

# Sale of Goods Agreement (Pro-Seller, Short-Form) (OH)

PRACTICAL LAW COMMERCIAL TRANSACTIONS,  
WITH MARY K. NEWMAN, DINSMORE & SHOHL LLP

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A short-form agreement for the sale of goods under the Ohio Uniform Commercial Code equivalent of model UCC Article 2, drafted in favor of the seller. This Standard Document has integrated drafting notes with important explanations and drafting and negotiating tips.

## Sale of Goods Agreement

### DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

Sale and supply agreements vary in length and complexity depending on a variety of factors, such as:

- The relationship between the parties.
- The size of the deal.
- Whether the goods are off-the-shelf or custom-made.
- The creditworthiness of the buyer.
- The reliability of the seller.
- The allocation of warranty and other responsibilities.

This Standard Document is:

- A short-form sale or supply agreement for the sale of goods under the Ohio Uniform Commercial Code (UCC) (R.C. 1302.01 et seq.).
- Drafted from the perspective of the seller of durable off-the-shelf goods.

For a sample short-form pro-buyer sale of goods agreement, see Standard Document,

Sale of Goods Agreement (Pro-Buyer, Short-Form) ([7-575-4057](#)).

### ASSUMPTIONS

This Standard Document assumes that:

- **This agreement is governed by Ohio law.** If the law of another state applies, these terms may have to be modified to comply with the laws of the applicable jurisdiction.
- **All references to the “UCC” refer to Ohio’s Uniform Commercial Code.** The information contained in this Standard Document is specific to Ohio and refers to the Uniform Commercial Code enacted under Ohio law and not the model Uniform Commercial Code.
- **The agreement is not intended to be a master agreement.** This Standard Document covers a single sales transaction only. If the seller sells additional goods to the buyer, each

subsequent purchase is governed by a new and separate contract. For a sample pro-seller master sale of goods agreement, see Standard Document, Sale of Goods Agreement (Pro-Seller) ([2-518-9260](#)). For a sample pro-buyer master sale of goods agreement, see Standard Document, Sale of Goods Agreement (Pro-Buyer) ([5-541-6567](#)).

- **The buyer does not present its purchase order, and the seller does not respond with its sales confirmation.** This document contemplates that the buyer and the seller will negotiate and incorporate all of the terms and conditions of the transaction into this document. Once signed, the seller is obligated to sell and buyer is obligated to buy the goods. This helps the parties to avoid the battle of forms. For more information about the battle of the forms, see Article, Preparing for the Battle of the Forms ([4-552-7146](#)).
- **The seller is a merchant selling durable, off-the-shelf goods.** The seller is a merchant in the business of manufacturing or selling durable goods of the type that are sold under the agreement. The parties must revise this agreement if the seller is selling nondurable (consumable) products. Furthermore, this agreement does not include certain terms and conditions that traditionally accompany a sale of custom-made goods. If the seller is selling custom-made goods, the parties should consider entering into a manufacturing supply agreement. For a sample pro-seller manufacturing agreement, see Standard Document, Manufacturing Supply Agreement (Pro-Seller) ([8-520-6860](#)).
- **The seller sells the goods without accompanying services.** If the seller sells or may sell services together with the goods, the parties must revise this Standard Document to address services-specific issues. For a sample services agreement, see Standard Document, Professional Services Agreement ([9-500-2928](#)).
- **Standard reseller and distributor agreement-specific terms and conditions are not appropriate for use under this transaction.** Although

parties can use this Standard Document to purchase goods for resale, certain considerations for purchase for resale are beyond the scope of this resource (for example, advertising and marketing terms and conditions). If the buyer is purchasing goods for resale, the parties should consider entering into either:

- a reseller agreement (see Standard Documents, Product Reseller Agreement (Pro-Supplier) ([4-517-9793](#)) and Product Reseller Agreement (Pro-Reseller) ([7-558-2725](#))); or
  - a distribution agreement (see Standard Documents, Distribution Agreement (Pro-Seller) ([2-520-3379](#)) and Distribution Agreement (Pro-Distributor) ([2-575-2206](#))).
- **The agreement contemplates the domestic sale of goods between the seller and buyer.** If either party is organized or operates in or is located in a foreign jurisdiction, the parties may need to modify the agreement to comply with applicable laws. For example, US companies that enter into international sales contracts with companies located in any of the other countries that have ratified the United Nations Convention on Contracts for the International Sale of Goods (CISG) must:
- consider the differences between state UCC law and the CISG; and
  - select the appropriate law to govern the sales contract.

For more information about the CISG, see Practice Note, Choice of Law and Choice of Forum: Key Issues: Choice of Law in International Sale of Goods Contracts ([7-509-6876](#)). If the seller is a foreign entity or the buyer believes that the seller's export activities could cause the buyer to suffer liability, then the buyer should consider adding international and export-specific representations and warranties and covenants. For more information on complying with US export control regulations, see Complying with US Export Control Regulations Checklist ([1-520-0908](#)).

- **The buyer does not have the right to resell the goods or incorporate the goods into other products that are resold to a**

**government entity.** In the US, contracts with the government are more heavily regulated than non-government contracts. US government procurement laws and regulations cover some subcontracting agreements, which may indirectly impact the relationship between the buyer and the seller. Therefore, if the parties agree to give the buyer the right to resell the goods or incorporate the goods into other products that are to be resold to a government entity, the parties may have to revise this agreement.

- **The buyer purchases the goods without any third-party imposed requirements or services.** The goods may contain or be contained in, be comprised of (in whole or in part) or be packaged together with products manufactured by a third party. This Standard Document assumes that the buyer purchases the goods without third-party manufacturer-imposed:
  - requirements (for example, return requirements);
  - accompanying third-party manufacturer services; or
  - warranties.

If there are third-party manufacturer-imposed requirements on the goods or the goods are covered by a services agreement or warranties, then the parties must revise the Agreement.

- **The agreement excludes a trademark license.** The parties must revise the agreement to include a trademark license from the seller if the buyer incorporates the goods into the buyer's products and the buyer wants to:

- display any of the seller's trademarks on the buyer's products; or
- use any of the seller's trademarks in any advertising, marketing or other materials.
- **There is a single seller and a single buyer.** The parties should revise this agreement if there are additional sellers or buyers. For example, multiple sellers or buyers must determine whether their obligations are joint, several, or joint and several and amend the agreement accordingly. For an example of a provision for several and joint and several liability, see Standard Clause, General Contract Clauses: Joint and Several Liability (OH) ([w-000-1173](#)).
- **These terms are being used in a business-to-business transaction.** This Standard Document should not be used for providing goods or services to individual consumers, which may involve legal and regulatory requirements and practical considerations that are beyond the scope of this resource.
- **These terms are not industry-specific.** This Standard Document does not account for any industry-specific laws, rules, or regulations that may apply to certain transactions, products, or services.

## BRACKETED ITEMS

Bracketed items in ALL CAPS should be completed with the facts of the transaction. Bracketed items in sentence case are either optional provisions or include alternative language choices, to be selected, added, or deleted at the drafter's discretion.

This Sale of Goods Agreement, dated as of [DATE] (this "**Agreement**"), is entered into between [SELLER NAME], a [STATE OF ORGANIZATION] [TYPE OF ENTITY] ("**Seller**") and [BUYER NAME], a [STATE OF ORGANIZATION] [TYPE OF ENTITY] ("**Buyer**", and together with Buyer, the "**Parties**", and each, a "**Party**").

### DRAFTING NOTE: THE PARTIES

This Standard Document is a two-party sale of goods agreement between:

- **Seller.** The seller either:
  - manufactures off-the-shelf goods and sells them to the buyer; or
  - resells goods manufactured by others to the buyer.
- **Buyer.** The buyer buys the goods from the seller for its own account, takes title to the goods and either uses the goods or incorporates the goods into its own products that it sells to resellers, retailers, dealers, or end users.

**WHEREAS**, Seller is in the business of selling [DESCRIPTION OF GOODS]; and

**WHEREAS**, Buyer is in the business of [DESCRIPTION OF BUSINESS];

**WHEREAS**, Buyer desires to purchase from Seller, and Seller desires to sell to Buyer the Goods.

### DRAFTING NOTE: RECITALS

While not legally required, recitals provide information about the basic background and purpose of the agreement. In this sale of goods agreement, they provide only a general description of the parties and the transaction. The parties can revise these recitals to include additional information.

When drafting recitals, the parties should draft them in a way that avoids ambiguity. For example, the parties should not include any language in the recitals that:

- Adds legally binding obligations.
- Contradicts the wording contained in an operative provision of the contract.

**NOW, THEREFORE**, in consideration of the mutual covenants and agreements hereinafter set forth and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Sale of Goods. Seller shall sell to Buyer and Buyer shall purchase from Seller the goods set forth on Exhibit A (the “**Goods**”) in the quantities and at the Prices (as defined in Section 7) and upon the terms and conditions set forth in this Agreement.

### DRAFTING NOTE: SALE OF GOODS

Section 1 contemplates that the parties have set out all of the business terms of the transaction, such as a description of the

goods, price, and quantity in an attached exhibit.

## 2. Delivery.

(a) The goods will be delivered within a reasonable time after the date of this Agreement[, subject to availability of finished Goods]. Seller shall not be liable for any delays, loss, or damage in transit.

### DRAFTING NOTE: DELIVERY DATE

Section 2(a) is a pro-seller provision that:

- Reflects the default provision of the UCC, which states that the time for delivery is a “reasonable time” (R.C. 1302.22(A)).
- Provides the seller with more flexibility than a specific delivery date.

What constitutes reasonable time may be inferred from:

- The course of dealing between the parties.
- Industry standards.
- The nature, purpose, and circumstances surrounding the transaction (R.C. 1301.205(A)).

The seller should expect the buyer to negotiate a date certain for delivery of the goods, or a delivery schedule (if there is

more than one shipment). A buyer with strong negotiating leverage might try to negotiate that timely delivery is of the essence, which would allow the buyer to terminate the contract and collect damages if the seller is late in delivering the goods.

For more information about time of the essence, see Practice Note, Time of the Essence in Commercial Contracts (6-519-514). For a sample time of the essence provision, see Standard Clause, General Contract Clauses, Time of the Essence (OH) (w-000-0941).

For more information on drafting and negotiating delivery clauses, including the delivery date, see Standard Clauses, General Contract Clauses: Delivery Provisions (9-521-7269).

(b) Seller shall deliver the Goods to [SELLER’S LOCATION] (the “**Delivery Point**”) using Seller’s standard methods for packaging and shipping such Goods. Buyer shall take delivery of the Goods within [NUMBER] days of Seller’s written notice that the Goods have been delivered to the Delivery Point. All Prices are [[EXW/OTHER INCOTERMS® RULE] Delivery Point, Incoterms® [YEAR OF APPLICABLE INCOTERMS® RULE]/[OTHER SHIPPING TERMS]].

### DRAFTING NOTE: DELIVERY POINT

Section 2(b) reflects the default position of the UCC, which:

- States that unless otherwise agreed by the parties, the place of delivery is the seller’s place of business (R.C. 1302.21(A)).
- Affords the seller the least amount of responsibility and risk.

The standard commercial terms (also referred to as shipping or delivery terms) selected by the parties impacts the price (including costs of shipping and insurance). Therefore, the last sentence of this

provision references prices. In this Standard Document, the parties should be sure to select the shipping term (whether set out in the Incoterms® rules or otherwise) that is consistent with the seller’s obligation to deliver the goods to the specified delivery point. By selecting the Ex Works INCOTERMS® rule, the parties agree that:

- The seller fulfills its delivery obligation merely by making the goods available at its facility to be picked up by the buyer or the buyer’s carrier.

- The buyer is responsible for all costs and risks involved in transporting the goods from the seller's premises to the desired destination.

"Incoterms" is a trademark of the International Chamber of Commerce.

The version of the Incoterms® rules being used should be specified, such as Incoterms® 2010, Incoterms® 2000 or an earlier version.

(c) Seller may, in its sole discretion, without liability or penalty, make partial shipments of Goods to Buyer. Each shipment will constitute a separate sale, and Buyer shall pay for the units shipped whether such shipment is in whole or partial fulfillment of the quantity purchased under this Agreement.

#### DRAFTING NOTE: PARTIAL SHIPMENTS ALLOWED

The first sentence of Section 2(c) provides the seller with flexibility to tender delivery in installments. Otherwise, the UCC's gap-filler provision, which states that tender of the ordered goods must take place in a single delivery, enables the buyer to reject the goods if delivery did not take place in

one shipment (R.C. 1302.20). By stating that each shipment is a separate sale, the second sentence is intended to prevent the buyer from having the right to terminate the contract if the seller breaches only after one shipment.

(d) [If for any reason Buyer fails to accept delivery of any of the Goods on the date fixed pursuant to Seller's notice that the Goods have been delivered at the Delivery Point, or if Seller is unable to deliver the Goods at the Delivery Point on such date because Buyer has not provided appropriate instructions, documents, licenses, or authorizations: (i) risk of loss to the Goods shall pass to Buyer; (ii) the Goods shall be deemed to have been delivered; and (iii) Seller, at its option, may store the Goods until Buyer picks them up, whereupon Buyer shall be liable for all related costs and expenses (including, without limitation, storage and insurance).]

#### DRAFTING NOTE: FAILURE TO ACCEPT DELIVERY

Optional Section 2(d) addresses risk of loss and allocation of expenses if the buyer fails to accept delivery of the goods. The seller may want to include Section 2(d) even if the delivery point is the seller's location to recoup any storage costs arising from the buyer's failure to accept delivery. If the delivery point is a location other than the seller's place of business, the seller can include Section 2(d) to:

- Minimize its risk that the buyer does not accept delivery.

- Protect against incurring additional expenses for transporting and storing the goods.

If Section 2(d) is included, the seller can expect many buyers to negotiate an exception for the buyer's refusal to accept delivery of any defective or nonconforming goods.

3. Non-Delivery. The quantity of any installment of Goods as recorded by Seller on dispatch from Seller's place of business is conclusive evidence of the quantity received by Buyer on delivery unless Buyer can provide conclusive evidence proving the contrary. Seller shall not be liable for any non-delivery of Goods (even if caused by Seller's negligence) unless Buyer gives written notice to Seller of the non-delivery within [NUMBER] days of the date when the Goods would in the ordinary course of events have been received. Any liability of Seller for non-delivery of the Goods shall be limited to delivering the Goods within a reasonable time or adjusting the invoice respecting such Goods to reflect the actual quantity delivered.]

#### DRAFTING NOTE: NON-DELIVERY

Optional Section 3 is more important to the seller when it has an obligation to deliver the goods to a location other than its own location. In these cases, Section 3 serves to minimize seller's increased liabilities associated with non-delivery. As Section 3 is drafted strongly in its favor, the seller can expect the buyer to resist its inclusion or limit its provisions. For example, many buyers are successful in negotiating:

- A right to inspect the goods in Section 6(a), so that the quantity of goods received is subject to the buyer's inspection and rejection rights.
- An obligation by the seller to replace the goods within a fixed time rather than a reasonable time in Section 6(b).

4. Quantity. If Seller delivers to Buyer a quantity of Goods of up to [NUMBER]% more or less than the quantity set forth on Exhibit A, Buyer shall not be entitled to object to or reject the Goods or any portion of them by reason of the surplus or shortfall and shall pay for such Goods the price set forth in this Agreement adjusted pro rata.

#### DRAFTING NOTE: QUANTITY

Section 4 provides for reasonable tolerances to the order quantity so that the seller is specifically entitled to deliver goods in quantities that are more or less than the order quantity without triggering the buyer's right to reject tender under the default provisions of the UCC.

This provision expands the seller's rights given under the default provisions of the UCC, which provide that if the goods fail in any way to conform to the contract requirements, the buyer may either:

- Reject all of the goods.
- Accept all of the goods.

- Accept any portion of the delivery and reject the rest.

(R.C. 1302.60.)

The buyer must determine the percentage of tolerance it is willing to accept. A shortfall may force the buyer to obtain the balance of the goods on the open market at a higher price, especially if a small quantity is sought, which may result in losing the advantage of a volume discount. The buyer may be unwilling to accept excess goods if it has storage constraints.

5. Title and Risk of Loss. Title and risk of loss passes to Buyer upon delivery of the Goods at the Delivery Point. As collateral security for the payment of the purchase price of the Goods, Buyer hereby grants to Seller a lien on and security interest in and to all of the right, title, and

interest of Buyer in, to, and under the Goods, wherever located, and whether now existing or hereafter arising or acquired from time to time, and in all accessions thereto and replacements or modifications thereof, as well as all proceeds (including insurance proceeds) of the foregoing. The security interest granted under this provision constitutes a purchase money security interest under Chapter 1309 of the Ohio Uniform Commercial Code.

### DRAFTING NOTE: TITLE AND RISK OF LOSS

The timing of both the passing of title and of risk of loss is extremely important in sale of goods contracts. If the parties revise Section 5 or the shipping terms set out in Section 2(b), they should ensure that the provisions are consistent with each other.

#### TRANSFER OF TITLE

This Section 5 provides that title to the goods passes to the buyer at the time and place of delivery to the named destination. This is consistent with the requirements of UCC Section 1302.42(B), which provides that unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes its performance with reference to the physical delivery of the goods:

- Despite any reservation of a security interest.
- Even though the parties plan for the seller to deliver a document of title at a different time or place.

#### PURCHASE MONEY SECURITY INTEREST (PMSI)

This provision protects against nonpayment of the purchase price by the buyer by providing the seller with a purchase-money security interest (PMSI) in the goods. For more information on PMSI, see Standard Clause, General Contract Clauses: Payment Terms, Purchase-Money Security Interest

(PMSI) (OH) ([w-000-1224](#)) and Practice Note, Purchase Money Security Interests (PMSI) ([1-515-2196](#)).

#### TRANSFER OF RISK

The general rule under the UCC for the transfer of risk is that if the seller is a merchant, risk is transferred only on the buyer's actual receipt of the goods (R.C. 1302.53(C)). However, the parties are free to vary the default rule by contract (R.C. 1302.53(D)). If the goods are destroyed before the risk in them has passed to the buyer, the seller still must deliver the equivalent quantity of goods to the buyer. Conversely, if the goods are destroyed after risk passes to the buyer, the buyer must still pay the seller for the goods. This provision links the transfer of risk with the completion of delivery.

Usually, the buyer and seller agree that title and risk of loss transfer at the same time. Sometimes, however, a buyer may request that title transfer at one point, but risk of loss transfer at some later point. For example, if the goods are to be stored in the seller's warehouse, the buyer may want to take title when the goods are ready to protect itself against the seller's creditors, but leave the risk of loss with the seller until delivery. Therefore, if there is, for example, a fire at the seller's warehouse, the seller would have to bear the cost of that loss.

## 6. Inspection and Rejection of Nonconforming Goods.

(a) Buyer shall inspect the Goods [upon/within [NUMBER] days of] receipt ("**Inspection Period**"). Buyer will be deemed to have accepted the Goods unless it notifies Seller in writing of any Nonconforming Goods during the Inspection Period and furnishes such written evidence or other documentation as [reasonably] required by Seller. "**Nonconforming Goods**" means only the following: (i) product shipped is different than identified in this Agreement; or (ii) product's label or packaging incorrectly identifies its contents.



(b) If Buyer timely notifies Seller of any Nonconforming Goods, Seller shall, in its sole discretion, (i) replace such Nonconforming Goods with conforming Goods, or (ii) credit or refund the Price for such Nonconforming Goods. Buyer shall ship, at its expense and risk of loss, the Nonconforming Goods to Seller's facility located at [LOCATION]. If Seller exercises its option to replace Nonconforming Goods, Seller shall, after receiving Buyer's shipment of Nonconforming Goods, ship to Buyer, at Buyer's expense and risk of loss, the replaced Goods to the Delivery Point.

(c) Buyer acknowledges and agrees that the remedies set forth in Section 6(b) are Buyer's exclusive remedies for the delivery of Nonconforming Goods. Except as provided under Section 6(b), all sales of Goods to Buyer are made on a one-way basis and Buyer has no right to return Goods purchased under this Agreement to Seller.

#### DRAFTING NOTE: INSPECTION AND REJECTION OF NONCONFORMING GOODS

If the seller delivers goods that do not conform to the contract requirements, under the UCC the buyer has the right to either reject or accept those goods (R.C. 1302.60). This pro-seller provision aims to override the UCC's default rule under model UCC Section 2-602 (R.C. 1302.61) that the buyer must reject nonconforming goods

within a reasonable time after delivery by establishing a deadline during which the buyer must complete its inspection and notify the seller of any nonconformity. The seller should expect the buyer to try to negotiate that the replacement remedies are non-exclusive and that the buyer is free to pursue any and all other remedies.

7. **Price.** Buyer shall purchase the Goods from Seller at the price[s] (the "**Price[s]**") set forth in Exhibit A. [If the Price[s] should be increased by Seller before delivery of the Goods to a carrier for shipment to Buyer, then this Agreement shall be construed as if the increased Price[s] were originally inserted herein, and Buyer shall be billed by Seller on the basis of such increased Price[s].] All Prices are exclusive of all sales, use and excise taxes, and any other similar taxes, duties, and charges of any kind imposed by any governmental authority on any amounts payable by Buyer. Buyer shall be responsible for all such charges, costs, and taxes; provided, that, Buyer shall not be responsible for any taxes imposed on, or with respect to, Seller's income, revenues, gross receipts, personnel or real or personal property, or other assets.

#### DRAFTING NOTE: PRICE

The parties should ensure that the provisions of Section 7 are consistent with the shipping terms set out in Section 2(b) because the shipping terms impact which party bears the cost of transportation, handling, insurance, and related costs. For more information on drafting and negotiating pricing clauses, see Standard Clauses, General Contract Clauses: Pricing Terms (Sale of Goods, Pro-Buyer) ([1-520-3879](#)) and General Contract Clauses: Pricing Terms (Sale of Goods, Pro-Seller) ([6-520-4819](#)).

Depending on the type of goods and the duration of the contract, taxes may amount to a significant portion of the transaction

costs. Unless the buyer is in a strong bargaining position, it generally bears all taxes which relate to the transaction, such as sales, use or excise taxes, as provided in this provision. For more information on pricing terms, see Standard Clauses, General Contract Clauses: Pricing Terms (Sale of Goods, Pro-Seller) ([6-520-4819](#)) and General Contract Clauses: Pricing Terms (Sale of Goods, Pro-Buyer) ([1-520-3879](#)). For more information on drafting and negotiating provisions regarding the allocation of sales, use and similar taxes in a sale of goods transaction, see Standard Clauses, General Contract Clauses: Taxes ([7-527-6405](#)).

8. Payment Terms. Buyer shall pay all invoiced amounts due to Seller [on receipt/within [NUMBER] days from the date] of Seller's invoice. Buyer shall make all payments hereunder by [wire transfer/check/[OTHER PAYMENT METHOD]] and in US dollars. Buyer shall pay interest on all late payments at the lesser of the rate of [1.5/OTHER NUMBER]% per month or the highest rate permissible under applicable law, calculated daily and compounded monthly. Buyer shall reimburse Seller for all costs incurred in collecting any late payments, including, without limitation, attorneys' fees.

#### DRAFTING NOTE: PAYMENT TERMS

Many sale of goods agreements provide that the "seller shall issue an invoice" at the specified time. However, that language obligates the seller to issue an invoice. This pro-seller provision eliminates the obligation to send invoices, so that the provision merely requires the buyer to pay all invoices. The default interest rate is generally set at the lesser of a certain percentage of the amount due per month or the maximum non-usurious interest rate of 8% annually

to avoid conflict with applicable state usury laws (R.C. 1343.01; see also *Hudson & Keyse, L.L.C. v. Yarnevich-Rudolph*, 2010-Ohio-5938, ¶ 34 (7th Dist. Jefferson)).

For more information on drafting and negotiating payment term clauses, see Standard Clauses, General Contract Clauses: Payment Terms (OH) ([w-000-6425](#)).

9. No Setoff. Buyer shall not, and acknowledges that it will have no right, under this Agreement, any other agreement, document, or law, to withhold, offset, recoup, or debit any amounts owed (or to become due and owing ) to Seller or any of its affiliates, whether under this Agreement or otherwise, against any other amount owed (or to become due and owing) to it by Seller or its affiliates, whether relating to Seller's or its affiliates' breach or non-performance of this Agreement or any other agreement between Buyer or any of its affiliates, and Seller or any of its affiliates, or otherwise.

#### DRAFTING NOTE: NO SETOFF

The seller wants to limit the buyer's flexibility to be able to set off its payment obligations against any moneys owed to it by the seller under the seller's indemnification obligations. This provision aims to overrule any setoff rights the buyer may have under common law or state statute.

For more information about setoff, see Practice Note, Setoff and Commercial

Contracts ([8-534-2848](#)). For more information on drafting and negotiating setoff clauses, see Standard Clause, General Contract Clauses: Setoff ([5-532-5548](#)). For more information on drafting and negotiating a clause that explicitly prohibits the right of setoff, see Standard Clause, General Contract Clauses: No Setoff (OH) ([w-000-1055](#)).

10. Warranties.**DRAFTING NOTE: WARRANTIES**

Section 10 includes customary product warranty provisions that:

- Limit express warranties to specific language stated in the contract (see Section 10(a)).
- Disclaim:
  - any express warranties that are not expressly stated in the agreement; and
  - all implied warranties.

(See Section 10(b) and Section 10(c).)

- Limit the buyer's remedies for breach of the product warranty (see Section 10(e), Section 10(f), and Section 10(g)).

For more information on drafting and negotiating warranty and disclaimer clauses, see Standard Clauses, General Contract Clauses: Product Warranty and Disclaimers ([4-521-5263](#)). For a sample pro-seller warranty disclaimer clause in a long-form sale of goods agreement, see Standard Document, Sale of Goods Agreement (Pro-Seller): Section 14.05 ([2-518-9260](#)). For a sample pro-buyer warranty clause in a long-form sale of goods agreement, see Standard Document, Sale of Goods Agreement (Pro-Buyer): Product Warranties ([5-541-6567](#)).

(a) [Seller warrants to Buyer that for a period of [NUMBER] [month[s]/years[s]] from the date of shipment of the Goods [{"**Warranty Period**"}], such Goods [will [materially] conform to [the specifications set forth in Exhibit A/Seller's published specifications in effect as of the date of this Agreement]] [[and] will be free from [material] defects in material and workmanship].]

**DRAFTING NOTE: LIMITED WARRANTY**

While Section 10(a) is optional, it is rare for the seller not to provide any warranties whatsoever while also disclaiming all implied warranties as most corporate buyers would reject entering into a transaction without warranties. Therefore, the seller more commonly provides the buyer with an express limited warranty like the one in Section 10(a) and then limits it by including Sections 10(b)-(g). For more information on the exclusion and limitation of warranties, see Practice Notes, UCC Article 2 Implied Warranties (OH) ([w-001-0159](#)) and UCC Article 2 Express Warranties: Pro-Seller Considerations: Limitation and Disclaimer of Express Warranties Under UCC Article 2 ([8-519-5098](#)).

If the seller omits Section 10(a), it should also omit:

- The first brackets in Section 10(b).
- The remaining bracketed sections (Sections 10(c)-(g)).

Ohio courts generally uphold a disclaimer of all warranties, express and implied (see, for example, *Martin v. Kings Ford, Inc.*, 2015-Ohio-409, ¶ 13 (1st Dist. Hamilton)). This is particularly true in the commercial setting, especially in the absence of any great disparity of bargaining power between the parties (see *Zaremba v. Marvin Lumber & Cedar Co.*, 458 F.Supp.2d 545, 549 (N.D. Ohio 2006) (citing *Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co.*, 42 Ohio St. 3d 40 (Ohio 1989)).

(b) **[EXCEPT FOR THE WARRANTY SET FORTH IN SECTION 10(A),] SELLER MAKES NO WARRANTY WHATSOEVER WITH RESPECT TO THE GOODS, INCLUDING ANY (i) WARRANTY OF MERCHANTABILITY; [OR] (ii) WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE; [OR (iii) WARRANTY OF TITLE;] [OR (iv) WARRANTY AGAINST INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS OF A THIRD PARTY;] WHETHER EXPRESS OR IMPLIED BY LAW, COURSE OF DEALING, COURSE OF PERFORMANCE, USAGE OF TRADE, OR OTHERWISE.**

(c) [Products manufactured by a third party (“**Third Party Product**”) may constitute, contain, be contained in, incorporated into, attached to, or packaged together with, the Goods. Third Party Products are not covered by the warranty in Section 10(a). For the avoidance of doubt, **SELLER MAKES NO REPRESENTATIONS OR WARRANTIES WITH RESPECT TO ANY THIRD PARTY PRODUCT, INCLUDING ANY (i) WARRANTY OF MERCHANTABILITY; (ii) WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE; (iii) WARRANTY OF TITLE; OR (iv) WARRANTY AGAINST INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS OF A THIRD PARTY; WHETHER EXPRESS OR IMPLIED BY LAW, COURSE OF DEALING, COURSE OF PERFORMANCE, USAGE OF TRADE OR OTHERWISE.]**

#### DRAFTING NOTE: THIRD PARTY PRODUCTS

The seller should include optional Section 10(c) if it is likely that the goods will contain, be contained in, incorporated into, attached to, or packaged together with products

manufactured by a third party. This provision makes it clear that the seller does not make any representations or warranties regarding any third-party products.

(d) [The Seller shall not be liable for a breach of the warranty set forth in Section 10(a) unless: (i) Buyer gives written notice of the defect, reasonably described, to Seller within [NUMBER] days of the time when Buyer discovers or ought to have discovered the defect; (ii) Seller is given a reasonable opportunity after receiving the notice to examine such Goods and Buyer (if requested to do so by Seller) returns such Goods to Seller’s place of business at Seller’s cost for the examination to take place there; and (iii) Seller reasonably verifies Buyer’s claim that the Goods are defective.]

(e) [The Seller shall not be liable for a breach of the warranty set forth in Section 10(a) if: (i) Buyer makes any further use of such Goods after giving such notice; (ii) the defect arises because Buyer failed to follow Seller’s oral or written instructions as to the storage, installation, commissioning, use or maintenance of the Goods; or (iii) Buyer alters or repairs such Goods without the prior written consent of Seller.]

(f) [Subject to Section 10(d) and Section 10(e) above, with respect to any such Goods during the Warranty Period, Seller shall, in its sole discretion, either: (i) repair or replace such Goods (or the defective part) or (ii) credit or refund the price of such Goods at the pro rata contract rate provided that, if Seller so requests, Buyer shall, at Seller’s expense, return such Goods to Seller.]

(g) **[THE REMEDIES SET FORTH IN SECTION 10(f) SHALL BE THE BUYER’S SOLE AND EXCLUSIVE REMEDY AND SELLER’S ENTIRE LIABILITY FOR ANY BREACH OF THE LIMITED WARRANTY SET FORTH IN SECTION 10(a).]**

#### 11. Limitation of Liability.

(a) **IN NO EVENT SHALL SELLER BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, PUNITIVE, OR ENHANCED DAMAGES, LOST PROFITS OR REVENUES, OR DIMINUTION IN VALUE, ARISING OUT OF, OR RELATING TO, AND/OR IN CONNECTION WITH ANY BREACH OF THIS AGREEMENT, REGARDLESS**

OF (i) WHETHER SUCH DAMAGES WERE FORESEEABLE, (ii) WHETHER OR NOT SELLER WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, (iii) THE LEGAL OR EQUITABLE THEORY (CONTRACT, TORT, OR OTHERWISE) UPON WHICH THE CLAIM IS BASED, AND (D) THE FAILURE OF ANY AGREED OR OTHER REMEDY OF ITS ESSENTIAL PURPOSE.

(b) IN NO EVENT SHALL SELLER'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER ARISING OUT OF OR RELATED TO BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, EXCEED [[NUMBER] TIMES] THE TOTAL OF THE AMOUNTS PAID TO SELLER FOR THE GOODS SOLD HEREUNDER [OR \$[AMOUNT], WHICHEVER IS LESS].

#### DRAFTING NOTE: LIMITATION OF LIABILITY

The potential damages a buyer may suffer as a consequence of its use or resale of the goods may greatly exceed the value of the transaction to the seller. Therefore, to avoid exposure to potentially unlimited liability, the seller typically:

- Excludes consequential and indirect damages (see Section 11(a)). The UCC permits the parties to limit or exclude consequential damages unless the limitation or exclusion is unconscionable (R.C. 1302.93(C)).
- Places a cap on the total amount damages (see Section 11(b)).

The seller should expect the buyer will try to negotiate to make this provision reciprocal.

Ohio courts generally uphold liability caps negotiated between commercial parties if the party invoking the provision has not committed a willful or reckless breach and the terms are **not**:

- Unconscionable.
- Contrary to public policy.
- Vague and ambiguous.

(*Nahra v. Honeywell, Inc.*, 892 F.Supp. 962 (N.D. Ohio 1995)).

Sometimes, courts may also consider whether a breaching party is grossly negligent (*Brondes Ford, Inc. v. Habitec Sec.*, 2015-Ohio-2441 (Ohio Ct. App., Lucas County 2015)).

For better enforceability under Ohio law, a limitation of liability clause, like the one in this Standard Document, is preferable to a liquidated damages clause as courts subject the latter to an inquiry into whether the clause amounts to a penalty (see Standard Clause, General Contract Clauses: Liquidated Damages (OH): Drafting Note: Compensatory Intent ([w-000-1171](#)); see also *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 29, 465 N.E.2d 392, 394 (1984)).

For more information on drafting and negotiating limitation of liability clauses, see Standard Clauses, General Contract Clauses: Limitation of Liability (OH) ([w-000-1253](#)). For a sample pro-seller limitation of liability clause in a long-form sale of goods agreement, see Standard Document, Sale of Goods Agreement (Pro-Seller): Article 16 ([2-518-9260](#)).

12. Compliance with Law. Buyer is in compliance with and shall comply with all applicable laws, regulations, and ordinances. Buyer has and shall maintain in effect all the licenses, permissions, authorizations, consents, and permits that it needs to carry out its obligations under this Agreement.

**DRAFTING NOTE: COMPLIANCE WITH LAW**

The seller wants assurance that the buyer:

- Does not use or resell the goods in an unlawful manner.
- Complies with all laws that affect the buyer's ability to perform its obligations under the agreement.

This agreement includes a general compliance with laws provision. The seller should revise this agreement to include any specific government standards or requirements that apply to the buyer's purchase or use of particular goods or relevant industry. For more information on drafting and negotiating compliance with law clauses, see Standard Clause, General Contract Clauses: Compliance

with Laws ([2-524-6307](#)). For a sample buyer's compliance with law provision in a long form pro-seller sale of goods agreement, see Standard Document, Sale of Goods Agreement (Pro-Seller): Section 9.01 ([2-518-9260](#)).

The buyer will likely object to this provision as overly broad and seek to include materiality or knowledge qualifiers to limit its liability. The seller should also expect the buyer to insist on a reciprocal provision requiring the seller to represent its compliance with law. For a sample seller's compliance with laws clause in a long-form sale of goods agreement, see Standard Document, Sale of Goods Agreement (Pro-Buyer): Section 12.01 ([5-541-6567](#)).

13. **Indemnification.** Buyer shall indemnify, defend, and hold harmless Seller [and its [officers,] [directors,] employees, agents, affiliates, successors, and permitted assigns] (collectively, "**Indemnified Party**") against any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, or expenses of whatever kind, including [reasonable] attorneys' fees, fees and the costs of enforcing any right to indemnification under this Agreement, and the cost of pursuing any insurance providers, [incurred by Indemnified Party/awarded against Indemnified Party [in a final [non-appealable] judgment]], [relating to/ arising out of or resulting from] any claim of a third party [or Seller] arising out of or occurring in connection with the products purchased from Seller or Buyer's negligence, willful misconduct, or breach of this Agreement. Buyer shall not enter into any settlement without Seller's or Indemnified Party's prior written consent.

**DRAFTING NOTE: INDEMNIFICATION**

In this pro-seller agreement, the general indemnification provision is unilateral, in favor of the seller. The seller should expect the buyer to insist on a similar indemnification obligation covering the seller's breach of the agreement. The bracketed definition of Indemnified Party includes third-party beneficiaries. Therefore, if the seller wants to ensure that third-party beneficiaries can seek remedies under this indemnification provision, it should carve them out from Section 26.

When drafting a unilateral provision, the seller should consider broadening the scope of the buyer's indemnity, for example, by:

- Defining losses broadly to include all losses incurred by the seller, not limited to:
  - judicial awards generally; or
  - final, non-appealable judgments.
- Including the broader "relating to" nexus phrase. For more information on nexus phrases, see Practice Note, Indemnification Clauses in Commercial Contracts: Choosing the Right Nexus Phrase ([5-517-4808](#)).

The seller should consider extending this provision by adding the optional phrase "or Seller" to cover direct claims (the seller's claims against the buyer) in addition to third-party claims. Indemnification provisions

in commercial contracts typically do not cover direct claims. A federal court applying Ohio law, however, held that an indemnity provision applies to both third-party and direct claims unless otherwise limited in the contract (*Battelle Mem. Institute v. Nowasco Pipeline Services, Inc.*, 56 F.Supp.2d 944, 951-52 (S.D. Ohio 1999)). For more information on indemnification for direct claims, see Practice Note, Indemnification Clauses in Commercial Contracts: Direct Versus Third-Party Claims ([5-517-4808](#)).

The buyer generally wants to limit its indemnity obligation, for example by:

- Excluding the seller's right to indemnification for any claim (direct or indirect) for which a sole or exclusive remedy is provided for under another section of the agreement.
- Qualifying certain provisions, for example, by using reasonableness to qualify attorneys' fees.
- Including the bracketed language to limit payment to losses that are finally adjudicated.
- Narrowing the definition of "Indemnified Party."
- Limiting the indemnity obligation to losses and liabilities that are not covered by:
  - insurance proceeds received by the indemnified party; and
  - tax benefits received by the indemnified party.
- Replacing the broad nexus phrase "relating to" with a narrower nexus phrase such as "caused by" or "solely resulting from."
- Limiting the scope of third-party claims to those caused by actual inaccuracies or breaches and not merely those caused by alleged inaccuracies or breaches. This may eliminate the obligation to defend (and reimburse or pay attorneys' fees) for third-party claims adjudicated in favor of the indemnified party.
- Including exceptions and liability limitations such as:
  - a liability cap (for more information on drafting and negotiating a liability cap, see Standard Clauses, General Contract Clauses: Indemnification (OH): Section 2.3 ([w-000-1141](#)));

- a liability basket (for more information on drafting and negotiating a limitation of liability clause, see Standard Clauses, General Contract Clauses: Indemnification (OH): Section 2.2 ([w-000-1141](#)));
- an exception for claims for losses arising from the buyer's gross negligence or bad faith (for a sample exceptions clause, see Standard Document, Sale of Goods Agreement (Pro-Buyer): Section 15.02 ([5-541-6567](#))); or
- the buyer's waiver of consequential and indirect damages (for a sample waiver clause, see Standard Document, Sale of Goods Agreement (Pro-Seller): Section 16.01 ([2-518-9260](#))).

For more information on drafting and negotiating indemnification clauses, see Practice Note, Indemnification Clauses in Commercial Contracts ([5-517-4808](#)) and Standard Clauses, General Contract Clauses, Indemnification (OH) ([w-000-1141](#)). For a sample pro-seller indemnification clause in a long-form sale of goods agreement, see Standard Document, Sale of Goods Agreement (Pro-Seller): Article 15 ([2-518-9260](#)).

### Intellectual Property Indemnification

In many supply agreements, the seller agrees to indemnify the buyer for intellectual property infringement claims brought by third parties arising out of the goods or the use of the goods. This pro-seller short-form agreement, however, does not contain a seller intellectual property indemnification provision. For a sample intellectual property indemnification clause in a long-form pro-buyer sale of goods agreement, see Standard Document, Sale of Goods Agreement (Pro-Buyer): Section 15.03 ([5-541-6567](#)). If the seller agrees to indemnify the buyer, it typically tries to negotiate a variety of qualifiers, including an exception for losses arising from infringement due to the buyer's:

- Sales and marketing activities.
- Unauthorized combination of the seller's goods with third-party goods.

For a sample exceptions clause, see Standard Document, Sale of Goods Agreement (Pro-Seller): Section 15.04 ([2-518-9260](#)).

14. Insurance. During the term of this Agreement [and for a period of [TIME PERIOD] thereafter], Buyer shall, at its own expense, maintain and carry insurance in full force and effect which includes, but is not limited to, commercial general liability in a sum no less than \$[AMOUNT] [ADD OTHER INSURANCE COVERAGES AND RESPECTIVE AMOUNTS, AS APPLICABLE] with financially sound and reputable insurers. Upon Seller's request, Buyer shall provide Seller with a certificate of insurance from Buyer's insurer evidencing the insurance coverage specified in this Agreement. [The certificate of insurance shall name Seller as an additional insured.] Buyer shall provide Seller with [NUMBER] days' advance written notice in the event of a cancellation or material change in Buyer's insurance policy. Except where prohibited by law, Buyer shall require its insurer to waive all rights of subrogation against Seller's insurers and Seller.

#### DRAFTING NOTE: INSURANCE

The seller must adjust this provision based on the type and size of the transaction, the creditworthiness of the buyer and the price or sophistication of the goods. The determination of the appropriate types of insurance coverage and policy limits for a particular transaction should be made by the seller in consultation with its risk management departments and insurance specialists.

For more information on drafting and negotiating an insurance covenant in a sale of goods agreement, see Standard Clauses, General Contract Clauses: Insurance Covenant (Sale of Goods) ([7-524-9426](#)). For more information about insurance generally, see Practice Note, Insurance Policies and Coverage: Overview ([9-505-0561](#)).

15. Termination. In addition to any remedies that may be provided in this Agreement, Seller may terminate this Agreement with immediate effect upon written notice to Buyer, if Buyer: (a) fails to pay any amount when due under this Agreement [and such failure continues for [NUMBER] days after Buyer's receipt of written notice of nonpayment]; (b) has not otherwise performed or complied with any of the terms of this Agreement, in whole or in part; or (c) becomes insolvent, files a petition for bankruptcy or commences or has commenced against it proceedings relating to bankruptcy, receivership, reorganization or assignment for the benefit of creditors.

#### DRAFTING NOTE: TERMINATION

This clause gives the seller the right to terminate for the buyer's nonpayment or other breach of the agreement. The seller may terminate the agreement due to the buyer's bankruptcy, insolvency, or financial distress. On determining that the buyer is insolvent, the seller may require cash payment for any delivery of goods and stop deliveries under the agreement (R.C. 1302.76(A)).

Although a clause allowing a party to terminate an agreement due to the other party's bankruptcy or insolvency (also referred to as an ipso facto clause) is generally unenforceable against a debtor during bankruptcy (11 U.S.C.A. § 365(e)(1)), this clause should still be included in contracts because it can be triggered by

events outside of bankruptcy (such as the inability to pay debts as they become due or making a general assignment for the benefit of creditors). Without this clause, none of these events would be grounds to terminate the agreement. Also, the clause is enforceable again once the bankruptcy case is closed if the debtor commits a new act described in the clause.

Consider whether any other event should trigger a termination, including:

- A breach by the buyer and termination of any other contract between the parties.
- The buyer's change of control.

This short-form document does not include the seller's right to terminate for



convenience. If the seller desires to negotiate the right to terminate for convenience, it should expect the buyer to negotiate the:

- Reciprocal right to terminate for convenience.
- Seller's payment of a termination fee.

Under the UCC, if a term is not specifically stated, the agreement will continue for a reasonable period of time, until either party provides reasonable notice of termination to the other party (R.C. 1302.22(B)-(C)).

For more information on drafting and negotiating termination clauses (including termination for convenience

clauses), see Standard Clauses, General Contract Clauses: Term and Termination (OH) ([w-001-7827](#)). For a sample pro-seller termination clause in a long-form sale of goods agreement, see Standard Document, Sale of Goods Agreement (Pro-Seller): Section 11.03 ([2-518-9260](#)).

The seller should expect that the buyer will try to negotiate a mutual termination provision. For a sample pro-buyer termination clause in a long-form sale of goods agreement, see Standard Document, Sale of Goods Agreement (Pro-Buyer): Section 10.03 ([5-541-6567](#)).

16. **Confidential Information.** All non-public, confidential, or proprietary information of Seller, including, but not limited to, specifications, samples, patterns, designs, plans, drawings, documents, data, business operations, customer lists, pricing, discounts, or rebates, disclosed by Seller to Buyer, whether disclosed orally or disclosed or accessed in written, electronic, or other form or media, and whether or not marked, designated, or otherwise identified as "confidential," in connection with this Agreement is confidential, solely for the use of performing this Agreement and may not be disclosed or copied unless authorized by Seller in writing. Upon Seller's request, Buyer shall promptly return all documents and other materials received from Seller. Seller shall be entitled to injunctive relief for any violation of this Section. This Section shall not apply to information that is: (a) in the public domain; (b) known to the Buyer at the time of disclosure; or (c) rightfully obtained by the Buyer on a non-confidential basis from a third party.

#### DRAFTING NOTE: CONFIDENTIAL INFORMATION

This clause sets out the buyer's obligations regarding the seller's confidential information. Consider adding language to this clause if the parties must create and enforce confidentiality provisions to cover their affiliates, employees, contractors, and other representatives.

The confidentiality obligations in this clause can be included in the general list of obligations that survive expiration or termination of the agreement in the survival clause (Section 18) of this Standard Document. If, however, the seller intends for the confidentiality obligations to only survive for a certain period after termination of the agreement, that should be specified in this clause.

For more information on drafting and negotiating confidentiality agreements, see Practice Note, Confidentiality and Nondisclosure Agreements ([7-501-7068](#)).

A seller may also want to make this provision mutual, as a buyer will likely object to a one-sided confidentiality provision, particularly if the buyer is providing any proprietary information. For more information on drafting and negotiating mutual confidentiality clauses, see Standard Clauses, General Contract Clauses: Confidentiality (Long-Form) (OH) ([w-000-0963](#)) and Confidentiality (Short-Form) (OH) ([w-000-0964](#)).

If the seller wants to protect highly sensitive or a large quantity of confidential information, it should consider entering into a separate, more detailed confidentiality agreement. For more information on drafting and negotiating a stand-alone confidentiality agreement, see Standard Document, Confidentiality Agreement: General (Unilateral, Pro-Discloser) ([9-501-6497](#)).

17. Entire Agreement. This Agreement, including and together with any related exhibits, schedules, attachments, and appendices, constitutes the sole and entire agreement of the Parties with respect to the subject matter contained herein, and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, regarding such subject matter.

#### DRAFTING NOTE: ENTIRE AGREEMENT

This provision (also known as a merger or integration provision) is used to prevent the parties from being liable for any understandings, agreements, or representations and warranties other than

those expressly set out in the agreement. For more information on drafting and negotiating entire agreement clauses, see Standard Clause, General Contract Clauses: Entire Agreement ([9-520-4139](#)).

18. Survival. Subject to the limitations and other provisions of this Agreement: (a) the representations and warranties of the Parties contained herein shall survive the expiration or earlier termination of this Agreement; and (b) [SECTIONS] of this Agreement, as well as any other provision that, in order to give proper effect to its intent, should survive such expiration or termination, shall survive the expiration or earlier termination of this Agreement. [All other provisions of this Agreement shall not survive the expiration or earlier termination of this Agreement.]

#### DRAFTING NOTE: SURVIVAL

This clause identifies the rights and obligations that continue after the termination of the Agreement. The seller should include the specific provisions that are applicable to its circumstances. Confidentiality and indemnification clauses are commonly included in the survival clause.

For more information on survival, see Standard Clause, General Contract Clauses: Contractual Statute of Limitations (OH) ([w-000-1142](#)) and Practice Note, Representations, Warranties, Covenants, Rights, and Conditions: Survival of Representations and Warranties ([9-519-8869](#)).

19. Notices. All notices, requests, consents, claims, demands, waivers, and other communications under this Agreement must be in writing and addressed to the other Party at its address set forth below (or to such other address that the receiving Party may designate from time to time in accordance with this Section). Unless otherwise agreed herein, all notices must be delivered by personal delivery, nationally recognized overnight courier, or certified or registered mail (in each case, return receipt requested, postage prepaid). Except as otherwise provided in this Agreement, a notice is effective only (a) on receipt by the receiving Party, and (b) if the Party giving the Notice has complied with the requirements of this Section.

Notice to Seller:	[SELLER ADDRESS] Attention: [TITLE OF OFFICER TO RECEIVE NOTICES]
Notice to Buyer:	[BUYER ADDRESS] Attention: [TITLE OF OFFICER TO RECEIVE NOTICES]

**DRAFTING NOTE: NOTICES**

This provision governs how any notice under the agreement must be given and the time when the notice is deemed to be formally given. This notices provision does not permit the delivery of formal notice by facsimile or email (to protect the receiving party

from being bound by a notice that it does not actually see). For more information on drafting and negotiating notices clauses, see Standard Clause, General Contract Clauses: Notice ([6-533-1025](#)).

20. Severability. If any term or provision of this Agreement is invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction[; provided, however, that if any fundamental term or provision of this Agreement (including [FUNDAMENTAL TERMS]), is invalid, illegal, or unenforceable, the remainder of this Agreement shall be unenforceable]. [Upon a determination that any term or provision is invalid, illegal, or unenforceable, [the Parties shall negotiate in good faith to/ the court may] modify this Agreement to effect the original intent of the Parties as closely as possible in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible].

**DRAFTING NOTE: SEVERABILITY**

The purpose of the severability clause is to clarify that if one or more terms or provisions is held to be invalid, illegal, or unenforceable, the parties intend the agreement as a whole to survive by severing the invalid, illegal, or unenforceable terms

or provisions from the agreement. For more information on drafting and negotiating severability provisions, see Standard Clause, General Contract Clauses: Severability (OH) ([w-000-0975](#)).

21. Amendments. No amendment to or modification of [or rescission, termination, or discharge of] this Agreement is effective unless it is in writing[, identified as an amendment to [or rescission, termination, or discharge of] this Agreement] and signed by [an authorized representative of] each Party.

**DRAFTING NOTE: AMENDMENTS**

For more information on drafting and negotiating amendment clauses, see Standard Clause, General Contract Clauses: Amendments (OH) ([w-000-0935](#)).

For a sample amendment agreement, see Standard Document, Amendment Agreement ([1-523-2278](#)).

22. Waiver. No waiver by any party of any of the provisions of this Agreement shall be effective unless explicitly set forth in writing and signed by the party so waiving. Except as otherwise set forth in this Agreement, no failure to exercise, or delay in exercising, any rights, remedy, power, or privilege arising from this Agreement shall operate or be construed as a waiver thereof, nor shall any single or partial exercise of any right, remedy, power, or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power, or privilege.

**DRAFTING NOTE: WAIVER**

Either party may fail to enforce its rights under a contract, whether as a result of oversight or because of the commercial realities of the situation. This clause provides that a waiver of a breach of the terms on one occasion does not affect the rights of the waiving party if there is a further breach or if that party later requires compliance with the relevant terms. No-waiver provisions are generally enforceable under the UCC, but may be waived by course of conduct or

course of performance in some situations (see, for example, *Kwikcolor Sand v. Fairmount Minerals Ltd.*, 8th Dist. Cuyahoga No. 96717, 2011-Ohio-6646, ¶ 17-22).

For more information on drafting and negotiating waiver clauses, see Standard Clause, General Contract Clauses: Waivers (OH) ([w-000-0933](#)). For a sample waiver of contractual provisions, see Standard Document, Waiver (OH) ([w-000-1879](#)).

23. Cumulative Remedies. All rights and remedies provided in this Agreement are cumulative and not exclusive, and the exercise by either Party of any right or remedy does not preclude the exercise of any other rights or remedies that may now or subsequently be available at law, in equity, by statute, in any other agreement between the Parties, or otherwise. Notwithstanding the previous sentence, the Parties intend that Buyer's rights under Section 6 and Section 10 are Buyer's exclusive remedies for the events specified therein.

**DRAFTING NOTE: CUMULATIVE REMEDIES**

This provision seeks to ensure that the rights and remedies set out in the agreement are in addition to any rights provided by law or equity and not in substitution for them. The extent to which express terms preclude implied terms without a cumulative remedies clause is unclear and may vary among jurisdictions. Without the clause, there may be a presumption (that may be supported by the entire agreement language) that all the terms intended to govern the parties' relationship are in the agreement itself and that, in doing so, rights and remedies provided by law that are not specified in the agreement are intentionally displaced. Under the UCC, however, clauses prescribing remedies are presumed

cumulative unless the remedy is expressly agreed to be exclusive (R.C. 1302.93(A)(2)).

While the buyer wants to preserve its rights and remedies provided by law that are not specified in the agreement, this pro-seller clause provides that the buyer's remedies under Section 6 and Section 10 contain the buyer's exclusive remedies for non-conforming goods and breach of warranty.

For more information on drafting and negotiating cumulative remedies clauses, see Standard Clause, General Contract Clauses: Cumulative Remedies (with Exclusive Remedies Carve-Out) ([7-508-3001](#)).

24. Assignment. Buyer shall not assign, transfer, delegate, or subcontract any of its rights or obligations under this Agreement without the prior written consent of Seller. Any purported assignment, transfer, delegation, or subcontract in violation of this Section shall be null and void. No assignment, transfer, delegation, or subcontract shall relieve Buyer of any of its obligations hereunder. Seller may at any time assign, transfer, delegate, or subcontract any or all of its rights or obligations under this Agreement without Buyer's prior written consent.

**DRAFTING NOTE: ASSIGNMENT**

This provision addresses the parties' respective rights to assign and delegate rights and obligations under the agreement. This pro-seller provision favors the seller by:

- Prohibiting the buyer from assigning or delegating without the seller's consent. However, the parties can adapt this provision to allow the buyer to assign or delegate without the seller's consent in specific situations.
- Permitting the seller to assign or delegate without limitation.

The second sentence renders any assignment by the buyer in violation of the clause

ineffective. Without this sentence, the seller may only have a breach of contract claim if the buyer assigns the contract without the seller's consent.

For more information on drafting and negotiating assignment clauses, see Standard Clauses, General Contract Clauses: Assignment and Delegation (OH) ([w-000-1042](#)). For a sample form of assignment agreement, see Standard Document, Assignment and Assumption Agreement and Optional Novation ([6-519-2171](#)).

25. Successors and Assigns. This Agreement is binding on and inures to the benefit of the Parties to this Agreement and their respective permitted successors and permitted assigns.

**DRAFTING NOTE: SUCCESSORS AND ASSIGNS**

For more information on drafting and negotiating successors and assigns clauses, see Standard Clause, General

Contract Clauses: Successors and Assigns (OH) ([w-002-4388](#)).

26. No Third-Party Beneficiaries. [Subject to the next paragraph, this/This] Agreement benefits solely the Parties to this Agreement and their respective permitted successors and assigns and nothing in this Agreement, express or implied, confers on any other Person any legal or equitable right, benefit, or remedy of any nature whatsoever under or by reason of this Agreement.

[The Parties hereby designate [CLASS OF INDEMNIFIED PERSONS] as third-party beneficiaries of [SECTION(S)], having the right to enforce [SECTION(S)].]

**DRAFTING NOTE: NO THIRD-PARTY BENEFICIARIES**

Most contracts contain an unqualified "no third-party beneficiaries" clause, which expressly states that third parties such as downstream customers do not have enforceable rights under the contract. However, if the parties intend for certain third parties such as non-party indemnified parties to benefit from the contract, they must qualify the clause by:

- Choosing the phrase "Subject to the next paragraph" from the alternatives in the bracketed language in the first paragraph.
- Adding the optional second paragraph and listing the third-party beneficiaries and the corresponding sections of the contract. In some cases, the parties add that the third-party beneficiaries have

the direct right to enforce the specified provisions of the contract.

For more information on drafting and negotiating no-third-party-beneficiaries

clauses, see Standard Clause, General Contract Clauses: Third-Party Beneficiaries ([6-519-7630](#)).

27. Choice of Law. This Agreement, including all exhibits, schedules, attachments, and appendices attached to this Agreement and thereto[, and all matters arising out of or relating to this Agreement,] are governed by, and construed in accordance with, the laws of the State of Ohio, United States of America, without regard to the conflict of laws provisions thereof to the extent such principles or rules would require or permit the application of the laws of any jurisdiction other than those of the State of Ohio.

#### DRAFTING NOTE: CHOICE OF LAW

This provision allows parties to choose the substantive law of an appropriate state to apply to the contract. For more information on drafting and negotiating choice of law clauses, see Standard Clause,

General Contract Clauses: Choice of Law (OH) ([w-000-1032](#)) and Practice Note, Choice of Law and Choice of Forum: Key Issues ([7-509-6876](#)).

28. Choice of Forum. Each Party irrevocably and unconditionally agrees that it will not commence any action, litigation, or proceeding of any kind whatsoever against the other Party in any way arising from or relating to this Agreement, including all exhibits, schedules, attachments, and appendices attached to this Agreement, and all contemplated transactions[, including contract, equity, tort, fraud, and statutory claims], in any forum other than the US District Court for the [Northern/Southern] District of Ohio or[, if such court does not have subject matter jurisdiction,] the courts of the State of Ohio sitting in [POLITICAL SUBDIVISION], and any appellate court from any thereof. Each Party irrevocably and unconditionally submits to the exclusive jurisdiction of such courts and agrees to bring any such action, litigation, or proceeding only in the US District Court for the [Northern/Southern] District of Ohio or[, if such court does not have subject matter jurisdiction,] the courts of the State of Ohio sitting in [POLITICAL SUBDIVISION]. Each Party agrees that a final judgment in any such action, litigation, or proceeding is conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

#### DRAFTING NOTE: CHOICE OF FORUM

In this provision, the parties confer personal jurisdiction on the courts of a selected state and agree that the selected forum is the exclusive forum for bringing any claims under (and sometimes, more broadly relating to) the agreement. For more information on drafting and negotiating choice of forum clauses, see Standard Clauses, General Contract Clauses: Choice

of Forum (OH) ([w-000-1027](#)) and Practice Note, Choice of Law and Choice of Forum: Key Issues ([7-509-6876](#)).

To settle or avoid protracted forum selection negotiations, the parties sometimes elect to include a floating forum selection clause that forces a party initiating litigation to do so in the home jurisdiction

of the counterparty being sued. For a sample floating forum selection clause, see Standard Clauses, General Contract Clauses: Choice of Forum (Floating: Reciprocal) (OH) ([w-000-1028](#)).

If the seller prefers to resolve disputes by arbitrating, rather than litigating them, then it must replace this provision with an arbitration clause. For more information on arbitration and other alternative dispute resolution agreements, including sample clauses, see:

- Practice Note, Drafting Arbitration Agreements Calling for Arbitration in the US ([2-500-4624](#)).
- Practice Note, Standard Recommended Arbitration Clauses ([1-381-8470](#)).

- Standard Clauses, Clauses for the AAA, ICDR, ICC, and UNCITRAL Arbitration ([6-502-3569](#)).

This short-form Standard Document does not contain a dispute resolution escalation provision, which is more commonly used in long-term supply agreements. Escalation provisions first require the parties to resolve their disputes by alternative dispute resolution (ADR), including a period of negotiation and then mediation before submitting the dispute to litigation or ad hoc arbitration. For more information on drafting and negotiating escalation clauses, see Standard Clauses, General Contract Clauses, Alternative Dispute Resolution (Multi-Tiered) ([9-555-5330](#)).

29. [WAIVER OF JURY TRIAL. EACH PARTY ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY THAT MAY ARISE UNDER THIS AGREEMENT, INCLUDING EXHIBITS, SCHEDULES, ATTACHMENTS AND APPENDICES ATTACHED TO THIS AGREEMENT, IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES AND, THEREFORE, EACH SUCH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LEGAL ACTION ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING ANY EXHIBITS, SCHEDULES, ATTACHMENTS OR APPENDICES ATTACHED TO THIS AGREEMENT, OR THE TRANSACTIONS CONTEMPLATED HEREBY.]

#### DRAFTING NOTE: WAIVER OF JURY TRIAL

Commercial agreements frequently include this optional provision. Many sophisticated parties prefer that a judge hear and decide any dispute arising out a complex agreement rather than a jury who may not appreciate or understand the potentially

complex issues involved in the litigation. For more information on drafting and negotiating waiver of jury trial clauses, see Standard Clause, General Contract Clauses: Waiver of Jury Trial (OH) ([w-000-1087](#)).

30. Counterparts. This Agreement may be executed in counterparts, each of which is deemed an original, but all of which together are deemed to be one and the same agreement. [Notwithstanding anything to the contrary in Section 19, a signed copy of this Agreement delivered by facsimile, email, or other means of electronic transmission is deemed to have the same legal effect as delivery of an original signed copy of this Agreement.]

**DRAFTING NOTE: COUNTERPARTS**

The parties should include the bracketed language that addresses the confirmation of actual receipt if facsimile and email are not accepted as means of sending notices under

Section 19. For more information on drafting and negotiating counterparts clauses, see Standard Clauses, General Contract Clauses: Counterparts ([5-564-9425](#)).

31. Force Majeure. Any delay or failure of Seller to perform its obligations under this Agreement will be excused to the extent that the delay or failure was caused directly by an event beyond such Party's control, without such Party's fault or negligence and that by its nature could not have been foreseen by such Party or, if it could have been foreseen, was unavoidable (which events may include natural disasters, embargoes, explosions, riots, wars, acts of terrorism, strikes, labor stoppages or slowdowns or other industrial disturbances, and shortage of adequate power or transportation facilities).

**DRAFTING NOTE: FORCE MAJEURE**

A force majeure clause aims to exclude liability for breach of contract where delay or failure to perform is a result of an event outside the reasonable control of the party who would otherwise be in default.

Section 31 is drafted as a unilateral provision because in a supply arrangement:

- Force majeure protection is more significant for the seller than it is for the buyer.
- The buyer's principal obligation, that of making payment for the goods and for any indemnification claims, is typically excluded from the scope of excused obligations.

In Ohio, mistaken assumptions about future events or worsening economic conditions do not qualify as a force majeure, and a party is not excused from performance because it proved difficult, burdensome, or economically disadvantageous (*Stand Energy Corp. v. Cinergy Services, Inc.*, 144 Ohio App.3d 410, 416, 760 N.E.2d 453, 457 (1st Dist.2001)).

For more information on drafting and negotiating force majeure clauses, see Standard Clause, General Contract Clauses: Force Majeure (OH) ([w-000-0945](#)) and Practice Note, Force Majeure Clauses: Key Issues ([5-524-2181](#)).

32. Relationship of the Parties. The relationship between the Parties is that of independent contractors. Nothing contained in this Agreement shall be construed as creating any agency, partnership, franchise, business opportunity, joint venture or other form of joint enterprise, employment, or fiduciary relationship between the Parties, and neither Party shall have authority to contract for or bind the other Party in any manner whatsoever. No relationship of exclusivity shall be construed from this Agreement.

**DRAFTING NOTE: RELATIONSHIP OF THE PARTIES**

This clause, also known as an "independent contractor" or "no agency or partnership" clause, minimizes the risk of creating

an unwanted joint venture, partnership, employer-employee, or agency relationship between the parties. Creating a relationship



