Smart Legal Planning for Biorefining Partnerships

Biorefining Magazine

September 7, 2010

Gary D. Colby

Partnering with an outside entity can offer a company access to materials, processes, capacity and expertise that are otherwise not available, but there is seldom perfect alignment between a company's goals and its partner's. This diversity of interests is compounded when more than two parties collaborate. Diversity of interests can inhibit partnering unless each company believes that its interests are protected. Most partnering is done under an agreement, whether it is reached orally, memorialized in email messages, or detailed in a formal legal document. The effort and expense needed to establish a partnering agreement should correspond to the importance of the joint project to the company and the value of company assets that might be imperiled by the project. Because these values can change, a company should ensure that its partnering agreements are, and remain, appropriate.

Many partnerships increase in scope and complexity as joint work proceeds, often evolving from an exploratory or pilot stage to more intensive stages, and including decision points at which parties may reconsider continuing the collaboration or changing its focus. For this reason, partnering agreements can change over time in terms of complexity, formality and scope. Initial stages of partnership often involve little more than discussions to explore the feasibility of joint work. As long as there is no risk of serious or irreparable harm to the company, these initial stages can be governed by relatively simple agreements or even performed without an agreement. However, if the possibility of serious harm or irreparable injury arises from joint work, then a company can find itself without legal redress in the absence of a sufficiently protective agreement.

As collaborations progress, participants commonly revise or replace an agreement that previously governed the project. It is important to recognize that a partnering agreement doesn't have to address every conceivable issue that may arise-often initial agreements address only a limited number of items, expressly reserving resolution of certain issues for later. However, where unresolved issues are left to be dealt with later, a company should pay attention to ensure that those issues are addressed before they become relevant to the project.

Addressing Important Issues

As a general rule, a partnering agreement should address at least two types of issues. First, they should address all of the situations in which serious disputes may foreseeably arise from joint work expected to occur during the agreement, including such basics as specifying the obligations of each party to perform work, provide materials, and make payments at specified dates and places. Where creation of tangible products or intangible property is foreseeable, the agreement should specify which party will own the asset or how ownership will be determined. Confidentiality obligations, procedures and the types of information to which they apply are also among these basic issues. The time or conditions that will end the partnership or permit it to be ended by a participant should also be determined. Second, partnering agreements should address long-term issues that affect the company's willingness to participate in the partnership. "Show stopper" issues don't need to be resolved in detail in early stage joint project agreements, but should be considered prior to executing the agreement.

Dealing with Change

Unlike many legal agreements that resolve specific disputes or address discrete situations, partnering agreements inherently relate to fluid and changing circumstances. That's why it is critical that partnering agreements provide flexibility to modify the terms of the agreement, mechanisms for resolving disputes that arise under the agreement, and terms that specify when and how a partner may cease participation in the joint project.

Living with an Agreement

No partnering agreement is useful unless it is followed. A party to an agreement should inform its project personnel of the agreement, their individual obligations under it, and those of its partner (i.e., so they can report noncompliance). Review of the terms of the agreement, as well as compliance of all parties with it, should be regularly performed by the party. Crafting and implementing appropriate partnering agreements can enhance the value a company obtains from partnering with others.

Author: Gary D. Colby
Patent Attorney, Flaster Greenberg
(215) 279-9384
gary.colby@flastergreenberg.com

Gary D. Colby