

General Contract Clauses: Representations and Warranties (OH)

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Standard Clauses providing general representations and warranties for a commercial sale of goods or services transaction under Ohio law. This resource also includes a disclaimer of other representations and warranties and acknowledgment of non-reliance sub-section. These Standard Clauses have integrated notes with important explanations and drafting tips.

DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

Representations and warranties are two principal components of most commercial contracts. Technically, they have different meanings:

- A **representation**:
 - is an assertion or statement of fact, given by one party (maker) to induce another party (recipient) to enter into a contract or take some other action;
 - may apply to the past or present; and
 - may be express or implied.
- A **warranty**:
 - is a promise that a condition or an assertion of fact is true, supported by an implied promise of indemnity if the condition or assertion is false;
 - may apply to the present and future (see *Solomon Sturges & Co. v. Bank of Circleville*, 11 Ohio St. 153, 169 (Ohio 1860)); and
 - may be either express, where there is a positive representation of fact that

induces a prospective purchaser to buy, or implied, where, considering the relations between the parties, the nature of the transaction and the surrounding circumstances, a warranty is imposed by operation of law (*Rogers v. Toni Home Permanent Co.*, 147 N.E.2d 612, 616 (Ohio 1958)).

In addition to inducing the recipient to enter into the contract, representations and warranties are used to:

- Allow the maker to disclose information to avoid potential liability.
- Allow the recipient to obtain information and assurances from the maker.
- Allocate risk between the parties by:
 - apportioning exposure to potential losses and shifting risk from one party to another;
 - creating a direct claim against the maker if representations are inaccurate or warranties are breached; and

- serving as a basis for the parties' indemnification obligations (see Standard Clauses, General Contract Clauses: Indemnification (OH) ([w-000-1141](#))).

- Trigger a contractual termination right.

In most commercial contracts, each party represents and warrants to any given statement of fact concurrently and interchangeably. So, each statement of fact serves as both a representation and a warranty. Many agreements expressly limit the recipient's remedies for inaccuracy or breach of representations and warranties to either:

- Indemnification rights.
- Other express remedies.

Therefore, despite their technical differences, in practice, any functional distinction between representations and warranties is, in most cases, irrelevant (see Practice Note, Representations, Warranties, Covenants, Rights, and Conditions: Functional Differences between Representations and Warranties ([9-519-8869](#))). However, the distinction between representation and warranties may have significance in specialized areas of the law (for example, insurance law) (see *Care Risk Retention Group v. Martin*, 947 N.E.2d 1214, ¶ 62 (Ohio 2d Dist. 2010)).

For more information on representations and warranties, see Practice Note, Representations, Warranties, Covenants, Rights, and Conditions: Representations and Warranties ([9-519-8869](#)). For information on the relationship between representations and warranties and indemnification and other remedial and remedy-related contract provisions, see Practice Note, Relationship Between Representations, Warranties, Covenants, Rights, and Conditions: Relationship Between Representations and Warranties, Covenants, and Indemnification ([7-519-8870](#)).

SCOPE OF STANDARD CLAUSES

These Standard Clauses are general representations and warranties commonly used in a variety of commercial contracts. To allow for greater drafting flexibility, they include separate sub-clauses for the

seller or service provider and for the buyer or service recipient, even though many standard representations and warranties are given mutually by the parties.

These clauses can be revised if the drafter prefers to make some of the representations and warranties mutual instead of including separate sub-sections for each party. When revising these clauses to create a mutual provision, if the contracting parties are different types of legal entities (for example, if one is a corporation and the other is a limited liability company (LLC)), the drafter should generalize each of the entity-specific references.

These Standard Clauses are not drafted in favor of either party. Counsel should customize these provisions to reflect:

- The facts and circumstances of the particular transaction.
- Each party's relative bargaining position and risk tolerance, including the effect on the representations and warranties of any indemnification or other provisions in the agreement (for example, counsel may negotiate and provide certain warranties if they do not survive the closing or are subject to favorable liability caps and baskets).

Types of Representations and Warranties

In most commercial contracts, the parties make:

- Standard representations and warranties.
- Transaction-specific representations and warranties.

Standard representations and warranties commonly relate to:

- The party itself.
- The validity and enforceability of the contract.

In a commercial contract, transaction-specific representations and warranties typically relate to the nature, type, quality, and condition of the goods, assets, or services central to the subject matter of the agreement. For example, a party may warrant that a purchased good (for example, a machine) is free from defects in material and workmanship, under normal use and service, for a specified period of time (see,

for example, *Caterpillar Fin. Servs. Corp. v. Harold Tatman & Son's Ents., Inc.*, 50 N.E.3d 955, ¶ 15 (Ohio 4th Dist. 2015)). Sellers and service providers, who often have most of the performance obligations, typically make more transaction-specific representations and warranties than buyers and service recipients.

These Standard Clauses include standard representations and warranties and some optional transaction-specific representations and warranties that may be appropriate for certain types of commercial agreements. They do not include product and service warranties, which are specialized contractual provisions that combine the concept of a warranty and a covenant (see Representations and Warranties or Covenants?). For information on product warranties under the Uniform Commercial Code (UCC), see Practice Note, UCC Article 2 Express Warranties (OH): Express Warranties Under UCC Article 2 ([w-001-7823](#)).

For examples of product and service warranty provisions, see Standard Documents:

- General Purchase Order Terms and Conditions (Pro-Buyer): Section 15 ([3-504-2036](#)).
- Product Reseller Agreement (Pro-Supplier): Section 17.02 ([4-517-9793](#)).
- Professional Services Agreement: Section 10.2 ([9-500-2928](#)).

These Standard Clauses also do not include the numerous and detailed representations and warranties contained in M&A and finance agreements. For examples of representations and warranties included in acquisition agreements, see Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Articles IV ([6-384-1736](#)) and Article V ([6-384-1736](#)), and Standard Clauses, IP Representations: Stock Purchase (Pro-Buyer) ([0-517-0657](#)). For examples of representations and warranties included in loan agreements, see Standard Clauses, Loan Agreement: Representations and Warranties ([0-383-3169](#)).

Representations and Warranties or Covenants

Representations and warranties are made on or "as of" a specific date, often the date

on which the agreement is executed by the parties. They typically relate to either:

- The present.
- Periods or points in time that occurred in the past.

For example, an Ohio court found that representations at issue in the case were made as of the signing date and, again, as of the closing date of the transaction (see *Carnahan v. SCI Ohio Funeral Services, Inc.*, 2001 WL 242555, at *9 (Ohio App. 10 Dist.)).

In some agreements, however, the parties include language stating that the facts of the representations and warranties will be true in the future. These statements are actually disguised covenants. The maker is effectively promising to act or refrain from acting in a manner that will result in the future accuracy of the presently made statement. Examples of representations and warranties that are (in whole or in part) disguised covenants include statements that:

- A party will be in compliance with applicable laws throughout the term of a contract.
- Goods sold or services rendered during the term of the contract will meet certain quality standards.
- A party will devote adequate resources to the sale and marketing of goods purchased for re-sale.

This technical distinction can have practical consequences. Legal, equitable, and express contractual remedies may be different for inaccuracies or breaches of representations and warranties than they are for breaches of covenants. For example, a breach of representations may give a party the right to void a contract or rescission damages, while a breach of covenants may give rise to injunctive relief or specific performance.

Parties to a commercial agreement should consider the practical implications of including disguised covenants within the representations and warranties section of the agreement (see Practice Note, Relationship between Representations, Warranties, Covenants, Rights, and Conditions: Representation and Warranty or Covenant? ([7-519-8870](#))). These Standard Clauses are limited to true representations

and warranties and assume that all covenants are included in other sections of the contract.

When drafting or reviewing a commercial contract, counsel should consider each representation and warranty and whether it is appropriate to include a corresponding covenant. For example, representations and warranties that often support adding corresponding covenants include:

- Compliance with law.
- Licenses, permits, and approvals.
- Professional and workmanlike manner.
- Intellectual property (IP) rights.

Related Clauses

In addition to discrete provisions for product and service warranties, related clauses include:

- **Indemnification.** This is a remedial clause that creates an express obligation for one party to reimburse the other party or pay directly for certain costs and other expenses typically arising from the indemnifying party's inaccuracy of representations, breach of warranties, and breach of some or all covenants (see Practice Note, Indemnification Clauses in Commercial Contracts (OH) ([w-006-3791](#)) and Standard Clauses, General Contract Clauses: Indemnification (OH) ([w-000-1141](#))).
- **Limitation of liability.** These clauses restrict the amount and kind of damages for which a party to the agreement may be held liable. These limitations typically:
 - exclude incidental, consequential, punitive, and other indirect damages; and
 - limit the overall monetary liability amount (also known as a cap) of a party under the agreement.
- (See Standard Clauses, General Contract Clauses: Limitation of Liability (OH) ([w-000-1253](#))).
- **Exclusive remedy.** Clauses in this category purport to give a party an exclusive remedy for a particular type of breach. See Standard Clauses:
 - Standard Clauses, General Contract Clauses: Indemnification (OH): Section 2.6 ([w-000-1141](#)); and

- Standard Clauses, General Contract Clauses: Liquidated Damages (OH) ([w-000-1171](#)).
- **Right of termination.** This is a provision that grants one or both parties the right to terminate the contract for:
 - inaccurate representations or breached warranties;
 - uncured covenant breaches; or
 - sometimes, for unsatisfied conditions.
- (See Standard Clauses, General Contract Clauses: Term and Termination (OH): Section 1.3 ([w-001-7827](#))).
- **Cumulative remedies.** This clause states the parties' intention that the rights and remedies set out in the agreement are in addition to any other rights or remedies provided by law or equity and not in substitution for them (see Standard Clauses, General Contract Clauses: Cumulative Remedies (with Exclusive Remedies Carve-out) (OH) ([w-001-7829](#))).
- **Equitable remedies.** This clause states the parties' intention to provide for equitable remedies for breach of contract in addition to or instead of monetary relief (see Standard Contract Clauses, General Contract Clauses: Equitable Remedies (OH) ([w-001-7828](#))).
- **Entire agreement.** This clause (also known as a merger or integration clause) prevents the parties from being liable for any understandings, agreements, representations, or remedies other than those expressly set out in the agreement (see Standard Clauses, General Contract Clauses: Entire Agreement (OH) ([w-008-2049](#))).

ASSUMPTIONS

These Standard Clauses assume that:

- **The 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.
- **This is a commercial agreement for the sale of goods or services.** These Standard Clauses are intended for use in a commercial agreement involving the sale of goods or services. They are readily

adaptable for other types of commercial transactions, but should not be used in specialized corporate or finance contracts (for example, merger and acquisition agreements, loan agreements, and security agreements), which contain more comprehensive standard representations and warranties and many additional transaction-specific representations and warranties. For more information and examples of specialized representations and warranties, see:

- Practice Note, Stock Purchase Agreement Commentary: Representations and Warranties ([6-381-0589](#));
 - Standard Document, Asset Purchase Agreement (Pro-Buyer Long Form): Article IV ([6-384-1736](#)) and Article V ([6-384-1736](#));
 - Standard Clauses, IP Representations: Stock Purchase (Pro-Buyer) ([0-517-0657](#)); and
 - Standard Clauses, Loan Agreement: Representations and Warranties ([0-383-3169](#)).
- **Product and services warranties, if any, will be handled in a separate provision or sub-clause.** These provisions do not include product and service warranties, which may be added in a separate sub-clause within this section or set out in a stand-alone provision of the agreement (see Standard Document, Product Reseller Agreement (Pro-Supplier): Section 17.02 ([4-517-9793](#))). For more information on product warranties, see Practice Note, UCC Article 2 Express Warranties (OH): Express Warranties Under UCC Article 2 ([w-001-7823](#)) and Standard Document, General Purchase Order Terms and Conditions (Pro-Buyer): Section 15 ([3-504-2036](#)).
 - **The buyer or customer and seller or service provider are the only two parties to the agreement.** The parties should revise the Standard Clauses if additional parties, like the seller's affiliates, also have rights or obligations under the agreement. If there are multiple parties on one side of the transaction making representations and warranties, the parties should determine whether these parties are making their representations and warranties severally, jointly, or jointly and severally (see Standard Clauses, General Contract Clauses: Joint and Several Liability (OH) ([w-000-1173](#))).
 - **Both parties to the agreement are corporations, LLCs, or other types of legal entities and not individual persons.** Some of the representations and warranties contained in the Standard Clauses (for example, those covering due organization and qualification) are only applicable to a legal entity and not to an individual person. In addition, these provisions are not drafted for an individual signatory. If either party to the agreement is an individual person, the relevant provisions must be modified to address this distinction.
 - **The parties to the agreement are US entities and the transaction takes place in the US.** If any party is organized or operates in, or any part of the transaction takes place in a foreign jurisdiction, these terms may have to be modified to comply with applicable laws in the relevant foreign jurisdiction.
 - **All references to the "UCC" refer to the Ohio Uniform Commercial Code.** The information contained in these Standard Clauses is specific to Ohio and refers to the Uniform Commercial Code enacted under Ohio law and not the model Uniform Commercial Code.
 - **These terms are being used in a business-to-business transaction.** These Standard Clauses should not be used in a consumer contract, which may involve legal and regulatory requirements and practical considerations that are beyond the scope of this resource.
 - **These terms are not industry-specific.** These Standard Clauses do not account for any industry-specific laws, rules, or regulations that may apply to certain transactions, products, or services.
 - **Capitalized terms are defined elsewhere in the agreement.** Certain terms are capitalized but not defined in these Standard Clauses because they are defined elsewhere in the agreement (for example, Agreement, Buyer, Customer, Seller, Service Provider, Goods, Services, Law, Deliverables, and Intellectual Property).

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.

1. Representations and Warranties.

1.1 Representations and Warranties of the [Seller/Service Provider]. [Seller/Service Provider] represents and warrants to [Buyer/Customer] that:

DRAFTING NOTE: REPRESENTATIONS AND WARRANTIES OF THE SELLER/ SERVICE PROVIDER

The seller or service provider makes:

- Standard representations and warranties, most of which relate directly or indirectly to the enforceability of the contract.
- Additional transaction-specific representations and warranties, which relate to the subject matter of the transaction.

Transaction-specific representations and warranties included in a particular agreement depend on:

- The nature of the agreement.
- The relative bargaining power and risk tolerance of each party.

The seller or service provider should try to limit the number of transaction-specific representations and warranties included in a particular agreement. It can also restrict the scope and legal effect of representations and warranties in certain ways, including by:

- Qualifying representations and warranties through:
 - disclosed exceptions;
 - materiality requirements; and
 - knowledge qualifiers.
- (See Practice Note, Representations, Warranties, Covenants, Rights, and

Conditions: Qualifying Representations and Warranties ([9-519-8869](#))).

- Limiting their survival period (see Standard Clause, General Contract Clauses: Survival (OH) ([w-003-9085](#))).
- Designating express, exclusive contractual remedies for inaccuracy or breach, often limited to the recipient's indemnification right (see Practice Note, Representations, Warranties, Covenants, Rights, and Conditions: Liability Limitations and Express Contractual Remedies ([9-519-8869](#))).
- Including a limitation on the overall monetary amount of a party's liability for inaccuracy or breach (see Practice Note, Representations, Warranties, Covenants, Rights, and Conditions: Liability Limitations and Express Contractual Remedies ([9-519-8869](#))).

Usually the maker qualifies individual representations and warranties. In some contracts, the maker qualifies all of its representations and warranties by including a general qualification in the lead-in language (for example, "Seller represents and warrants, to the best of its knowledge, ..."). The recipient should resist a blanket qualification and instead address appropriate limitations within individual representations and warranties.

(a) it is a [corporation/limited liability company/[TYPE OF ENTITY]], duly organized, validly existing, and in good standing under the laws of the [STATE OF ORGANIZATION/FORMATION];

DRAFTING NOTE: ORGANIZATION AND EXISTENCE

This representation and warranty affirms the legal existence of the maker as a corporation, LLC, limited partnership (LP), or other type of legal entity (not an individual person). It is one of a series of related representations and warranties that address the party's legal capacity to enter into the contract, which ultimately speaks to the enforceability of the contract. Section 1.1(a) covers three distinct concepts:

- **Due organization.** An entity is duly organized if:
 - it was properly incorporated or formed by making all requisite filings and taking other required actions (see, for example, Practice Note, Forming and Organizing a Corporation (OH) ([w-000-0532](#)) and Forming and Organizing an LLC (OH) ([w-000-1370](#))) in its state of formation; and
 - once it was formed, the shareholders or members took all steps required by state law (for example in Ohio, as applicable, adopting regulations, electing directors, managers, and officers) to transform the bare-bones entity (known as a shell) into one that can legally function. In Ohio, courts have indicated that only the filing of the articles of the organization with the secretary of state is sufficient to create a valid corporation (see *The Promotion Co./Special Events Div. v. Sweeney*, 782 N.E.2d 117, ¶¶ 19, 20 (Ohio 7th Dist. 2002)).

- **Valid existence.** An entity validly exists if it has not been voluntarily or involuntarily dissolved (see, for example, Practice Notes, Dissolving a Corporation (OH) ([w-000-1255](#)) and Dissolving an LLC (OH) ([w-000-0584](#))).
- **In good standing.** Requirements for good standing vary by state but generally mean that the entity has:
 - made all requisite annual or other periodic filings in its state of incorporation or formation; and
 - paid annual franchise taxes and other fees required by that state's applicable corporations, LLC or LP statute.
 - Ohio repealed the corporation franchise tax in 2014, but not-for-profit corporations must file a "Statement of Continued Existence" every five years with the secretary of state (R.C. 1702.59).

Typically, an entity that is not in good standing:

- Cannot bring a lawsuit in the courts of that state.
- May have restrictions placed on its business operations.
- May be subject to fines and penalties.

(See, for example, *Benefit Management Consultants, Inc. v. Gencorp, Inc.*, 1996 WL 267747, at *4 (Ohio App. 9 Dist.) (holding that a corporation whose articles of organization had been filed did not have the power to bring suit after its charter had been cancelled).)

(b) it is duly qualified to do business and is in good standing in every jurisdiction in which such qualification is required [for purposes of this Agreement][.] [except where the failure to be so qualified, in the aggregate, [would/could] not reasonably be expected to adversely affect its ability to perform its obligations under this Agreement];

DRAFTING NOTE: QUALIFICATION

This representation relates to the maker's capacity to perform under the contract. Similar to due organization, it only applies to

legal entities and not to individual persons. Foreign qualification is a legal concept that applies to all entities that conduct business

in jurisdictions other than or in addition to their state of incorporation or formation (for example, owning property, renting an office or warehouse, or having employees). State law varies on the specific factors that require a foreign entity to qualify to do business in that state (see Corporation Law: State Q&A Tool). Most state laws do not clearly designate the exact types and degrees of activity or presence that trigger the foreign qualification requirement, but instead list several determining factors that are considered by state authorities.

In Ohio, a foreign corporation engages in business within a state when its agents have entered the state and engaged in carrying on and transacting through them some substantial part of its ordinary or customary business. Ordinary or customary business is usually continuous, which differs from merely casual, sporadic, or occasional transactions, and isolated acts. (*First National Bank of Omaha v. Spirit Medical Transport*, 2017 -Ohio- 1468, ¶ 13, 2017 WL 1422884, at *2 (Ohio App. 2 Dist.).)

For more information on foreign corporations under Ohio law, see State Q&A: Corporation Law: Ohio: Foreign Corporations ([6-517-0739](#)) and Qualifying a Foreign Entity to Do Business in Ohio Checklist ([w-000-1532](#)).

The due qualification representation and warranty provides assurance that:

- The foreign entity is registered to do business in every foreign jurisdiction in which that entity must be qualified.
- In each jurisdiction where qualification is required, the foreign entity properly qualified to do business by making all requisite filings and taking other necessary actions (for example, publication).
- The foreign entity is in good standing in each state of foreign qualification (which is a similar concept to good standing in the domestic state context (see Drafting Note: Organization and Existence)).

Because of the difficulty in clearly determining whether foreign qualification is required by individual jurisdictions, if the maker of this representation and warranty is active in several different states, counsel should consider including:

- The first bracketed language that limits qualification to those jurisdictions that affect the maker's ability to perform under the subject agreement.
- The bracketed language at the end of Section 1.1(b), which carves out immaterial failures to duly qualify as a foreign entity.

(c) it has the full right, [corporate] power, and authority to enter into this Agreement[, to grant [Buyer/Customer] the rights and licenses set forth herein,] and to perform its obligations hereunder;

DRAFTING NOTE: AUTHORITY

This representation and warranty relates to the capacity of a party that is a legal entity to enter into and perform under the contract. It specifically addresses whether the maker possesses the requisite authority to execute, deliver, and perform its obligations. Due authority includes:

- Having the authority to enter into a transaction of this nature under its organizational documents.
- Taking all necessary actions to authorize the specific transaction (for example, obtaining the approval of the board of directors or board of managers (and shareholder or member approval if it is the type of transaction that requires that approval) (see, for example, Standard Clauses, Board Resolutions: Approving a Significant Commercial Contract (OH) ([w-001-1274](#)) and Member/

Manager Resolutions: Approving a Significant Commercial Contract (OH) ([w-005-4260](#))).

The maker typically tries to limit the scope of requisite authority by including the bracketed term “corporate.” This limits the representation to applicable state corporate laws and the party’s organizational documents. (In this context, “corporate” is not limited to laws affecting corporations, but is understood to refer to the state entity laws affecting the applicable type of legal entity that is party to the agreement.) Without this limitation, “full right, power,

and authority” would cover all applicable laws and regulations (for example, tax and regulatory laws and regulations). Because both parties typically make the same representation and warranty, the additional language is usually acceptable to the opposing party.

The bracketed language covering authority to grant rights and licenses should be used in agreements that include any license grants. Because it duplicates a provision included in Section 1.1(j), this language should be excluded from Section 1.1(c) if the contract otherwise includes it in Section 1.1(j).

(d) the execution of this Agreement by [each of] the individual[s] whose signature is set forth at the end of this Agreement, and the delivery of this Agreement by [Seller/Service Provider], have been duly authorized by all necessary [corporate] action on the part of [Seller/Service Provider];

DRAFTING NOTE: EXECUTION

This representation and warranty also relates to the capacity of a party that is a legal entity to enter into the contract. It addresses specifically whether the person or persons who signed the agreement on behalf of the maker had the requisite authority to bind that entity.

General authority to execute contracts is often granted to particular officers in an entity’s organizational documents (for example, in Ohio, commonly in regulations or in an LLC operating agreement). Authority to execute and deliver a particular contract may be granted to specific officers or representatives by the board of directors or managers in the resolutions

authorizing the individual transaction (see, for example, Standard Clauses, Board Resolutions: Approving a Significant Commercial Contract (OH): Authorized Officers ([w-001-1274](#)) and Amendments and Member/Manager Resolutions: Approving a Significant Commercial Contract (OH): Authorized Officers and Amendments ([w-005-4260](#))).

Similar to due authority, the maker should try to include the bracketed word “corporate,” to limit the scope of its representation and warranty to requisite corporate authority (see Drafting Note: Authority).

(e) the execution, delivery, and performance of this Agreement by [Seller/Service Provider] will not violate, conflict with, require consent under, or result in any breach or default under [(i) any of [Seller’s/Service Provider’s] organizational documents (including its [articles of incorporation and regulations/ articles of organization and limited liability company agreement/[APPLICABLE GOVERNING DOCUMENTS]]),] [(i)/(ii)] any applicable Law[, or [(ii)/(iii)] [with or without notice or lapse of time or both,] the provisions of any [material] contract or agreement to which [Seller/Service Provider] is a party or to which any of its material assets are bound (“[Seller/Service Provider] Contracts”);

DRAFTING NOTE: NO VIOLATION OR CONFLICT

This representation and warranty (which is sometimes referred to as a non-contravention provision) also relates to the capacity of a party to enter into and perform its obligations under the agreement. It provides the recipient assurance that entering into the agreement will not result in claims or litigation that may interfere with or defeat the purpose of the entire transaction. It requires the maker to assert that the execution, delivery, and performance of the agreement does not conflict with or violate:

- The maker's organizational documents (for example, in Ohio, the articles of incorporation and regulations for corporations, and articles of organization and LLC agreement for LLCs).
- Any applicable law (which should be defined to include laws, regulations, and rulings of courts or other tribunals that affect the maker).
- Any contract to which the maker is a party or which otherwise binds any of its material assets.

ORGANIZATIONAL DOCUMENTS

Sub-clause (e)(i) affirms that the agreement will not conflict with the organizational documents of the maker. It is bracketed because it may not be necessary to include this language in a standard sale of goods or services agreement. Generally it is unlikely that an entity's organizational documents would prohibit or restrict this type of transaction. However, this provision should not be controversial and is suitable for certain contracts. Therefore, it is included in the Standard Clauses. If used, the list of organizational documents in parentheses should be customized to the facts of the particular entity (for example, an LLC in Ohio does not have articles of incorporation and usually does not have regulations, but does have an operating agreement).

LAWS

Sub-clause (e)(ii) addresses the general concept that there are no legal requirements or judicial orders that would prohibit the maker from entering into or performing its obligations under the contract. Optional

Section 1.1(h) more specifically addresses whether the seller or service provider has obtained any required licenses or permits to operate its business as it relates to the agreement (which is particularly appropriate if the maker operates in a regulated industry) (see, for example, *J.J.O. Constr., Inc. v. Baljak*, 2007 WL 2309741, at *1 (Ohio App. 10 Dist.) (where a general construction contractor brought suit against a subcontractor who did not hold required permits for the masonry work despite contractual requirement that it obtain the permits)).

If the type of transaction does not support including the more specific language in Section 1.1(h), sub-clause (e)(ii) is drafted broadly enough to provide assurance that performance does not violate applicable laws and regulations that require licenses or permits to perform under the contract.

CONTRACTS

Sub-clause (e)(iii) addresses whether entering into and performing under the contract triggers a breach of any other contract binding the maker or its business, including whether a non-party's consent is necessary. In the general commercial context, the recipient's primary concern often relates to whether the maker has undertaken exclusive obligations to a third party that would be breached by performance under this contract (or the converse, if this agreement is exclusive and the maker has additional exclusive or non-exclusive obligations to a third party).

In some instances, the third-party contract anticipates potential exclusions to exclusivity if the obligee's consent is obtained. In other instances, the exclusivity may be absolute and instead require waiver or amendment to perform for another party. In certain types of agreements (for example, in a merger or acquisition agreement), there is often a discrete representation and warranty addressing required consents. This is largely because the sale-of-business transaction may trigger consent requirements for the assignment of contracts and other assets or if a change of control occurs. However, for a sale of goods or services transaction,

the general language of sub-clause (e)(iii) is sufficient to address the failure to obtain consent or waiver.

The maker should try to include the bracketed materiality qualifier which limits sub-clause (e)(iii) to material contracts.

The recipient should consider adding the bracketed language “with or without notice or lapse of time or both,” to cover breaches and defaults that do not have automatic triggers but require notice or the passage of time to be deemed an actual breach or default.

(f) this Agreement has been executed and delivered by [Seller/Service Provider] and (assuming due authorization, execution, and delivery by [Buyer/Customer]) constitutes the legal, valid, and binding obligation of [Seller/Service Provider], enforceable against [Seller/Service Provider] in accordance with its terms[, except as may be limited by any applicable bankruptcy, insolvency, reorganization, moratorium, or similar laws and equitable principles related to or affecting creditors’ rights generally or the effect of general principles of equity];

DRAFTING NOTE: ENFORCEABILITY

This representation and warranty addresses the recipient’s ability to enforce its contractual rights against the maker. Enforceability relies in large part on the accuracy of the other standard representations and warranties because they relate to the maker’s legal capacity and its authority to enter into and perform its obligations under the agreement. Facts and conditions that negatively affect enforceability include if:

- The entity does not legally exist. Ohio courts, however, hold that a party holding itself as a valid corporation cannot use its lack of legal existence to avoid a contract (see *Lamancusa v. Big Little Farms Inc.*, 5 N.E.3d 1080, ¶ 21 (Ohio 11th Dist. 2013)).
- A legally existing entity does not have the necessary right, power, or authority to enter into the agreement.
- The individual executing and delivering the contract does not have the requisite authority to bind the entity (see, for example, *Brooks Capital Servs., L.L.C. v. 5151 Trabue Ltd.*, 2012 -Ohio- 4539, ¶¶ 36-38, 2012 WL 6520232, at *8 (Ohio App. 10 Dist.) (where one member of a manager-managed limited liability company did not have authority to mortgage property of such company)).
- Entering into the contract is not permitted by the entity’s organizational documents

or otherwise violates the law or the contractual or other rights of a non-party.

- The contract lacks adequate consideration.
- The contract covers an illegal subject matter or contains provisions that are generally unenforceable. For example, in *Rinehart v. Martin*, 2013 WL 6020781, at *3 (Ohio App. 11 Dist.), an attempt to sell two cemeteries violated an Ohio prohibition on distributing profits out of a cemetery corporation.

In most contracts, the maker tries to qualify this representation and warranty by including the bracketed language at the end of Section 1.1(f). This language addresses the principle that, even if the agreement is otherwise enforceable:

- Bankruptcy and other laws affecting creditors’ rights may make the agreement unenforceable (see Practice Notes, Automatic Stay: Lenders’ Perspective ([9-380-7953](#)) and Executory Contracts and Leases: Overview ([8-381-2672](#))).
- Principles of equity may limit enforceability (see Practice Note, Contracts: Equitable Remedies ([0-519-3197](#))). For example, in *Easton Telecom Servs., L.L.C. v. Corecomm Internet Group, Inc.*, an Ohio court found that a liquidated damages cause constituted a

penalty as a matter of law, and therefore was unenforceable (216 F. Supp. 2d 695, 698-99 (N.D. Ohio 2002)).

Both parties will typically request the same limitation, so it is commonly accepted.

However, in certain transactions, because sellers and service providers undertake most of the duty to perform, as a matter of risk allocation, the buyer or service recipient may insist that the seller or service provider bear this risk.

(g) it is in [material] compliance with all applicable Laws and [Seller/Service Provider] Contracts relating to this Agreement, the [Goods/Services] and the operation of its business[; and/]

DRAFTING NOTE: COMPLIANCE WITH LAW AND CONTRACTS

In contrast to sub-clauses (e)(ii) and (e)(iii), which address whether entering into and performing the contract may cause a legal violation or breach of a third-party contract, Section 1.1(g) addresses:

- The maker’s general compliance with laws.
- Its contractual obligations at the time of execution.

For example, if a seller is in breach of an IP license that it requires to manufacture the subject goods, if the license is terminated, the breach could ultimately result in an injunction against the sale of the goods or in a product recall of goods in the marketplace. A similar situation occurred in Ohio, where a corporation that manufactured and sold ink jet printing systems filed for an injunction against a company formed by a former shareholder of the plaintiff, seeking to prevent the newly formed company from producing jet printing

ink in competition with the plaintiff (see *Mead Corp. v. Lane*, 560 N.E.2d 1319 (Ohio 4th Dist. 1988)).

The maker should insist on qualifying this representation and warranty (see Practice Note, Representations, Warranties, Covenants, Rights, and Conditions: Qualifying Representations and Warranties (9-519-8869)) so that immaterial breaches and violations do not cause inaccuracy and breach of the agreement. It could include the bracketed word “material” or instead add the following language to the end of Section 1.1(g):

“, except to the extent that any failure to be in compliance, individually or in the aggregate, [would/could] not [reasonably] [be expected to] have a material adverse effect on [Seller’s/ Service Provider’s] ability to perform its obligations under this Agreement“.

(h) [it has obtained all [material] licenses, authorizations, approvals, consents, or permits required by applicable Laws (including the rules and regulations of all authorities having jurisdiction over the [[manufacture and] sale of the Goods/provision of the Services]) to conduct its business generally and to perform its obligations under this Agreement[; and/]]

DRAFTING NOTE: LICENSES, PERMITS AND APPROVALS

This optional clause can be used in an agreement if the seller or service provider operates in a regulated industry. It is related

to Section 1.1(e) because failure to have obtained a necessary permit or license would likely constitute a legal violation. Both parties

should consider the interrelationship of these two provisions and the effect that qualifying or revising one of them may have on the other. For example, if the seller or service provider negotiates materiality qualifications to this representation and warranty, it must ensure that the compliance with laws provision is similarly qualified. If not, the buyer or customer may be able to

claim inaccuracy and breach under the more general provision, even if it has no claim under the narrower one.

Similar to compliance with laws and contracts, the maker should insist on qualifying this representation and warranty (see Drafting Note: Compliance with Law and Contracts).

(i) [it has all of the requisite resources, skill, experience, and qualifications to perform all of the [Services/services] under this Agreement in a professional and workmanlike manner, in accordance with [best/generally recognized/commercially reasonable] industry standards for similar services[; and/.]]

DRAFTING NOTE: PROFESSIONAL AND WORKMANLIKE MANNER

This optional clause can be used in a services contract. It addresses the ability of the service provider to perform satisfactorily under the agreement. The customer should also negotiate a corresponding covenant (usually found within the services warranty), in which the service provider agrees to perform all services at the same level of skill and expertise. The service provider should resist including a “best standards” standard and instead try to

limit the bracketed language to “generally recognized” or “commercially reasonable” standards. In Ohio, commercially reasonable efforts generally require a party to make every effort to achieve the desired objective that a reasonable business entity would have made under similar circumstances (see *Castle Properties v. Lowe’s Home Centers, Inc.*, 2000 WL 309395, at *3 (Ohio 7th Dist.)).

(j) [it has the full right, power, and authority (by ownership, license, or otherwise) to use all [Intellectual Property/patents, copyrights, trademarks, or other intellectual property] [embodied in the Goods/used in performing the Services and embodied in the Deliverables[,]] [and to grant [Buyer/Customer] the rights and licenses set forth herein,] on the terms and conditions of this Agreement.]

DRAFTING NOTE: INTELLECTUAL PROPERTY RIGHTS

This optional representation and warranty should be used in any contract where the goods or services deliverables are comprised of or include IP components (which is likely to apply in many transactions) and it is not otherwise covered under the product or service warranty. It provides:

- Assurance that the maker has all IP rights required to create, manufacture, and distribute the goods or deliverables.
- A basis for indemnification or other claims if the seller or service provider does not own or has not obtained all necessary IP rights.

Additional protections regarding IP rights (including a discrete warranty of non-infringement) are typically included in the product or services warranty. When drafting or reviewing an agreement, counsel should consider the language of both provisions to avoid duplication and retain consistency.

For more information about IP rights, see Practice Note, Intellectual Property Rights: The Key Issues ([2-500-4365](#)).

In some instances, a seller or service provider with a strong bargaining position may refuse to make IP representations and warranties. If this occurs, the buyer or customer should insist on including a discrete IP indemnification clause or otherwise ensure that IP indemnification is covered by the general indemnification clause. If achieved, at a minimum, the party is protected against third party claims for IP infringement. However, even with indemnification protection, the buyer or customer:

- Cannot assert a breach of contract claim based on the sale of goods or services that infringe third-party IP rights.
- May not be able to terminate the contract for IP infringement, unless there is a discrete termination provision that specifically addresses this situation.

If the seller or service provider cannot delete this representation and warranty, it should consider:

- Adding a knowledge qualifier (see Practice Note, Representations, Warranties, Covenants, Rights, and Conditions: Knowledge Standards ([9-519-8869](#))).
- Limiting the territory of the representation and warranty to the US, Ohio, or other specific jurisdictions agreed to by the parties, which allows the maker to better manage its risk.
- Limiting the scope of the representation and warranty to registered IP.
- Providing that the sole and exclusive remedy for inaccuracy or breach of this representation and warranty is the maker's indemnification obligation for infringement claims (see Standard Documents, Product Reseller Agreement (Pro-Supplier): Section 18.6 ([4-517-9793](#)) and Professional Services Agreement: Drafting Note: Infringement Indemnification by Service Provider ([9-500-2928](#))).

The seller or service provider should consider requesting a reciprocal representation and warranty from the buyer or customer if the buyer or customer is:

- Incorporating the goods or deliverables into its own products or services.
- Providing the seller or service provider with products or materials to be incorporated into the products or deliverables.

1.2 Representations and Warranties of the [Buyer/Customer]. [Buyer/Customer] represents and warrants to [Seller/Service Provider] that:

DRAFTING NOTE: REPRESENTATIONS AND WARRANTIES OF THE BUYER OR CUSTOMER

The buyer or customer commonly makes many of the same standard representations and warranties made by the seller or service provider. In some instances, if the buyer or customer prepares the first draft of the contract, it may exclude buyer or customer

representations and warranties in the draft. However, if requested by the opposing party, the buyer or customer typically agrees to make some or all of the seller's or service provider's standard representations and warranties. Even if the buyer or

customer is only paying money for goods or services, the seller or service provider wants assurance that:

- The buyer or customer has the requisite capacity to enter into and perform its obligations under the contract.
- The contract is enforceable against the opposing party.

Because the buyer or customer is expected to make the same standard representations and warranties as the seller, it should consider this fact when drafting and negotiating the seller's standard representations and warranties. Similarly, the buyer or customer expects to include the same qualifications and other limitations negotiated by the seller. When negotiated changes are made to the representations and warranties in Section 1.1, the drafter should make corresponding changes to Section 1.2.

When drafting or reviewing buyer or customer representations and warranties, the parties should consider the same factors discussed in the drafting notes to Section 1.1. Additional buyer or customer considerations are also included in the drafting notes to some of the clauses in Section 1.2.

TRANSACTION-SPECIFIC BUYER OR CUSTOMER REPRESENTATIONS AND WARRANTIES

In many commercial contracts, the buyer or customer's role in the transaction is limited to compensating the seller or service provider for the goods or services purchased under the agreement. In these cases, especially if consideration is purely monetary and is paid in advance or simultaneously with delivery, there is little need for the buyer or customer to make any transaction-specific representations and warranties.

However, in many types of standard commercial contracts, primarily those that involve an ongoing relationship between the parties, the facts and circumstances of the transaction support a requirement that the buyer or customer make certain transaction-specific representations and warranties. These situations include contracts where:

- The purchase price paid for the goods or services is not purely monetary or is not paid on or before delivery. For example:
 - in a sale of goods or manufacturing services contract, if the seller or service provider grants credit terms to the buyer, which allows for payment to be made days or months after delivery of the purchased goods or manufactured products; or
 - in a business acquisition agreement, if the consideration paid to the seller includes the buyer's stock or a promissory note (see Standard Document, Stock Purchase Agreement (Pro-Buyer Long Form): Drafting Note: Representations and Warranties of Buyer ([4-382-9882](#))).
- The nature of the relationship (for example, an exclusive distribution agreement) or the goods or services themselves warrants assurance that the buyer or customer will use or resell the goods or services in a lawful manner that is not likely to injure the seller's or service provider's legal position, business operations, or commercial reputation.
- Both parties are contributing raw materials, services, or both (for example, an added-value reseller agreement and certain types of manufacturing or distribution agreements).

(a) it is a [corporation/limited liability company/[TYPE OF ENTITY]], duly organized, validly existing, and in good standing under the laws of the [STATE OF ORGANIZATION/FORMATION];

(b) it is duly qualified to do business and is in good standing in every jurisdiction in which such licensing and qualification is required [for purposes of this Agreement][,] [except where the failure to be so qualified, in the aggregate, [would/could] not reasonably be expected to adversely affect its ability to perform its obligations under this Agreement];

(c) it has the full right, [corporate] power, and authority to enter into this Agreement and to perform its obligations hereunder;

(d) the execution of this Agreement by [each of] the individual[s] whose signature is set forth at the end of this Agreement, and the delivery of this Agreement by [Buyer/Customer], have been duly authorized by all necessary [corporate] action on the part of [Buyer/Customer];

(e) the execution, delivery, and performance of this Agreement by [Buyer/Customer] will not violate, conflict with, require consent under, or result in any breach or default under [(i) any of [Buyer's/Customer's] organizational documents (including [its articles of incorporation and regulations/articles of organization and limited liability company agreement/[APPLICABLE GOVERNING DOCUMENTS]]),] [(i)/(ii)] any applicable Law[,] or [(ii)/(iii)] [with or without notice or lapse of time or both,] any of the provisions of any contract or agreement to which it is a party or to which any of its material assets are bound [("[Buyer/Customer] Contracts"); and]

DRAFTING NOTE: NO VIOLATION OR CONFLICT

In many types of commercial contracts, both parties make non-conflict representations and warranties regarding laws and organizational documents (for example, in Ohio, the articles of incorporation and regulations for corporations, and articles of organization and LLC agreement for LLCs). In some types of transactions sub-clause (e)(ii) is equally important to the seller or service provider as it is to the buyer or customer. In contrast to agreements in the M&A context, where the subject agreement is unlikely to present a potential conflict for the buyer of a business, in agreements relating to the sale of goods or services, the

recipient wants specific assurance that, if the contract anticipates:

- An exclusive arrangement, the buyer or customer is not party to a conflicting agreement that would breach the exclusive agreement.
- A non-exclusive arrangement, the buyer or customer is not party to an existing exclusive arrangement.

Include the optional defined term for Buyer or Customer Contracts when using the bracketed language covering Buyer/Customer Contracts in Section 1.2(g).

(f) this Agreement has been executed and delivered by [Buyer/Customer] and (assuming due authorization, execution, and delivery by [Seller/Service Provider]) constitutes the legal, valid, and binding obligation of [Buyer/Customer], enforceable against [Buyer/Customer] in accordance with its terms[, except as may be limited by any applicable bankruptcy, insolvency, reorganization, moratorium, or similar laws and equitable principles related to or affecting creditors' rights generally or the effect of general principles of equity][; and/.]

(g) [it is in [material] compliance with all applicable Laws [and [Buyer/Customer] Contracts] relating to this Agreement, the use [or re-sale] of the [Goods/Services] and the operation of its business][; and/.]

DRAFTING NOTE: COMPLIANCE WITH LAW AND CONTRACTS

This optional compliance with law and contracts representation and warranty for the buyer or customer is appropriate for many types of commercial contracts relating

to the sale of goods or services, especially if the arrangement is exclusive. Parties can customize this language to expressly state compliance with specific laws applicable to

particular sectors or industries, in addition to the general legal compliance included in the Standard Clause (see, for example, *Solid Waste Auth. of Cent. Ohio v. Firmgureen Fuels of Ohio*, 2010 WL 11553398 (Ohio C.P. Sept. 27, 2010) (where parties to a contract regarding landfill gas collection specifically referenced compliance with the Federal Clean Air Act and permits issued under the Clean Air Act)).

If the terms of a particular transaction permit the buyer or customer to export

the goods or incorporate the goods or deliverables into products for export, the parties should also consider including certain export-related representations and warranties (see, for example, Standard Document, Sale of Goods Agreement (Pro-Seller): Sections 9.2 ([2-518-9260](#)) and 9.6 ([2-518-9260](#))).

The bracketed language covering Buyer/Customer Contracts is optional, as it may not be appropriate for every type of agreement.

(h) [it has obtained all [material] licenses, authorizations, approvals, consents, or permits required by applicable Laws (including the rules and regulations of all authorities having jurisdiction over the operation of its business as it relates to this Agreement).]

DRAFTING NOTE: LICENSES, PERMITS AND APPROVALS

This optional provision is another representation and warranty that may be appropriate for the buyer or customer to make in certain types of commercial contracts, especially if the buyer or customer operates in a regulated industry (see, for example, *Solid Waste Auth. of Cent. Ohio v.*

Firmgureen Fuels of Ohio, 2010 WL 11553398 (Ohio C.P. Sept. 27, 2010) (where parties to a contract regarding landfill gas collection specifically referenced compliance with the Federal Clean Air Act and permits issued under the Clean Air Act)).

1.3 NO OTHER REPRESENTATIONS OR WARRANTIES; NON-RELIANCE, EXCEPT FOR THE EXPRESS REPRESENTATIONS AND WARRANTIES CONTAINED IN THIS SECTION [NUMBER] [AND THE EXPRESS [PRODUCT/SERVICE] WARRANTIES CONTAINED IN SECTION [NUMBER]], (A) NEITHER PARTY TO THIS AGREEMENT, NOR ANY OTHER PERSON ON SUCH PARTY'S BEHALF, HAS MADE OR MAKES ANY EXPRESS OR IMPLIED REPRESENTATION OR WARRANTY, EITHER ORAL OR WRITTEN, WHETHER ARISING BY LAW[, COURSE OF DEALING, COURSE OF PERFORMANCE, USAGE, TRADE] OR OTHERWISE, ALL OF WHICH ARE EXPRESSLY DISCLAIMED, AND (B) EACH PARTY ACKNOWLEDGES THAT IT HAS NOT RELIED UPON ANY REPRESENTATION OR WARRANTY MADE BY THE OTHER PARTY, OR ANY OTHER PERSON ON SUCH PARTY'S BEHALF, EXCEPT AS SPECIFICALLY PROVIDED IN THIS SECTION [NUMBER] [AND UNDER SECTION [NUMBER OF SECTION WITH PRODUCT OR SERVICE WARRANTY]] OF THIS AGREEMENT.

DRAFTING NOTE: NO OTHER REPRESENTATIONS OR WARRANTIES; NON-RELIANCE

Section 1.3 (also known as a disclaimer of representations and warranties) expressly states that neither party to the agreement

(or any other person on that party's behalf) has made or is making any representations and warranties except for those included in

this section of the contract. The bracketed optional language near the beginning of Section 1.3 covers product or services warranties if they are separately located in another section of the contract.

Section 1.3 also includes an acknowledgement from the recipient (sometimes referred to as a non-reliance acknowledgment) that it has not relied on any representation or warranty except for those expressly provided for under the contract.

The purpose of Section 1.3 is to restrict any claims based on inaccuracy or breach of representations and warranties to those made within the four corners of the written agreement. This restriction serves to:

- Support a contractual structure that limits a party's potential liabilities to those provided for under express contractual remedy provisions (which may help to insulate the maker from extra-contractual tort damages for misrepresentation (including punitive damages)).
- Counteract the potential effect of UCC Article 2, which provides for:
 - implied warranties of title and non-infringement, merchantability, and fitness for a particular purpose (R.C. 1302.25, 1302.27, and 1302.28 and see Practice Note, UCC Article 2 Implied Warranties (OH) ([w-001-0159](#))); and
 - express warranties, which may be oral, written, or, in some instances, inferable from a party's actions (for example, the provision of a model or sample of goods) and do not require the use of formal words (like "warranty" or "guarantee") (see Practice Note, UCC Article 2 Express Warranties (OH): Express Warranties Under UCC Article 2 ([w-001-7823](#))).
- This consideration is not limited to contracts for the sale of goods in all states. Even though UCC Article 2 generally applies only to the sale of goods, some courts have, in certain circumstances, applied Article 2 principles to services contracts. However, in Ohio,

the general rule is that the concept of implied warranties does not apply to services contracts (see *Cincinnati Gas & Elec. Co. v. Gen. Elec. Co.*, 656 F. Supp. 49, 67 (S.D. Ohio 1986) and *Knorn v. Orkin Exterminating Co.*, 2000 WL 36728760 (S.D. Ohio Feb. 8, 2000)).

Consider including the bracketed language in subclause (A) if Section 1.3 is also intended to disclaim product or service warranties.

The maker of representations and warranties should be aware that, while disclaimers of reliance provisions are generally enforceable when included in negotiated contracts between sophisticated business entities, some courts do not enforce them, especially if:

- The disclaimer is broadly written (and not limited to specific matters).
- The party relying on the disclaimer was aware of the facts that were allegedly misrepresented or omitted.

The UCC permits the disclaimer of both express and implied warranties (R.C. 1302.29). For more information on:

- How a seller can make an express warranty and effectively disclaim implied warranties, see Practice Note, UCC Article 2 Express Warranties (OH): Pro-Seller Considerations: Limitation and Disclaimer of Express Warranties Under UCC Article 2 ([w-001-7823](#)).
- Disclaiming implied warranties, see Practice Note, UCC Article 2 Implied Warranties (OH) ([w-001-0159](#)).

ENTIRE AGREEMENT CLAUSE

A well-drafted entire agreement clause includes language similarly stating that no representations and warranties are made except for those expressed in the written agreement (see Standard Clauses, General Contract Clauses: Entire Agreement (OH) ([w-008-2049](#))). When drafting or negotiating a sales or services agreement, the seller or service provider should not merely rely on the entire agreement clause,

but should include the express waiver under Section 1.3. In addition to disclaiming all representations and warranties not expressed in the agreement, the language included in Section 1.3:

- Identifies the precise representations and warranties that are being made

(eliminating the potential for implied warranties and unidentified but inferable express warranties).

- Includes the acknowledgment of no reliance.

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