until this summer, improperly treated by the company as capital expenditures, i.e., assets that are expensed over their useful lives.

- **On June 25, WorldCom announced that it would restate its financial statements to account for $3.8 billion of line cost expenses that it said were improperly transferred to capital in 2001 and the first quarter of 2002.**
- **WorldCom's line costs primarily consisted of access charges and transport charges that the company paid to other companies for the use of their telecommunications networks. As payments for services used during particular periods, the ordinary – and, WorldCom itself ultimately determined, correct – accounting treatment is to treat the payments as**

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expenses rather than as something that the paying company receives the benefit of for a several-year period.

- **Also, the fact that the expenses appear to have been transferred to capital accounts after having apparently been initially booked as expenses, may raise dangerous issues for the individuals involved in such transfers.**

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VIII. Balance Sheet Issues: Writing Down Goodwill

A. A recent change in accounting rules is likely to lead to a new area of scrutiny for regulators and class action lawyers – the new GAAP requirement to re-value good will every year and take a write down if it has become impaired.

B. Goodwill is listed as an asset on a company's balance sheet. It is the difference in value between a company's book value (tangible assets net of liabilities) and the higher price paid to purchase the company.

C. Until this year, companies were required to amortize goodwill over a period of many years, and they were required to review goodwill (and other intangible assets) for impairment only when certain events had occurred, such as significant decreases in market value, significant adverse legal developments, and significant unexpected acquisition costs.

D. Now, however, under the new Statement of Financial Accounting Standards 142, companies must instead revalue goodwill every year to determine whether it has become impaired, and, if so, take a write-down of the asset on its balance sheet.

E. In the first quarter of this year, the new process resulted in AOL Time Warner's writing down $54 billion from the $128 billion in goodwill initially ascribed to the merger that created the company in January 2001. The resulting $52.2 billion loss was the largest quarterly loss in U.S. history.

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F. The new rule risks creating a litigation whipsaw for companies:

- **On the one hand, they now have a legal duty to evaluate their goodwill for impairment every year, so any failure to take a write down when necessary would create potential legal liability.**
- **On the other hand, the disclosure of impairments and taking of write downs, particularly in this first year of the rule, could prompt lawsuits from shareholders claiming that the impairments should have been disclosed earlier.**

G. Indeed, this has already happened:

- **A class action lawsuit filed against AOL Time Warner this past July (after it took its write down) alleges that the company committed securities fraud by failing to take the write down earlier, under the old accounting rule (FAS 121) based on a decline in the company's advertising market and difficulties in integrating the two merged entities.**
- **Likewise, WorldCom disclosed in its March 2002 annual report that the company expected to record a $15-20 billion write down of goodwill and other intangible assets, and a class action lawsuit filed against WorldCom this past June alleges that it committed securities fraud by failing earlier to write down its goodwill and other intangible assets from acquisitions of several entities based on the well-known**

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problems in the telecommunications industry and the acquired companies (including MCI, Skytel, and Wireless One). The lawsuit also alleges that the size of the expected write down may be insufficient.

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IX. Balance Sheet Issues: Using Special Purpose Entities to Carry Debt

A. A threshold balance sheet issue for any company is what entities associated with it are accounted for with the company itself. Specifically, must the accounting for special purpose entities ("SPEs") created in reference to the company be consolidated with the company for accounting purposes?

B. Broadly speaking, an SPE is an entity created to serve a specific function. Frequently, that function is financing: a company will sell assets to an SPE in exchange for cash or other assets, which the SPE usually acquires by borrowing money from and selling equity to third parties.

C. Although SPEs can be used to lower a company's financing costs and tax liabilities, their recent prominence results from their being used to obtain off-balance sheet treatment. Specifically, when used properly, they can allow a company to obtain cash, which the company lists as an asset on its balance sheet, without incurring debt that it ordinarily would need to list as a liability.

D. For example, in a recent case, a private prison company sold several of its prison facilities to an SPE in exchange for cash that the company could then use to finance an expansion program. The SPE issued debt to finance the purchase, and the prison company then leased the facilities back from the SPE and continued to operate them (and to obtain their fees from governments for doing so). Thus, before the transaction, the prison company had prisons and operating revenues but very little cash, plus various sources of debt; after the transaction, it maintained

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the operating revenues (offset slightly by the long-term lease payments) and had a lot of cash, some of which it used to pay off the pre-existing debt. The SPE owned the prisons, which secured the SPE's now substantial debt (which it serviced through the lease payments that it received from the company).

E. For a company to obtain such off-balance sheet treatment of the debt, however, it must meet certain requirements under generally accepted accounting principles (GAAP). Broadly speaking, these requirements are:

- **The assets must actually be sold to the SPE, with the company retaining no legal, beneficial interest in them;**
- **The SPE must have an independent owner that controls the SPE and possesses the risks and rewards associated with owning the SPE's assets. The independent ownership interest must be in equity (or subordinated debt) equal to at least 3% of the SPE's capitalization;**
- **The company cannot own more than 50% of the SPE's equity.**

F. The recent accounting issues involving SPEs have concerned questions of whether the SPEs met these requirements, and, therefore, whether it was proper for the public companies to keep the SPEs' assets and, especially, debt off their balance sheets.

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G. The prison company described above – Cornell Companies – restated its financials after initially treating the SPE as an off-balance sheet entity because of concerns about whether the 3% equity requirement was met.

- **The outside equity investor was an investment bank, and, less than a month after the closing of the prison sale transaction, Cornell paid the investment bank a retainer fee for future investment banking work. That fee was equal to approximately half of the investment bank's equity investment in the SPE.**
- **The issue that arose was whether the amount of the retainer fee was really a return of capital on the earlier investment, which would have reduced the independent equity investment amount below the 3% requirement.**
- **Cornell chose to restate its financials and consolidate the SPE with its own financial statements, but even that did not end the issue, as several shareholder class actions were filed against the company and some of its officers.**

H. Enron's dramatic spiral began when it restated its financials last fall to consolidate SPEs that it had helped set up.

- **Although the facts surrounding the SPEs were problematic for several reasons, the issue that caused Enron to restate and consolidate the entities into its own financials was Enron's guaranteeing the SPEs' outside investors against loss, thereby**

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assuming the financial risk that the independent investors are required to retain under the accounting rules.

- **In one example, Enron formed an SPE called Chewco to buy out Calpers' 50% interest in a joint venture (called JEDI) that Enron and Calpers had previously formed. Enron kept Chewco's debt from the nearly $400 million Calpers buyout off its books based on an independent financial institution's having made a 3% equity investment in Chewco. It turned out, however, that Enron provided the investor with cash collateral for half of that investment, thus causing the 3% equity test to not be met and off-balance-sheet treatment to be unavailable.**
- **In two other examples, Enron formed SPEs, called Raptor and LJM2, that purchased, respectively, technology stock (Rhythms Net Communications) and dark fiber optic cable, from Enron. Enron initially kept these SPEs, and their assets and debts, off of its balance sheet, but ultimately restated and consolidated after revelations that Enron had essentially guaranteed the SPEs' outside investors investments by entering transactions that provided for Enron to give its own stock to the SPEs (or the investors) if the SPEs' underlying assets (i.e., Rhythms Net stock or the dark fiber) declined in value. These guarantees removed the economic risk from the investors.**

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