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Much Ado About … Conflict Minerals in M&A?

By Sandra L. Flow and Benet J. O'Reilly of Cleary Gottlieb Steen & Hamilton LLP

Despite having already passed the first compliance deadline on June 2, 2014, the conflict minerals saga continues—after the Court of Appeals for the D.C. Circuit found part of the disclosure rule violated the First Amendment just weeks before the deadline (and the SEC clarified that companies should comply with the June 2 deadline anyway, with slightly modified requirements), the Court of Appeals indicated in August 2014 that it might rehear the case en banc, as requested by both the SEC and Amnesty International.

For those who haven't been following the intricate details, the Dodd-Frank Act required the SEC to adopt a rule requiring disclosures by a reporting company that manufactures or contracts to manufacture products for which so-called "conflict minerals" are necessary to those products' functionality or production. The specified minerals—cassiterite, columbite-tantalite (coltan), gold and wolframite, and their three derivatives—tin, tantalum and tungsten, are widely used in various types of products, including electronics, lighting, electrical and heating applications, and jewelry.

After a long and controversial rulemaking process, the SEC adopted Rule 13p-1 under the Securities Exchange Act of 1934, in August 2012, which required disclosures about the use of conflict minerals from the Democratic Republic of the Congo and neighboring countries in the manufacture of products to be made annually on new Form SD (Specialized Disclosure Report), with the first report due June 2, 2014. Industry groups challenged the rule, but the federal district court of the D.C. Circuit rejected the challenge in July 2013. At that point, companies geared up for what can be extensive procedures to investigate their supply chains and determine what disclosure was required. This year's Court of Appeals decision, and a flurry of activity around it as companies wondered how the SEC would react and how the disclosure requirements would change, came at the 11th hour, just seven weeks before the deadline. And now here we are again, wondering how the requirements might change in light of the anticipated ongoing court activity.

But in the acquisition context, most of that convoluted regulatory process doesn't really matter. Even the details of the disclosure itself may not be particularly relevant (as a result, we have not gone into the gory details).

In most cases, a buyer will mostly care about three main issues on the topic of conflict minerals:

- Are there any major reputational issues related to the conflict minerals disclosure?
- How much will it cost to comply with the reporting requirements?
- What is needed to comply with requests from customers who have to make disclosure?

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Of course, a US public company that has already fought its way through the first year of compliance on conflict minerals may have other particular areas of focus—it may be concerned about exactly how the target company will fit into its existing compliance framework and whether it will add to particularly thorny or burdensome areas that the company already wrestled with. A sample list of detailed questions, which may help get answers to these various issues, is included below.

In many cases, the buyer will have some time before it has to report on an acquired company's conflict minerals supply chain. The rule includes a transition period for acquired companies, similar to the one in the internal control context. A buyer that acquires a company that manufactures or contracts for the manufacturing of products with necessary conflict minerals, where the acquired company previously was not required to provide a specialized disclosure report with respect to its conflict minerals, may delay reporting on the acquired company's products until the end of the first reporting calendar year that begins no sooner than eight months after the effective date of the acquisition.

A public company that recently completed an initial public offering also has a transition period, and is not required to report on conflict minerals until the first reporting calendar year that begins no sooner than eight months after the effective date of its IPO registration statement.

Importantly, however, there is no transition period for any acquired company that was required to report on conflict minerals before its acquisition. This generally means that any US public company must be ready to comply with conflict minerals reporting requirements regarding such an acquired company immediately—at least covering the period of time starting from the acquisition date (although it is not entirely clear under the rule). If the acquired company will retain separate reporting obligations after the acquisition, it will be required to file a separate Form SD for itself and any of its consolidated subsidiaries (in that case, the Form SD would probably need to cover periods both before and after the acquisition date).

Practically, application of the various transition periods means:

Type of Target	Target Acquisition Date	Period Covered by First Form SD	Form SD Deadline
Public company (already filing conflict minerals reports)	Before Jan. 1, 2015	2014 calendar year	June 1, 2015
	Jan. 1 – Dec. 31, 2015	2015 calendar year	May 31, 2016
Private company or company not yet filing conflict minerals reports (*e.g.*, recent IPO)	On or before May 1, 2014	2015 calendar year	May 31, 2016
	May 2, 2014 – May 1, 2015	2016 calendar year	May 31, 2017

Of course, that all assumes that the courts don't take action that changes the whole framework before then …

Sample Due Diligence Questions

- Are you subject to the SEC conflict minerals reporting requirements (*i.e.*, are you required to file a Form SD annually)? If yes:
  - Please provide your most recent Form SD and Conflict Minerals Report (if any), together with any related back-up materials or reports (including any reports presented to the Board, any Board committee or the Disclosure Committee).
  - Did you obtain an independent private sector audit related to the Conflict Minerals Report? If yes, please provide, together with any related back-up materials or reports.
- Do you manufacture or contract to manufacture for sale to third parties any products for which cassiterite, columbite-tantalite (coltan), gold and wolframite, and their three derivatives—tin, tantalum and tungsten (collectively, "conflict minerals"), are necessary to the functionality or production of the product? If yes:
  - Please describe those products and your supply chain related to those products.
  - Please describe your due diligence framework for suppliers with respect to 3TG minerals.
  - Please provide any supplier forms or sample documents for certifications, questionnaires, agreements or other similar documents relating to or covering conflict minerals issues.
  - Do you have a conflict minerals policy? If yes, please provide.

– Do you have any reason to believe any of your conflict minerals originated in the Democratic Republic of the Congo or any of its neighboring countries ("Covered Countries")? Or any reason to believe any of those minerals did not come from recycled or scrap sources?

– Are you aware of any of those minerals that may have directly or indirectly financed or benefitted armed groups in the Covered Countries?

– Are there any provisions in any of your customer agreements relating to conflict minerals? If yes, please provide a list of those customers, and the relevant agreements or forms or samples. Do any of your customers prohibit or limit their purchase of products containing conflict minerals? If yes, please provide the relevant documentation.

– Please provide copies of any correspondence with or reports provided to customers relating to conflict minerals since [January 1, 2014].

Exclusive Forum Provisions: A New Item for Corporate Governance and M&A Checklists

By Michael O'Bryan, Kevin Calia, James J. Beha II of Morrison & Foerster LLP

Public companies increasingly are adopting "exclusive forum" bylaws and charter provisions that require their stockholders to go to specified courts if they want to make fiduciary duty or other intra-corporate claims against the company and its directors.

Exclusive forum provisions can help companies respond to such litigation more efficiently. Following most public M&A announcements, for example, stockholders file nearly identical claims in multiple jurisdictions, raising the costs required to respond. Buyers also feel the pain, since they typically bear the costs and may even be named in some of the proceedings. Exclusive forum provisions help address the increased costs, while allowing stockholders to bring claims in the specified forum.

The recent surge in adoptions started last year, after the Delaware chancery court confirmed the general enforceability of exclusive forum bylaws for companies incorporated there. Perhaps more importantly, courts outside of Delaware also have been enforcing the provisions and dismissing claims brought outside the specified forums.

Exclusive forum provisions can be implemented by most companies in their bylaws by action of their board of directors, without stockholder approval, though some companies have sought (and generally obtained) stockholder approval. Companies may want to consider adopting these bylaws as part of their general corporate governance regime or when they see events, such as the arrival of activists or a potential M&A process, that portend greater potential for litigation ahead.

Background

Response to Expanding Litigation Environment. Exclusive forum bylaws arose in response to the ever-increasing stockholder litigation against public companies. In the M&A context, stockholder litigation now is brought in virtually all public company transactions. Moreover, such litigation is frequently brought in multiple jurisdictions, so that the company has to defend against the same or very similar claims in different courts at the same time, resulting in higher costs (in terms of time as well as money) and exposure to potentially inconsistent rulings.

Exclusive forum bylaws attempt to address the problems associated with fighting similar claims in multiple jurisdictions by requiring potential plaintiffs to bring the claims in one specified court or jurisdiction. The specified courts are almost always in the company's jurisdiction of incorporation, and so for public companies more often than not are in Delaware. By focusing the litigation in such courts, the companies

and other parties also get the benefit of having the cases heard by judges who are experienced in applying the law of that jurisdiction, which can enhance speed and predictability. Most exclusive forum provisions also allow the company to permit exceptions, where the board consents to allowing the litigation to proceed in another forum.

However, companies also should consider whether there may be strategic or other advantages in litigating in a jurisdiction outside their state of incorporation. For example, a company in some circumstances may prefer to litigate in the state where its headquarters is located, if it perceives a "home court" advantage based on local goodwill or other advantages. Depending on the kinds of litigation expected and its perception of the relative strength of such advantage, such a company may prefer not to adopt an exclusive forum bylaw.[1]

Scope of Litigation. The litigation subject to exclusive forum bylaws generally is limited to claims of breach of fiduciary duty and other matters relating to the incorporating jurisdiction's corporate law and other intra-company disputes.

Increasing Popularity. The number of companies adopting exclusive forum bylaws shows steady growth. In the first quarter of this year, about 40 public companies incorporated in Delaware adopted exclusive forum bylaws, and about 75% of Delaware corporations going public had adopted the provisions.

Enforcing Exclusive Forum Bylaws

The Delaware Perspective

The Delaware chancery court in June 2013 found that exclusive forum provisions, even if not approved by stockholders, generally should be enforceable.[2] The court described a corporation's bylaws as part of the "contract" between the stockholders and the corporation. The court noted that stockholders were on notice that the board, under Delaware's corporate statute and the company's certificate of incorporation, could amend the bylaws without a stockholder vote (as is the case in most public companies), and that stockholders themselves could take action in response to the bylaws, such as by changing the bylaws to repeal the provision or even replacing the board of directors.

The court also noted that there might be some equitable limits on the enforcement of such bylaws, saying that while "in most internal affairs cases [exclusive forum] bylaws will not operate in an unreasonable manner," the application of the bylaws might be subject to review in any particular "real-world" situation.

Delaware courts have recognized, though, that the decision actually to enforce an exclusive forum bylaw should be made initially by courts in other jurisdictions, and have declined to enjoin plaintiffs from proceeding in other jurisdictions.[3] For the provisions to be of practical benefit, then, courts in other jurisdictions have to be willing to enforce them.

Courts Outside Delaware

Courts in several states that have been asked to consider exclusive forum bylaws that specified another court as the exclusive forum for a dispute have enforced the bylaws by dismissing the litigation in their courts, leaving the plaintiffs to bring claims in the courts specified in the exclusive forum bylaws. It remains to be seen, though, whether all courts will recognize the enforceability of these provisions, and whether these and other courts will place any limits on the enforceability in specific contexts.

California. In May a California court enforced an exclusive forum bylaw adopted by Safeway in October 2013.[4] Safeway (according to its SEC filings) had received notices from an activist stockholder and had been approached by Albertsons about a potential acquisition, but had decided not to pursue the sale at that time. Later Safeway pursued the sale, and in March 2014 agreed to be sold to Albertsons.

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[1] A company may also choose to designate its headquarter state as the exclusive forum for intra-litigation. In a recent decision, the Delaware chancery court affirmed the validity of a bylaw provision in which a North Carolina-based Delaware corporation designated North Carolina as the exclusive forum for intra-corporate disputes. *See City of Providence v. First Citizens Bancshares, Inc.,* C.A. No. 9795-CB (Del. Ch. Sept, 8, 2014). While the court expressed the view that Delaware was "the most obviously reasonable forum" for litigation involving a Delaware corporation, it explained that "the fact that the Board selected … North Carolina—the second most obviously reasonable forum given that [the company] is headquartered and has most of its operations there—rather than … Delaware as the exclusive forum for intra-corporate disputes does not … call into question the facial validity of the Forum Selection Bylaw." *Id.* It should be noted, however, that such provisions must account for the fact that Delaware law grants the Delaware chancery court exclusive jurisdiction over certain stockholder actions—such as statutory books and records proceedings.

[2] *Boilermakers Local 154 Ret. Fund v. Chevron Corp.,* 73 A.3d 934 (Del. Ch. 2013).

[3] *See, e.g., Edgen Group Inc. v. Genoud,* C.A. No. 9055-VCL (Del. Ch. Nov. 5, 2013).

[4] *Groen v. Safeway,* No. RG14716641, 2014 WL 3405752 (Cal. Super. May 14, 2014).

Plaintiffs filed multiple lawsuits in California state and federal courts and in Delaware, alleging breaches of the Safeway directors' fiduciary duties. Safeway moved to dismiss the litigation in the California state court, pointing to the exclusive forum bylaw, and the court agreed, noting the "contractual principles" underlying the Delaware court's analysis of such provisions in *Boilermakers*. The court further noted that the plaintiffs had not shown why enforcement of the provision might be unreasonable in this case, and that the record did not support an argument that the provision had been adopted after the "wrongdoing" had already occurred.

The decision is all the more significant because it declined to follow a California federal court that three years previously had refused to enforce an exclusive forum bylaw. The Safeway court noted that the earlier case had been decided before *Boilermakers*, and had involved allegations of wrongdoing prior to adoption of the bylaw.

Illinois. An Illinois court recently dismissed litigation that had been filed in Illinois against Beam after it agreed to be acquired by Suntory.[6] Beam had adopted an exclusive forum bylaw in December 2013, about a month after being approached by Suntory, and a month before agreeing to be acquired. The court noted the contractual rationale of *Boilermakers*, and that the complaint did not allege that any "wrongdoing" had occurred by the time of adoption of the bylaw or that the board had adopted the bylaw with a "sinister purpose."

New York. In November 2013, in one of the first cases relying on *Boilermakers*, the New York Supreme Court dismissed all of the derivative claims that had been brought against Aspen University by its stockholder and former CEO, citing the company's exclusive forum provision.[7] Among other things, the court specifically rejected the plaintiff's claim that an exclusive forum bylaw needed to be approved by the company's stockholders in order to be binding.

Proxy Advisor Positions & Stockholder Reactions

Proxy advisory services tend to recommend against exclusive forum bylaws that are put to a stockholder vote, though, as noted below, most stockholders don't seem to be following their advice.

Both ISS and Glass Lewis state in their 2014 proxy voting guidelines that they make recommendations on how stockholders should vote on exclusive forum provisions on a case-by-case basis. Both also look for some showing of harm to the adopting corporation from other litigation and to otherwise good governance at the adopting company. Moreover, Glass Lewis says in its guidelines that it will recommend that stockholders vote against an adopting company's governance committee chair, if during the past year the board approved an exclusive forum bylaw without stockholder approval.

However, the results of votes on the bylaws that have been put to stockholders and director elections suggest that the majority of stockholders approve of such provisions:

- ISS recommended against approval by stockholders of 11 exclusive forum provisions that have been put to stockholders this year (as of early June). Nonetheless, each passed (and one other against which they recommended is still pending).
- Glass Lewis recommended against reelection of the chairman of SEACOR Holdings' nominating and governance committee after the board adopted an exclusive bylaw provision. The director nonetheless was reelected by a comfortable margin, with only about 5% of the shares voted being voted against his reelection.

Timing

Relative to Alleged Wrongdoing. Companies seeking the benefits of exclusive forum bylaws should consider carefully the timing of their adoption. While courts have enforced such bylaws, several have noted the potential for additional questions, at least, if the bylaws are adopted after "wrongdoing" that may be the subject of litigation has occurred or appear to be adopted for an improper purpose.

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[5] *See Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011).

[6] *Miller v. Beam Inc.*, No. 2014 CH 00932 (Ill. Ch. March 5, 2014).

[7] *Hemg v. Aspen Univ.*, No. 650457/13, 2013 WL 5958388 (N.Y. Sup. Nov. 4, 2013).

In the M&A context, then, it may be best, if possible, to adopt such a provision early in the process, or even before beginning the process, before the board starts making the acquisition-related decisions that are likely to be the subject of stockholder claims. The California and Illinois courts in the examples noted above both involved adoption of exclusive forum bylaws after the company was approached by the eventual buyer, but before the company was committed to the sale and before the board had completed its process. Several companies have adopted exclusive forum bylaws concurrent with or soon before entering into a sale agreement or around the time that activists seemed to be taking positions in the stock, but courts have not yet ruled definitively on the enforceability of the bylaws in those contexts. In any event, it may be better to adopt such a provision at such a time than not at all.

Effect of Public Announcement. Adoption of an exclusive forum bylaw, as an amendment to the bylaws, must be announced publicly via an SEC filing. Companies thus should be ready to respond to questions about the implications of the adoption. Given the number of companies currently adopting the provisions after recent court decisions, however, such an adoption may be seen as less of a signal than it might have been previously.

Conclusion

Exclusive forum provisions are an increasingly popular response to the costs of multi-forum stockholder litigation. Public companies should consider whether such provisions would be beneficial to them and their stockholders. Companies that anticipate substantial litigation, such as those contemplating a sale or facing aggressive activist involvement, may want to implement such provisions sooner rather than later, to minimize the potential challenges to the provisions based on the timing of any alleged misconduct.

Checklist: Special Committees—M&A Context

By Randi Morrison, DealLawyers.com

1. Formation Considerations—Special committees are not legally required in M&A transactions, but are advisable in certain circumstances. Special committees:

- Most commonly are used in transactions involving controlling (via stock or board seats) stockholders seeking to acquire the balance of the company's shares from minority stockholders ("freeze-outs")
- May also be used in other situations, such as:
  - Sale of controlled company to a third party where circumstances give rise to conflict of interest (*e.g.*, where controlling stockholder seeks a control premium or other consideration not shared with minority holders)
  - Management buyout—to exclude interested directors from decision-making and help evidence board discharge of duties in order to get the best price reasonably available
  - Any transaction where there is a controlling stockholder simply given the uncertainty as to how things will unfold, and the potential for a conflict of interest to arise
  - Where there is a large, non-controlling stockholder (*e.g.*, founder, management) who may exert significant influence over the transaction
  - Majority of the board has a conflict of interest—or a minority of the board with a conflict controls or dominates a majority
  - Where the board concludes that establishment of a committee will allow it to more effectively and efficiently provide ongoing oversight of a potential transaction
- If properly constituted & functioning, evidence the "fair process" component of transactions reviewed under the "entire fairness" standard

– If properly constituted & functioning, may shift the burden of proof to the plaintiff on the issue of transaction fairness

– Invoke the business judgment rule when combined with a non-waivable condition that the transaction be approved by a majority of the outstanding minority shares

– Protect interested or controlling stockholders who are excluded from serving on the committee from liability for breach of duty of loyalty

– Entitle non-conflicted directors who don't serve on the committee to rely in good faith on the committee's report provided they inform themselves of the committee's work

– More easily accommodate special disclosure rules applicable to "going private" transactions under Schedule 13e-3

2. Not Always Advisable—Special committees aren't warranted or advisable where:

– Only one director or a small minority of directors—who can disclose their conflicts and recuse themselves from relevant board deliberations—have a conflict of interest, and there is no controlling stockholder on both sides of the transaction

– Best practices can't be followed

Also consider whether establishing a special committee may be perceived as acknowledgement of a conflict in situations where one arguably does not exist.

3. Follow Best Practices—Best practice special committees are characterized by:

– Independent & disinterested directors

– Board resolutions that clearly define the scope of the special committee's duty & authority

– Authority to retain own financial, legal & other advisors

– Clear mandate & broad power to negotiate the transaction.

– Power to "veto" a transaction—To receive appropriate deference from a court, the committee must be empowered to say "no" to any transaction under consideration, *i.e.*, the company can't enter into a deal without the prior approval & recommendation of the committee.

– Full power & authority of the board in connection with the potential transaction comparable to what the board would have in dealing with a third party including, e.g., authority to evaluate & consider strategic alternatives, adopt a poison pill

4. Committee Composition is Paramount—Special committees:

– Only need one member under most corporate statutes—but Delaware courts place more trust in multiple-member committees (*Gesoff v. IIC Indus. Inc.*, 902 A.2d 1130, 1146 (Del. Ch. 2006))

– Often have 3-4 directors, which, aside from Delaware court considerations, provides "insurance" in the event one or more members become conflicted down the road, *e.g.*, as the bidding process unfolds

– Should be composed solely of "disinterested" directors. Directors are "disinterested" if they "neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally" (*Orman v. Cullman*, 794 A.2d 5, 23 (Del. Ch. 2002)). For example, a director of a target corporation who has a material financial interest in the acquiring corporation is "interested."

– Should be composed solely of "independent" directors. Directors are deemed "independent" if they are not controlled by or beholden to someone who is interested in the transaction (*Aronson v. Lewis*, 473 A.2d 805, 815 (Del. 1984)). Stock exchange definitions are relevant in this analysis—but aren't dispositive.

Disinterest and independence can only be determined in the context of a specific contemplated transaction—not in a vacuum. Helpful tools include:

- Completion by special committee candidates of D&O questionnaires, and participation in other "self-reporting"/self-disclosure about potential conflicts of interest
- One-on-one interviews by legal counsel of potential committee candidates to identify conflicts that might adversely affect their ability to serve on the committee
- Implementing an ongoing conflict self-identification & disclosure process to catch any potential conflicts of interest as the process plays out

5. Selection Process Matters Too—In addition to who actually serves on the special committee, the selection process itself may be scrutinized after the fact. Interested directors should recuse themselves from the selection process, *i.e.*, should not be involved in selecting special committee members, unless necessary to adopt the resolution appointing the special committee members due to, *e.g.*, the size of the board, quorum requirements, number of interested directors. In that event, as long as the interested directors don't exert improper influence in selecting the committee members, this minimal involvement shouldn't taint the special committee formation.

6. Compensation Considerations—Special committee members are commonly compensated—and reasonable compensation is expected—for what is often a considerably time-consuming process.

Factors to consider include:

- Impact on independence—*i.e.*, whether the compensation would be likely to influence the committee members' independent judgment & any relevant case law (*e.g.*, *In re MFW*)
- When the compensation should be set—at the outset vs. later in the process
- How much should be paid
- Disclosure requirements
- Who ultimately pays—company or other party to the deal
- Form and timing of payment—*e.g.*, fixed fees/retainer payable monthly + per meeting fees
- Telephonic vs. in-person meeting attendance (assuming meeting-triggered fees)
- Whether committee chair and non-chair compensation should differ
- Using benchmarking data to help determine amount and form of compensation based on other company disclosures
- Potential for process to consume considerably more time or effort or last much longer than initially anticipated—and associated "need" to re-evaluate compensation as the process unfolds

Learn more in our "Special Committees" Practice Area posted on DealLawyers.com.

Respecting Boilerplate: Definitions & Rules of Construction

By Rob James of Pillsbury Winthrop Shaw Pittman LLP[1]

The charts in this series of *Respecting Boilerplate* articles are intended to facilitate the process of drafting, reviewing, negotiating, and *respecting* boilerplate provisions. The common topics are illustrated in the first column by a "reference" clause—which is assuredly *not* a universally recommended text—and which is neither the most simple nor the most complex possible provision, but one that illustrates the basic purposes. For each reference clause, the second column identifies questions or other comments to consider. These reference clauses are neither necessary nor sufficient for any particular deal, and the comments are far from exclusive (this sentence sounds like boilerplate itself). Nonetheless, the charts may help you select an appropriate subset of general clauses for a specific transaction.

REFERENCE CLAUSE	COMMENTS
II. DEFINITIONS	
Capitalized terms used in this Agreement have the following respective meanings.	Avoid use of uncapitalized defined terms or terms that would have an unexpected meaning. A definition of "Contract" that excludes government contracts, for example, might lead to misunderstandings.
"Affiliate" means, with respect to a specified Person, any other Person that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with the Person specified. [For purposes of this definition, control of a Person means the power, directly or indirectly through intermediaries, to direct or cause the direction of the management and policies of such Person whether through ownership of voting securities or ownership interests, by contract, or otherwise.] [With respect to a corporation, partnership or limited liability company, control includes direct or indirect ownership of more than 50% of the voting securities in such corporation or of the voting interest in a partnership or limited liability company.]	Do you have the same meaning of "Affiliate" in mind for all provisions where that term is used? Some contracts distinguish Affiliates from Wholly-Owned Affiliates or from Subsidiaries. Is there any reason to define or treat one Party's Affiliates differently than those of another? In determining who has "control" of a joint venture, pay particular attention to arrangements in which each person, with even a small percentage interest, might have veto rights or pass-through or holdback issues. An alternative is to use the percentage of equity ownership as the exclusive bright-line test without further or alternative reference to "control."
"Business Day" means a day other than Saturday, Sunday or any day on which banks located in the State of _____ are authorized or obligated to close.	The timing of actions involving more than one jurisdiction can be significantly affected by the definition. Watch for inclusion or exclusion of states or countries in the definition. Saturday and Sunday are not universal bank closure days, especially in Middle Eastern countries—see Wikipedia's "Work week and Weekend" article.
"Contract" means any agreement, contract or lease, whether written or oral and whether express or implied.	The Uniform Commercial Code distinction between "agreement" and "contract" (§ 1-201) is not commonly observed. Do you intend for all purposes to include oral contracts in the "Contracts" definition? What about bankruptcy bids that have been submitted to third parties?

[1] For the complete charts and additional references, see http://www.pillsburylaw.com/siteFiles/Publications/RespectingBoilerplate131022.pdf.

REFERENCE CLAUSE	COMMENTS
"Government Authority" means any court, tribunal, arbitrator, authority, agency, commission, official or other instrumentality of the United States or any state, county, city or other political subdivision or similar governing entity. [Government Authority includes any governmental, quasi–governmental or non-governmental body administering, regulating or having general oversight over [gas, electricity, or other relevant markets].]	Is there any need to distinguish among judicial, legislative, executive or administrative Government Authorities? Participants in a regulated industry may be affected by actions of a non-public authority, such as a power exchange (PX) or independent system operator (ISO), and these private entities are sometimes included in such a definition.
"Knowledge" of [Party] means the actual awareness of a particular fact or matter by any of [names of specific persons] as of the date of a representation and warranty of that fact or matter[, in each case after [due] inquiry].	"Knowledge" of an organization is often limited to the actual knowledge of named individuals. Attorneys are often excluded from the list to avoid arguments about possibly waiving privileges and immunities. If the named persons will become employees of the other Party (or be terminated) following closing, they and their recollections would not necessarily be aligned with the promisor at the time that a dispute arises. Do you want to specify knowledge after "due," "diligent," "reasonable" or other levels of inquiry? Or to require making inquiry of direct reports, or reviewing records? Or to disclaim any such duty of inquiry whatsoever?
"Law" means any statute, common law or equitable principle, constitution, treaty, convention, ordinance, code, rule, regulation, order, writ, injunction, decree, executive order, or other similar authority enacted, adopted or promulgated by any Government Authority.	Some forms separately define specific bodies of law (e.g., Environmental Law, Antitrust Law), where the scope of those laws is relevant to particular clauses. Some also provide shorthands for Internal Revenue Code, HSR Act, WARN Act, Immigration Control and Reform Act, OFAC Regulations, and similar statutes or regulations.
"Material" means of a level of significance that would affect whether a reasonable Person in the position of the [promisee] would enter into or conclude the transactions contemplated by this Agreement.	Distinguish between "material" as used in a MAC clause—significant enough to permit the buyer to walk away—from the level of significance required for monetary liability under a representation and warranty.
"Material Adverse Change" or "MAC" means a Material adverse change in the business, assets, liabilities, results of operations [or prospects] of the [Seller], regardless of the temporal duration thereof, including [list inclusions] but excluding [list exclusions such as changes in general economic conditions, industry conditions, this very transaction, or reactions of securities analysts].	Consider whether to quantify the amount of adverse impact required for either kind of standard, such as a net present value of the adverse effect of $X discounted at Y% per year. Consider whether the clause should clarify that a MAC can result from a single source or in the aggregate of diffuse or types of adverse changes. An alternative to including "prospects" in the MAC definition is to refer in operative clauses to circumstances that result, or would reasonably be expected to result, in a MAC or a Material Inaccuracy. See the discussion in Kenneth L. Adams, A Manual of Style for Contract Drafting, 3d edition, 2013.
"Ordinary Course of Business" means in accordance with [Seller's historical and customary] practices with respect to the activity in question.	Consider specifying an industry standard, or a standard observed during a specific time period, if the Party's own historical practices are atypical. The amount of resources (dollars, time, or personnel) dedicated to a particular item or task (proportionately) could be used to define ordinary course.
"Party" means [Purchaser] and [Seller] [or "has the meaning set forth in the Preamble"].	Do you want Affiliates to be considered Parties under the agreement for any purposes?

REFERENCE CLAUSE	COMMENTS
"Person" means any natural person, corporation, general partnership, limited partnership, limited liability company, proprietorship, other business organization, trust, union, association or Government Authority.	Do you want a Governmental Authority to be considered a Person for all clauses of the agreement? Or to disclaim that inclusion?
"Reasonable Efforts" means, with respect to the efforts to be expended by a Party with respect to any objective, that the level of efforts to be expended by a Party under this Agreement will be consistent with the level of reasonable, good faith efforts and resources that would normally be used by such Party (whether acting alone or through its Affiliates) to accomplish a similar objective under similar circumstances [consistent with the promisor's past practices, or industry practices, including [list required efforts] but excluding [list non-required efforts]].	Cases construing "best efforts," "reasonable efforts," "commercially reasonable efforts" or other variants have a range of results. Rather than be a test case in litigation, consider expressing what kinds of efforts are necessary, such as maintaining at least the same level of staffing as on a given date, or manufacturing 24 hours per day when necessary to fill orders or consider expressing what kinds of efforts are not necessary, such as paying money to third parties to obtain a consent.
III. RULES OF CONSTRUCTION	The rules of construction sometimes appear together with an opening definitions section; other times they appear in the general provisions section at the end.
Unless a [clearly] contrary intention applies, the following rules of construction apply to this Agreement.	This introduction somewhat diminishes the purpose and power of the clauses, but affords a safety valve to avoid a materially surprising result.
All Article, Section, Schedule and Exhibit references in this Agreement are to components of this Agreement unless otherwise specified. The Schedules and Exhibits attached to this Agreement constitute a part of this Agreement and are incorporated herein for all purposes.	This subject is sometimes addressed in the Entire Agreement clause.
Any reference in this Agreement in the singular includes the plural where appropriate, and any reference in this Agreement in the masculine gender includes the feminine and neutral genders where appropriate.	Do you really need a gender/number clause? Consider consequence these matters in drafting, rather than relying on the boilerplate.
The headings used in this Agreement have been inserted for convenience of reference only and do not limit or exclusively define the provisions hereof.	Some forms purport to prohibit any use of the headings in construction of the contract. It may be sufficient only to provide that such headings are not exclusive definitions of scope.
The words "includes" or "including" mean "including without limitation". The words "hereof," "hereby," "herein," "hereunder" and similar terms in this Agreement refer to this Agreement as a whole and not any particular Article, Section, Exhibit or Schedule in which such words appear. Any reference to a Person includes any successor or permitted assignee of such Person. Any reference to a Contract includes any subsequent amendment in accordance with its terms and any exhibits or schedules thereto. Any reference to a Law includes any amendment or successor thereto and any rules and regulations promulgated thereunder.	Do you intend the agreement to apply to contracts and laws as later amended? Some forms provide that a reference to a Person in one capacity (e.g., as an administrative agent) is not a reference to that Person in any other capacity (e.g., individually). Some agreements expressly reject the rule of ejusdem generis—so that "including" and "such" are not limited by the nature of the specific examples given.

REFERENCE CLAUSE	COMMENTS
Currency amounts referenced herein are in U.S. Dollars.	Contemporary style uses only numerals (1, 200, $300,000) rather than the handwriting-era convention of swinging twice at the same pitch—words followed by numerals in parentheses (one (1), two hundred (200), three hundred thousand and no-hundredths dollars ($300,000.00)). In cross-border agreements, consider the need to define the consequences of currency conversion and its costs and risks.
[Time is of the essence of all terms of this Agreement for which a definite time is expressed.] Whenever this Agreement refers to a number of days, such number refers to calendar days unless Business Days are specified. Whenever any action must be taken hereunder on or by a day that is not a Business Day, then such action may be validly taken on or by the end of the next day that is a Business Day.	Do you really want time to be of the essence at all, or for all time-based provisions? What if your client is the one that is late, and the other party is motivated to terminate? A time of essence clause may not be enforceable if a forfeiture would result (see California Civil Code § 3275). Try to define time periods precisely rather than relying solely on a rule of construction. A period computed as "January 1 and concluding 'through' March 31" is easy to draft, yet potentially clearer than "within three days," or "by the first of the month," or "at midnight December 1."
All accounting terms used herein and not expressly defined herein have the meanings given to them under generally accepted accounting principles in the United States ("GAAP").	Are you sure that the referenced financial statements and accounting concepts conform to GAAP, or are there exceptions? Some forms require GAAP to be applied consistently between iterations of a given set of financial documents. Some agreements further adopt terms as they are defined in the Internal Revenue Code ("IRC" or the "Code"), the International Financial Reporting Standards ("IFRS"), or "the" Uniform Commercial Code ("UCC")—but be aware that the applicable commercial code will differ from the official UCC published from time to time..
Each Party acknowledges that it and its legal counsel have been given an equal opportunity to negotiate the terms and conditions of this Agreement, and that any rule of construction that ambiguities are to be resolved against the drafting party, or any similar rule operating against the drafter, does not apply to the construction of this Agreement.	Consider retaining either (a) "construction" or (b) "interpretation" of an agreement, rather than attempting to weave the two terms in different places. The Restatement of Contracts (Second) distinction between the two (§ 200) is not consistently observed.