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Transactional Matter Files

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### K Drafting - Schedules

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5. Note that party definitions can be tricky. For example, if "Big Financial Co." is defined in a mutual settlement and release agreement to be "Big Financial Co., Inc., and all of its subsidiaries, parent corporation, officers, directors, employees, attorneys, and accountants" so as to give these Big Financial Co.-related individuals the benefit of the release of all claims granted by the other side, does it follow that Big Financial Co.'s release of the other side includes a release by all those defined as part of Big Financial Co.? Why or why not?

#### **F. Information Schedules.**

Certain sections of agreements are designed to elicit information from the parties to the agreement, such as lists of existing indebtedness, contracts, subsidiaries, etc. Those items should be included as a schedule to the agreement or identified as having been delivered under the agreement. Identification of the schedules can be by sequential numbering or lettering, or may correspond to the numbers of the sections addressing this information in the agreement. Rather than leaving the form of schedules as an open issue to be resolved after the parties have signed the main transactional documents, negotiate and agree to them up front. This will avoid later disputes when one party will have gained or lost negotiating leverage. This establishes that everyone knows what is expected and helps to avoid later, disruptive disputes.

#### **G. Informational Documents.**

Where an agreement requires the delivery of *existing* documents or certificates, copies of the documents do not need to be attached to the agreement as long as it states that the documents will be delivered prior to closing. Often, the attorney will also want the representations and warranties of the party to apply to these documents. The documents should be accurately identified and incorporated into the agreement with a specific reference in the representations or warranty section.

#### **H. Supplemental Documents.**

Where an agreement calls for the execution and delivery of other, related documents (notes, employment agreements, security documents, etc.), consider attaching forms of these documents as consecutively numbered or lettered exhibits ("in substantially the form of Exhibit A to this Agreement").<sup>8</sup> As with schedules to an agreement, it is the best practice to negotiate the form of supplemental documents up front rather than leaving them for negotiation and preparation after execution of the main agreement. Among other things, this will force the parties and counsel to really think through all aspects of the deal and make appropriate arrangements for all foreseeable contingencies. This practice can make for bulky documents. However, the benefits generally outweigh the extra work and paper expended on the front end to prevent later disputes.

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<sup>8</sup>See Appendix 2, a sample asset purchase and sale agreement with exhibits.