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# Buying and Selling a Business—The Purchase Agreement

Written for the Hunter Group CPA LLC

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Buying or selling a business is an important event, especially for first-time buyers and sellers. The importance is reflected in the many legal documents used to record the terms of the deal, with the key document being the purchase agreement. Whether the deal is structured as an asset purchase or a stock purchase, the purchase agreement will contain the same types of provisions, which include (1) purchase terms, (2) representations and warranties, (3) closing conditions, (4) covenants, (5) indemnification, and (6) boilerplate. The purpose of this article is to explain the nuts and bolts of a purchase agreement.

**Purchase Terms.** The purchase terms describe what is being sold, the purchase price, payment terms, and collateral security. For example, in an asset purchase, this section will describe the assets sold, the assets excluded from the deal, the party responsible for the debts and liabilities of the business, payment terms, and collateral security for any part of the purchase price paid over time instead of at the closing.

**Representations and Warranties.** Next are the representations and warranties, which are the seller's detailed factual statements about the business, its assets, liabilities, income, expenses, and more. A buyer wants detailed representations and warranties because he wants to know exactly what he is getting when buying the business. Numerous schedules with documents and detailed information, such as financial statements, tax returns, and lists of accounts receivable and accounts payable, are attached to the purchase agreement to support the representations and warranties. If after the closing the buyer discovers that something is not as represented and warranted, the buyer will ask the seller to indemnify or reimburse the buyer for his loss.

**Closing Conditions.** Closing conditions describe what has to occur or not occur in order for the parties to close the deal. They may include such matters as the buyer getting bank financing to pay the purchase price, the seller getting a third party's consent to assign contracts to the buyer, and the parties getting a tax clearance letter from the New Jersey Division of Taxation. If a condition is not satisfied, the closing cannot occur, unless the parties waive the condition.

**Covenants.** Covenants are promises to do or not do something. There are pre-closing and post-closing covenants. Pre-closing covenants include such matters as the seller promising to operate the business in the ordinary course consistent with past practice to preserve the business for the buyer. Post-closing covenants include restrictive covenants, such as the seller agreeing not to compete with, and not to solicit the customers and employees of, the business for a period of years.

**Indemnification.** The indemnification provisions identify the party responsible to pay for specific items discovered after the closing. Indemnification usually results from a seller's breach of the representations and warranties about the business. For example, a debt that is presented after the closing that was not known by the buyer because it was not disclosed by the seller in the purchase agreement. In such a case, the buyer will seek indemnification from the seller, requiring the seller to pay, or reimburse the buyer in the amount of, the debt.

**Boilerplate.** Finally, the purchase agreement will include definitions of terms and boilerplate provisions. Definitions can include important information, such as what constitutes a material adverse change allowing a party to terminate the purchase agreement. Boilerplate provisions are also important. For example, what law will govern the agreement and which court will resolve any disputes between the parties.

**Conclusion.** This article merely describes the general contents of a purchase agreement. Such an agreement can be as short as 15 pages in a simple deal and over 50 pages in a complex deal. However, no matter its length, the agreement will contain the provisions discussed in this article.

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