

SUMMARY

UPDATING DISCLOSURE SCHEDULES: SAMPLE PROVISIONS

Negotiating a Disclosure Schedule Updates Provision

- When negotiating a disclosure schedules updates provision parties typically focus on:
 - Whether the seller is obligated or merely permitted to make updates;
 - The scope of permitted updates; and
 - How the updates affect other rights and obligations of the parties.

Sample Seller-Friendly Disclosure Schedules Update Provisions

During the Pre-Closing Period, Seller shall have the ***right (but not the obligation)*** to update the Disclosure Schedules to the extent information contained therein or ***any*** representation or warranty of Seller becomes untrue, incomplete or inaccurate after the Agreement Date due to events or circumstances after the date hereof or facts of which the Seller becomes aware after the date hereof. [Buyer shall have the right to terminate this Agreement pursuant to Section [] ***within five (5) days after receipt*** of such update if the updated portion or portions of the Disclosure Schedules disclose any facts and circumstances that would cause a failure of the Closing Condition set forth in Section []; provided, however, that if (a) Buyer is not entitled to, or does not timely exercise, such right to terminate this Agreement, or (b) Buyer consummates the Closing,] Buyer shall, in any such case, be ***deemed to have accepted*** such updated Disclosure Schedules, ***any such update shall be deemed to have amended the Disclosure Schedules, to have qualified the relevant representations and warranties contained in Article [], and to have cured any breach of any representation or warranty that otherwise might have existed hereunder by reason of such event or circumstance.*** Nothing in this Agreement, including this Section [], shall be interpreted or construed to imply that Seller is making any representation or warranty as of any date other than as otherwise set forth herein.

[Emphasis added.]

- This provision says that the seller has the right, not the obligation, to update the disclosure schedules. This is good for the seller because when updates are required:
 - An inadvertent failure to disclose new facts could result in an indemnification claim for breach of the seller’s covenant to update the disclosure schedules.
 - Or the buyer could claim that the closing conditions weren’t satisfied because the seller didn’t comply with its obligation to perform under the covenant.
- The next part of the first sentence allows any updates needed to complete or correct any information in the disclosure schedules or reps that becomes untrue, incomplete, or inaccurate because of “events or circumstances” or “facts of which the Seller becomes aware”—in each case after the date of the agreement.
 - This sets up a broad scope for updates, including anything that happens or is learned after signing.

- The only way this provision could be more seller-friendly is if the seller were also allowed to include information known or that should have been known prior to signing.
- Most of the rest of the provision covers the impact of the disclosure schedule updates on the buyer's rights, and it's also beneficial to the seller because the buyer's only recourse in this version of the provision is to terminate the provision.
 - If the buyer completes the acquisition, it's deemed to have accepted the new disclosure and can't then bring an indemnity claim relating to the new facts.

Sample Buyer-Friendly Disclosure Schedules Update Provisions

From time to time prior to the Closing, *Seller shall promptly* supplement or amend the Disclosure Schedules hereto with respect to *any matter arising* after the date hereof, which, if existing, occurring or known at the date of this Agreement, would or should have been required to be set forth or described in the Disclosure Schedules (each a "Schedules Supplement"). Any disclosure in any such Schedules Supplement *shall not be deemed to have cured any inaccuracy in or breach of any representation or warranty contained in this Agreement*, including for purposes of the indemnification or termination rights contained in this Agreement or of determining whether or not the conditions set forth in Section [] have been satisfied.
 [Emphasis added.]

- In this example, the seller is obligated to promptly update the disclosure schedules when it becomes aware of new facts that would have been required to be disclosed if they had arisen prior to signing.
 - This ensures that the buyer has complete information at closing.
 - Most sellers agree to this formulation because it's a pretty convincing argument that the buyer has a right to know all new facts or events that could impact the business prior to closing.
- The provision goes on to limit updates to matters that arise after signing that would or should have been disclosed if they had occurred prior to signing.
 - This is different from the seller-friendly version because here the seller isn't allowed to update the disclosure schedules with facts that arose before signing.
 - Parties often agree to limit the scope of updates to new things that happen post-signing.
 - Drafting the provision this way removes any incentive for a seller to wait to disclose material information until after signing, when the buyer could be obligated to close the deal.
- Finally, in this example updates don't affect the buyer's rights under the agreement.
 - So the buyer has the option not to close if the closing conditions aren't satisfied.
 - If the acquisition does close, the buyer can still bring an indemnification claim based on the disclosure as it stood at signing.

The rest of the video includes interviews with ABA M&A Committee members John F. Clifford from McMillan LLP and Ann Beth Stebbins from Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates.