UNIVERSAL ISSUES IN DRAFTING CORPORATE AGREEMENTS

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I. Who Is Your Client?

This is clearly the first question that should be addressed before drafting any corporate agreement. Although deceptively simple on its face, this question incorporates many facets. We can start with the basics. Is your client the buyer or the seller in an acquisition? Is your client a joint venturer? Is your client going to be the general partner or a limited partner of a partnership? Is your client the customer, or the provider of goods or services?

Is this a one time deal, or an ongoing relationship? Even if it appears to be a one time deal, is your client likely to do business with the other parties to the transaction in the future?

What is your client’s negotiation style? Does your client have a reputation as a "good guy" in the industry, or is your client known for having a heavier handed style? Does your client prefer to lead all of the negotiations? Or, is your client looking to you and your experience and expertise to lead the negotiations?

What is the negotiation leverage between your client and the other parties to the transaction?

II. What Are Your Client’s Expectations?

What is the proposed timing for the transaction? Is getting the deal done quickly a top priority? How much is your client willing to accommodate the other side in order to get a deal signed quickly? Or, is your client more risk adverse? How much specificity will your client require, or does your client desire, in the documents?

How much flexibility does your client feel a need to preserve? Is your client strongly committed to doing this transaction or entering into this relationship, or is your client viewing the drafting process as an extended due diligence period?

Will your client always be the "good cop," while you are expected to play the role of the "bad cop?"
Is your client expecting you to guide its more junior personnel through the transaction? Is your client looking to you for advice on business issues, as well as document negotiation and preparation?

Of course, expectations can, and often do, change over the course of a transaction, and over the life of a relationship documented by a written agreement. Thus, it is important to not only have an initial understanding of your client's expectations, but to reassess the expectations periodically throughout the transaction process.

III. Describing the Deal

It is probably most helpful if an agreement begins with those points that are most important to the nonlawyers involved in the transaction. In most deal descriptions, what is most important is what is being bought or sold, and for what price. The most important point to the business people is almost always the price, the money -- how much is being paid, when is it being paid, and how is it being paid. For those making the payment, what are they receiving in return (shares of stock, title to assets, or goods and/or services), when are they receiving them, and what recourse do they have if things are not as represented? If the transaction is a credit or other financing arrangement, the operative questions are how much is being lent, at what interest rate, and on what terms?

IV. Drafting the Agreement

Usually, the party who is most interested in obtaining the protection provided by the document drafts, for example, the buyer, the lender, the licensor. However, in an auction situation, the seller will usually provide a form of draft contract with the investment banker's announcement of the proposed sale. This draft is to be marked up by potential buyers and returned with their bids. Initiating the drafting process can provide a party with a real advantage in setting the tone for a transaction, as well as controlling the tempo of the transaction going forward.

Many corporate agreements include the following as their principle sections:

1. Definitions;
2. Description of transaction;
3. Conditions of closing;
4. Representations and warranties;
5. Covenants;
6. Indemnification and/or limits on liability; and
7. Miscellaneous.

Although definitions are critical to a document, sometimes it may be easier for the business people if the definitions section is placed in an appendix at the end of the agreement, rather than as the first section of the agreement after the recitals. Although it is often helpful if all defined terms are listed in the definitions section, many terms may actually be defined in the body of the agreement, with only a cross reference to the section which contains the definition in the definitions section.

Whether the closing conditions, the representations and warranties or covenants should follow the description of the transaction should be determined by the nature of the transaction. Oftentimes, a chronological ordering is used, and the representations and warranties (which describe the state of affairs at the signing and at the closing), come first. Pre-closing covenants (which govern the parties' conduct prior to the closing) follow the representations and warranties, then the closing conditions, then post-closing covenants (which govern the parties's conduct after the closing), and then the provisions regarding indemnification and/or limits on liability. In financing transactions, the post-closing covenants are often divided into affirmative and negative covenants.

Whatever the organizational scheme, the document should have a logical flow whenever possible. The document’s table of contents should serve as an outline for the material terms and conditions of the agreement and the organization of the agreement, as well as a useful finding device.

To draft effectively, for each provision always consider:

a. Who;
b. What;
c. When;
d. Where;
e. How; and
f. Why.

Make sure that each provision is relevant to the transaction at hand, and consistent with the other terms and provisions of the document. If you are allowing a seller to take certain actions between the signing and closing of a transaction, consider how those actions will affect the accuracy of the representations and warranties at the closing (compared to the time of signing). Also, consider the impact of those actions on your client’s ability to enforce a subsequent claim for indemnification for breach of a
representation or warranty. Consistency among the requirements of representations and warranties, covenants and conditions is critical to the enforcement of a subsequent claim for indemnification.

V. Some Drafting Techniques and Concerns

1. Use active voice rather than passive voice whenever possible.

2. Use plain English whenever possible (unless ambiguity is clearly in your client's best interests).

3. Use descriptive headings and subheadings to break your document up into manageable sections. Don't be afraid to break a lengthy section into subsections or separate paragraphs.

4. Avoid overly long sentences. Break them up into shorter, declarative sentences.

5. If there are several provisos following a general restriction or prohibition, consider numbering them, making them subparagraphs, or at least underlining the words "provided, however" and "provided, further."

6. Write in the "positive" whenever practicable. Positive sentences are often shorter and easier to understand than their negative counterparts. For example:

   Negative: Persons other than the primary beneficiary may not receive these dividends.

   Positive: Only the primary beneficiary may receive these dividends.

7. Avoid "lawyerisms" like aforementioned, hereinafter and hereby.

8. Include examples of how certain formulas or computations are intended to work.

9. Consider underlining all defined terms in the text of the document.

10. Beware of multiple "materiality" or "materiality2."

11. What does it mean for representations and warranties to be "true in all material respects" at closing? Who determines if the representations and warranties are true and correct in all material respects?
12. When should knowledge qualifiers be used? How should "knowledge" be defined? What is "best knowledge?"

13. Make sure that sections drafted by specialists (for example, tax, ERISA and environmental provisions) are consistent in substance and terminology with other parts of the agreement.