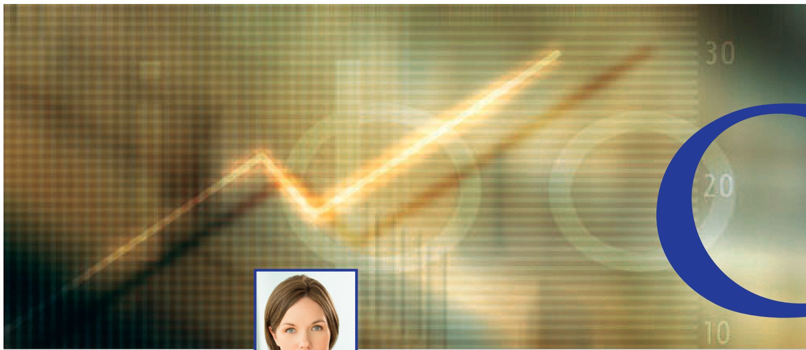

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Maximizing Value When Selling Your Business

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Congratulations! Someone wants to buy your business. It seems like a straight-forward transaction, and you want to keep legal fees down. So, when should you involve counsel to maximize the company's value?

The sale of your business is a process that requires forethought and planning, clear focus on the end goal and an understanding of the steps needed to get there. In order to get the highest purchase price for your business and to navigate the selling process effectively and efficiently, business owners should engage qualified attorneys and financial advisors early in the sale process, preferably before marketing it for sale.

Start with the end in mind. The sale of a business starts long before a prospective buyer's offer is entertained. Entrepreneurs who engage counsel upon launching a new venture and who consistently consult their attorneys on contractual and corporate governance matters will be in a better position to sell their companies five or ten years down the road. Similarly, business owners who engage in exit and succession planning early in a business's lifespan, particularly in closely-held or family-owned businesses, will have lower costs and fewer issues to address when it comes to estate planning and estate administration.

Understand your options. There are various business, financial and legal issues to consider when choosing a transaction structure, all of which can impact the seller's earnings and tax consequences. Many business owners think their only exit option is to sell their entire business to a third party. In fact, there are a myriad of contractual arrangements that can be employed to sell a business. In addition to selling all of the stock or assets of a business, business owners can sell a majority stake in the company and retain a minority interest, gift or sell a portion of the business to key employees or retain the intellectual property and license it to the new owner to secure future revenue.

Business owners should assess their primary business and personal goals prior to signing a letter of intent to ensure the structure proposed by the buyer will achieve their objectives. This is your opportunity to assess your current and future financial needs and those of your family. Are you planning to retire or start a new venture with the sale proceeds? Are you willing to provide consulting services to the company, or do you want a clean break? Do you want to give a portion of the purchase price to key employees or require the buyer to compensate them at or above their current levels? Do you want to sell the real estate or retain it and enter into a lease with the new owner? Do you have intellectual property or other assets you want to continue using?

Minimize tax obligations. How the transaction is structured and the allocation of sale proceeds will play a central role in determining the seller's tax liability.   There are numerous strategies to reduce the seller's tax liability and protect sale proceeds, but each requires careful planning well in advance of signing a definitive purchase agreement. To maximize value and minimize tax liability, business owners should consult tax counsel and estate planning counsel at least 60 days prior to signing a letter of intent.

Get your ducks in a row. The bulk of due diligence is completed once a letter of intent is signed. The prospective buyer will conduct a comprehensive assessment of the target business and its assets and liabilities. The buyer's attorneys and financial advisors will request a multitude of documents relating to all aspects of the business, including the company's financial statements, tax returns, equipment and inventory records, employee benefit plans, real estate leases, loan documents and contracts necessary for the operation of the business. The process is designed to expose all risks associated with the business, which the parties can then assume or delegate in the purchase agreement.

While business owners want to ensure corporate formalities are observed, minutes are kept and contracts are executed, sometimes the daily concerns of running a business rank above legal formalities. Consulting with an attorney prior to commencing the due diligence process can help you identify and address issues and oversights that, if left unchecked, can result in an unrecoverable reduction in purchase price. Even worse, a bad first impression can create an atmosphere of distrust and potentially dissuade the buyer from moving forward with the transaction. There will inevitably be unexpected issues that arise, and your attorney's creativity and problem-solving skills will be critical in resolving these issues and advancing the ball.

Although the majority of due diligence is buyer-driven, the due diligence period also allows the seller to take the measure of the purchaser to ensure they have the right management experience and expertise needed to run the business and the financial wherewithal to satisfy any post-closing payment obligations. The deal on the table isn't necessarily the right deal. Business owners should assess whether the buyer's business model compliments their own. Does the prospective buyer have a reputation for cutting costs and flipping companies or a history of post-closing lawsuits? Are there any other red flags making litigation likely?

Avoid landmines. The results of due diligence often determine the terms of the purchase agreement, including the purchase price, the scope of the seller's representations and warranties, the seller's indemnification obligations and the parties' post-closing covenants. This is a highly technical document, and details matter. The purchase agreement establishes the rules of the game and will be referred to in perpetuity to address any and all issues that may arise between the buyer and seller. A well-documented purchase agreement can lead the way towards a smooth closing and minimize post-closing disputes.

The "sticker price" of a deal, cash at closing, is only one element of a purchase price. Often agreements include complex post-closing purchase price adjustments and earn-out provisions. These can go awry unless dispute resolution mechanisms are documented precisely.

When a significant portion of the seller's purchase price is tied up in an earn-out, the seller will want assurances that the buyer will operate the business in a manner designed to achieve the earn-out target and prevent the buyer from doing anything that could adversely affect the earn-out. Naturally, buyers will resist having restrictions placed on the operation of their newly acquired business. A savvy M&A attorney will create a compromise that gives the seller the economics of the deal that he or she deserves without unduly restricting the buyer.

Preserve your legacy. For many entrepreneurs, their business represents their life's work. Turning over the keys is emotional, and there's often much more at stake than the payout. They want to ensure their employees are compensated fairly, that the company's contracts with long-standing vendors and customers are honored and that the founder's principles and business standards are upheld. While many buyers will offer to operate the company in the founder's footsteps, their oral assurances are rarely incorporated into the purchase agreement. If the obligations are not in writing, there's no assurance the buyer will honor his verbal commitment and the seller will be left without recourse. Ensuring that these promises are accurately memorialized can be crucial to preserving your legacy.

Like building your business, selling it will require creativity, agility, endurance and a skilled team. Inevitably, there will be hurdles and trying moments during the process. However, with the right team and the right transaction, you will close the deal and have much to celebrate. ■