

# **MODEL LETTER OF INTENT**

**Presented by**

**George M. Taylor, III  
Burr & Forman LLP  
Birmingham, Alabama**

Birmingham, Alabama  
January 28, 2001

This letter of intent is based on the Model Letter of Intent included with the ABA MODEL STOCK PURCHASE AGREEMENT WITH COMMENTARY originally published in 1998. Two members of the firm, Sam Oliver and George Taylor, are active participants on the Negotiated Acquisitions Committee of the Business Law Section of the American Bar Association which drafted the MODEL STOCK PURCHASE AGREEMENT and which is busy at work producing additional acquisition documentation, including the MODEL ASSET PURCHASE AGREEMENT WITH COMMENTARY which will be published this year. While the commentary contained in these documents is the property of the American Bar Association, the documents themselves are not subject to copyright protection and we accordingly present below the text of the sample Letter of Intent for your review.

While most attorneys would advise clients "not to try this at home", we practitioners are frequently confronted by acquisition transactions that begin with a "home grown" letter of intent which has not had the benefit of review by counsel. Many counsel, including the undersigned, do not think much of Letters of Intent because they are for the most part non-binding and are little more than the embodiment of informal understandings. Letters of intent do, however, serve a very useful purpose in the early stages of a transaction in reducing to writing important points of a deal and in furnishing a framework for the transaction to proceed based on a few critical points and unencumbered by pages of language that are usually found in the binding agreement itself. Clients should be very sensitive to the fact that parts of letters of intent are binding and breach of those provisions can result in significant liability. In the case of some poorly-drafted letters of intent, all of the document is binding with the result that the client may have unwittingly bound himself to proceed with a transaction that is only partially thought ought or which is not subject to the elaborate representations and warranties that were originally anticipated.

The letter of intent set forth below makes a very clear distinction between the binding provisions and the nonbinding provisions and also contains good disclaimer language regarding the obligations of the parties to go forward with negotiations. Also note that this form is for a stock purchase. Different language would be needed in the case of an asset purchase agreement. In any event, this form is presented for your general information only and is not to be used with consulting one of our attorneys regarding the details of the proposed transaction.

SAMPLE LETTER OF INTENT

\_\_\_\_\_, 2000

Prospective Seller A  
[Address]

---

Prospective Seller B  
[Address]

---

Re: Proposal to Purchase Stock of the Company

Dear Prospective Sellers:

The purpose of this letter (the "Letter") is to set forth certain nonbinding understandings and certain binding agreements between \_\_\_\_\_, a \_\_\_\_\_ corporation ("Prospective Buyer"), and \_\_\_\_\_ ("A") and \_\_\_\_\_ ("B") (A and B are referred to collectively herein as "Prospective Sellers") with respect to the possible acquisition of all of the outstanding capital stock of \_\_\_\_\_, a \_\_\_\_\_ corporation (the "Company"), which is owned beneficially and of record by Prospective Sellers, on the terms set forth below. The Company and its subsidiaries are collectively referred to in this Letter as the "Target Companies".

PART ONE -- NONBINDING PROVISIONS.

The following numbered paragraphs of this Letter (collectively, the "Nonbinding Provisions") reflect our mutual understanding of the matters described in them, but each party acknowledges that neither the Nonbinding Provisions nor any prior or subsequent course of conduct or dealing between the parties is intended to create or constitute any legally binding obligation between Prospective Buyer and Prospective Sellers, and neither Prospective Buyer nor Prospective

Sellers shall have any liability to the other party with respect to the Nonbinding Provisions. Whether or not a fully integrated, definitive agreement (the "Definitive Agreement"), and other related documents, are prepared, authorized, executed or delivered by the parties, no party to this Letter shall have any liability to any other party to this Letter based upon, arising from, or relating to the Nonbinding Provisions.

1. Basic Transaction. Prospective Buyer would acquire all of the outstanding capital stock of the Company, being \_\_\_\_\_ shares of common stock, par value \_\_\_\_\_ per share (the "Shares"), all of which are owned beneficially and of record by Prospective Sellers. If the proposed transaction is consummated, the parties intend that the closing would occur before \_\_\_\_\_, 20\_\_, unless compliance with the applicable waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") would result in a later date (the "Closing").

2. Proposed Purchase Price. Based on the information known to Prospective Buyer on the date hereof, the total consideration for the Shares would be \$ \_\_\_\_\_ (the "Purchase Price"), of which:

(a) \$ \_\_\_\_\_ would be paid to Prospective Sellers in cash at the Closing;

(b) \$ \_\_\_\_\_ would be delivered to a mutually acceptable escrow agent at the Closing to hold until \_\_\_\_\_, 20\_\_ as security for undisclosed liabilities and breaches of representations, warranties and covenants, as set forth in Paragraph 8 below; and

(c) the balance of \$ \_\_\_\_\_ would be paid to Prospective Sellers by the delivery of Prospective Buyer's unsecured, non-negotiable, subordinated promissory notes (the "Promissory Notes"), payable in \_\_\_\_\_ equal consecutive [annual] [quarterly] installments commencing on \_\_\_\_\_, 20\_\_, [and on \_\_\_\_\_ of each year thereafter] [and on \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_ of each year thereafter] until paid in full. Interest on the unpaid principal balance of the Promissory Notes at an annual rate equal to \_\_\_\_\_% would be due and payable [annually] [quarterly], together with each payment of principal.

The Purchase Price, and each component thereof, would be divided between Prospective Sellers pro rata in accordance with their respective ownership of the Shares.

3. Purchase Price Adjustment. The Purchase Price would be increased or decreased, as the case may be, on a dollar-for-dollar basis by any difference between \$ \_\_\_\_\_ (the Target Companies' consolidated stockholders' equity as of \_\_\_\_\_, 20\_\_ ) and the Target Companies' consolidated stockholders' equity as of the Closing. For these purposes, "consolidated stockholders' equity" means the consolidated assets less consolidated liabilities, of the Target Companies determined as of the closing of Prospective Buyer and certified by its independent accountants, all as determined in accordance with generally accepted accounting principles.

4. Proposed Form of Agreement. Prospective Buyer and Prospective Sellers intend promptly to begin negotiating to reach a written Definitive Agreement, the execution of which would be subject to the approval of Prospective Buyer's board of directors, containing comprehensive representations, warranties, indemnities, conditions and agreements by each Prospective Seller.

5. Conditions to Proposed Transaction. The parties do not intend to be bound to any provisions covering the same subject matter as the Nonbinding Provisions unless and until the Definitive Agreement has been executed and delivered. It is expected, however, that if the Definitive Agreement were to be successfully negotiated, it would provide that the proposed transaction would be subject to comprehensive terms and conditions, including, among others, the following:

(a) receipt of all necessary consents and approvals of governmental bodies, lenders, lessors and other third parties including compliance by the parties with the HSR Act, if necessary;

(b) absence of any material adverse change in the Target Companies' businesses, financial condition, prospects, assets or operations since \_\_\_\_\_, 20\_\_ ;

(c) absence of pending or threatened litigation regarding the Definitive Agreement or the transactions to be contemplated thereby;

(d) delivery of customary legal opinions, closing certificates and other documentation; and

(e) Buyer's obtaining financing for the acquisition of the Shares and operation of the Target Companies' businesses after the Closing, satisfactory to Buyer in its sole discretion.

6. Proposed Employment Agreement. At the Closing, the Company and A would enter into a \_\_\_\_\_ year employment agreement providing for him to be \_\_\_\_\_ of the Company, subject to the authority of its board of directors, at a salary of \$\_\_\_\_\_ per year, and containing other customary provisions (including noncompetition provisions to extend \_\_\_\_\_ years following separation from employment).

7. Proposed Noncompetition Agreement. At the Closing, Prospective Buyer and each Prospective Seller would enter into a \_\_\_\_\_ year noncompetition agreement, pursuant to which each prospective Seller would agree that he and his affiliates would not compete with the Target Companies for \_\_\_\_\_ years after the Closing in \_\_\_\_\_, and containing confidentiality and other customary provisions.

8. Proposed Escrow Agreement. At the Closing, Prospective Buyer and Prospective Sellers would enter into an escrow agreement which would contain provisions for an escrow of \$\_\_\_\_\_ of the Purchase Price to secure Prospective Buyer against undisclosed liabilities, misrepresentations and breaches of warranties, covenants and agreements by Prospective Sellers.

9. Other Proposed Terms.

## PART TWO -- BINDING PROVISIONS.

In consideration of the significant costs to be borne by Prospective Buyer and Prospective Sellers in pursuing this proposed transaction and further in consideration of their mutual undertakings as to the matters described herein, upon execution by Prospective Sellers of this Letter or counterparts thereof, the following lettered paragraphs of this Letter (collectively, the "Binding Provisions") shall constitute the legally binding and enforceable agreement of Prospective Buyer and each Prospective Seller.

A. Nonbinding Provisions Not Enforceable. The Nonbinding Provisions do not create or constitute any legally binding obligations between Prospective Buyer and Prospective Sellers, and, whether or not the Definitive Agreement is prepared, authorized, executed or delivered by the parties, neither Prospective Buyer nor Prospective Sellers shall have any liability to any other party to this Letter based upon, arising from, or relating to the Nonbinding Provisions. No prior or subsequent course of conduct or dealing between the parties, oral communications or other actions not reduced to or reflected in a writing executed by all of the parties shall serve to modify this

Paragraph A in any way or cause the Nonbinding Provisions or any provisions covering the same subject matter to become in any sense legally binding and enforceable.

B. Definitive Agreement. If the Binding Provisions are not sooner terminated pursuant to Paragraph M, Prospective Buyer and its counsel shall prepare the initial draft of the Definitive Agreement.

C. Access. Unless and until the Binding Provisions are terminated pursuant to Paragraph M, Prospective Sellers shall cause the Target Companies to provide to Prospective Buyer complete access to the Target Companies' facilities, books and records and shall cause the directors, employees, accountants, and other agents and representatives (collectively, "Representatives") of the Target Companies to cooperate fully with Prospective Buyer and Prospective Buyer's Representatives in connection with Prospective Buyer's acquisition review of the Target Companies and their assets, contracts, liabilities, operations, records and other aspects of their businesses.

D. Exclusive Dealing. Unless and until the Binding Provisions are terminated pursuant to Paragraph M and for a period of 30 days following the date of any such termination, Prospective Sellers shall not and shall cause the Target Companies not to, directly or indirectly, through any representative or otherwise, solicit or entertain offers from, negotiate with or in any manner encourage, discuss, accept or consider any proposal of any other person relating to the acquisition of the Shares or the Target Companies, their assets or business, in whole or in part, whether through direct purchase, merger, consolidation or other business combination (other than sales of inventory in the ordinary course).

E. Break-up Fee. In the event that Prospective Sellers breach Paragraph D or the Binding Provisions are terminated by Prospective Sellers pursuant to Paragraph M below and, within twelve (12) months after such breach or termination, either Prospective Seller or one or more of the Target Companies sign a letter of intent or other agreement relating to the acquisition of a material portion of the Shares, or of the Target Companies, their assets or businesses, in whole or in part, whether through direct purchase, merger, consolidation or other business combination (other than sales of inventory or immaterial portions of the Target Companies' assets in the ordinary course) and such transaction is ultimately consummated, then, immediately upon such closing, Prospective Sellers shall pay, or cause the Target Companies to pay, to Prospective Buyer the sum of \$ \_\_\_\_\_. This fee shall not serve as the exclusive remedy to Prospective Buyer under this Letter in the event of a breach of Prospective Sellers of Paragraph D or any other of the Binding Provisions. Prospective Buyer shall be entitled to all other rights and remedies provided by law or in equity.

F. Conduct of Business. Unless and until the Definitive Agreement has been duly executed and delivered by all of the parties or the Binding Provisions have been terminated pursuant to Paragraph M below, Prospective Sellers shall notify the Prospective Buyer, in advance, of any conduct of the Target Companies outside of the ordinary course of business and of any extraordinary transactions involving the Target Companies.

G. Confidentiality. Except as and to the extent required by law, Prospective Buyer shall not disclose or use, and it shall direct its Representatives not to disclose or use, any Confidential Information (as defined below) with respect to the Target Companies furnished, or to be furnished, by either Prospective Seller, the Target Companies or their respective Representatives to Prospective Buyer or its Representatives in connection herewith at any time or in any manner other than in connection with its evaluation of the transaction proposed in this Letter. For purposes of this Paragraph, "Confidential Information" means any information about the Target Companies stamped "confidential", or identified in writing as such to Prospective Buyer by Prospective Sellers; provided that it does not include information which (i) is or becomes generally available to or known by the public other than as a result of improper disclosure by Prospective Buyer or (ii) is obtained by Prospective Buyer from a source other than Prospective Sellers or the Target Companies, provided that Prospective Buyer is unaware that such source was not bound by a duty of confidentiality to Prospective Sellers or the Target Companies or another party with respect to such information. If the Binding Provisions are terminated pursuant to Paragraph M below, Prospective Buyer shall promptly return to Prospective Sellers or the Target Companies any Confidential Information in its possession and certify in writing to Prospective Seller that it has done so.

H. Disclosure. Except as and to the extent required by law, without the prior written consent of the other party, neither Prospective Buyer nor either Prospective Seller shall, and each shall direct its Representatives not to, directly or indirectly, make any public comment, statement or communication with respect to, or otherwise disclose or permit the disclosure of the existence of discussions regarding, a possible transaction between the parties or any of the terms, conditions or other aspects of the transaction proposed in this Letter or any confidential information. If a party is required by law to make any such disclosure, it shall first provide to the other party the content of the proposed disclosure, the reasons that such disclosure is required by law, and the time and place that the disclosure will be made.

I. Costs. Prospective Buyer and each Prospective Seller shall be responsible for and bear all of its own costs and expenses (including any broker's or finder's fees and the expenses of its Representatives) incurred at any time in connection with pursuing or consummating the

proposed transaction. Notwithstanding the foregoing, the Prospective Buyer shall pay one-half and the Prospective Sellers shall pay one-half of the HSR Act filing fee.

J. Consents. Unless and until the Binding Provisions are terminated pursuant to Paragraph M, Prospective Buyer and each Prospective Seller shall cooperate with each other and proceed, as promptly as is reasonably practicable, to prepare and file the notifications required by the HSR Act, the seek to obtain all necessary consents and approvals from lenders, landlords and other third parties, and to endeavor to comply with all other legal or contractual requirements for or preconditions to the execution and consummation of the Definitive Agreement.

K. Entire Agreement. The Binding Provisions constitute the entire agreement between the parties, superseding all prior oral or written agreements, understandings, representations and warranties, and courses of conduct and dealing between the parties on the subject matter hereof. Except as otherwise provided herein, the Binding Provisions may be amended or modified only by a writing executed by all of the parties.

L. Governing Law. The Binding Provisions shall be governed by and construed in accordance with the internal laws of \_\_\_\_\_.

M. Termination. The Binding Provisions shall automatically terminate on \_\_\_\_\_, 20\_\_ and may be terminated earlier upon written notice by either party to the other party unilaterally, for any reason or no reason, with or without cause, at any time; provided, however, that the termination of the Binding Provisions shall not affect the liability of a party for breach of any of the Binding Provisions prior to the termination. Upon termination of the Binding Provisions, the parties shall have no further obligations hereunder, except as stated in Paragraphs A, E, G, H, I, K and L, which shall survive any such termination.

Please sign and date this Letter in the space provided below to confirm the mutual agreements set forth in the Binding Provisions and return a signed copy to the undersigned.

Yours very truly,

PROSPECTIVE BUYER

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Acknowledged and agreed as to the binding Provisions:

\_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_

Date: \_\_\_\_\_