Strategies to ensure a gratifying business sale

By Christopher S.W. Blake and John Paul Lucci

Selling a business can represent the pinnacle of a life's work, provide the ability to diversify assets and the opportunity to create generational wealth. Preparation and planning will streamline the process and increase the likelihood of success.

As any successful seller will attest, selling a business can be an all-consuming process, equivalent to a second full-time job for the owner and key executives. While daunting, we set forth seven proven strategies to prepare your business for sale that will reduce transaction expenses, maximize proceeds and increase the odds of closing.

Before we present our list, sellers should be aware of an evolving trend in corporate transactions. In recent years, more buyers and sellers purchase representation and warranty insurance (RWI) to cover-post closing indemnification obligations. While RWI benefits sellers because it decreases the size of escrows and other holdbacks and limits sellers' post-closure exposure, RWI carriers require buyers to conduct very thorough due diligence, increasing the diligence burden on buyer.

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The seven proven strategies are:

1. Advisers. Selling a business is a highly technical legal, tax and accounting exercise that requires experienced professionals who understand market terms and transactions. Some of the most expensive deals we have worked on involved unsophisticated seller advisers. Save yourself money, hassle and delay by hiring experienced deal lawyers, investment bankers and accountants.

2. Financial statements. Before you begin the sale process, be sure your financial statements are up to date and accurate. If personal or family expenses that have been run through the business could be questioned, we strongly recommend working with your advisers to address those issues before diligence begins.

3. Conduct lien searches. While banks and finance companies are quick to place liens on assets, removing liens can be cumbersome. Often owners never know about certain liens, banks neglect to release liens and, in some instances, the secured party that filed the liens has ceased to exist or is part of a different company where the business owner no longer has any contacts. These "phantom liens" create unique challenges. Generally, a buyer — and, more importantly, its lender — will not close a transaction when relevant assets are encumbered by liens. While active liens can be paid off at closing, phantom liens can take weeks to release. By conducting lien searches early in the process, you can "scare away" phantom liens.

4. Good standings. We recommend verifying the good standing of your legal entity in its state of incorporation/formation and in each state where your business is qualified to transact business. It is very easy — and shockingly common — for an entity to fall out of good standing or even have its charter revoked for failure to file state tax returns or annual reports. For a business with a complex entity structure or that files consolidated tax returns, taxing authorities often misapply tax payments or report a return missing for a subsidiary that is part of a consolidated return. The process of correcting these errors is cumbersome, often requiring someone with a power of attorney to remain on the phone for hours. In addition, reviving an entity after revocation of status is not an automatic process in many states.

5. Contracts and other business records. Buyers will not purchase a business without completing due diligence, which is more involved in the era of RWI. You can streamline that diligence by locating and assembling fully executed electronic copies of all business records. This statement seems overly broad and burdensome — because it is. Tackling this chore on the front end, though, can expedite diligence and thus your closing.

As a start, you should obtain fully executed copies of all contracts, such as customer and vendor agreements, leases, software agreements and benefit plan documentation. Furthermore, you should assemble all stock certificates and ledgers, minutes and other governing documents. Finally, you should gather all tax returns for the business and your benefit plans, including related form 5500s. The list of documents that must be disclosed can seem endless. Sellers often tell us documents do not exist or cannot be located. Buyers will not accept that excuse. A seasoned transactional lawyer can provide you with a standard diligence checklist to jumpstart this process.

6. Declutter. Many businesses have obsolete, slow-moving or other unsaleable inventory. Rather than debating the value of such material, disposing of such items will make physical inventory counts easier and reduce post-closing working capital disputes.

7. Ordinary course. As a seller, you should run your business like you own it until the moment you have the sale proceeds. Not only will Letters of Intent and purchase agreements require sellers to operate the business in the ordinary course consistent with past practice, but the risk remains that a deal falls apart at the eleventh hour. Therefore, continue to maintain inventory, process payables and take other customary actions until the end.

These few action items will save you time, money and make that celebratory bourbon cocktail taste so much sweeter at the closing dinner. And if you hire the right advisers, they will buy.

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