Preparing for the Potential Sale of Your Business

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In this article, the authors explain the steps that business owners should take ahead of any merger or acquisition event.

Deciding that it might be time to explore a sale of a family or founder owned business can be an intimidating task, but what can make it even more daunting is being unprepared for what comes next. This article sets forth the high-level steps that should be taken early on ahead of any merger or acquisition event (whether it be assets sale, equity sale, merger, or otherwise) for such businesses to ensure as smooth of a sale as is possible. Some of the items below are steps to take to protect your business, others are proactive steps that potential buyers will generally want to see, but all are generally best market practices.

BUSINESS VALUATION

Conducting a thorough business valuation involves analyzing your company's financial performance, assets and overall market position. You may use various methods such as discounted cash flow analysis, comparable company analysis or precedent transactions to determine the value of your business, but, regardless, it is a good idea to have a rational, thought-out number in mind prior to soliciting offers. Regardless of which method is used, the business valuation lays the foundation for the transaction and helps to structure the terms of the deal.

PREPARE AN OVERVIEW

In the event you are not set on a singular buyer or, even if you are and they would like more information on the company before proceeding further into the process, you may want to prepare an overview of the company and the business. Such an overview will usually be high level and in the form of a slideshow or PDF highlighting management, the history of the company, key personnel, the industry and what sets your business apart. While not always necessary, the overview provides the potential buyer with a good snapshot of why your company is worthy of being acquired, without divulging any confidential information.

ORGANIZE COMPANY RECORDS

Depending on the type of business you have, there will be different "buckets" that your main records will fall into. All businesses will have financial/tax records covering the busi-

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nesses' bottom line and tax filings, corporate governance documents that formed the entity with the state and kept it compliant with certain statutes and third-party contracts for services and/or goods. Beyond these core documents, other common buckets of records potentially relate to employment, intellectual property and specific regulatory, such as government regulations, healthcare regulations or other, more niche regulations that certain businesses may need to adhere to.

Regardless of the type of records your business has, you will want to identify all such records, compile them digitally in an organized fashion (i.e., employment agreements in one folder, commercial contracts in another, tax documents in another and so forth) and review them. When reviewing the records, you want to ensure, among other things, no pages or signatures are missing, all documents are scanned into digital versions and nothing stands out as out of the ordinary. At this stage and throughout the process, you will want to put yourself in the shoes of a potential buyer and ask yourself: "What do I want to see if I am going to pay a substantial sum for a business? What don't I want to see? What is going to be a cause for concern?"

PREPARE FOR DUE DILIGENCE

The purpose of organizing the company records and thinking like a potential buyer is to prepare for a crucial, ongoing stage in the process: due diligence. Any potential buyer will want to investigate the business and all aspects of it. A potential buyer will expect all relevant documents to be provided and will come with blanket requests of what files they will want to see; spoiler alert, they will want to see it all. A potential buyer will submit due diligence requests and want answers to basic questions, such as, did the board of managers or board of directors meet regularly? Did they keep minutes of such meetings and, if so, please provide copies.

In order to provide copies of all files, a potential buyer will expect a data site to be constructed. This data site will be the repository for all information on the company and will be organized into folders and subfolders that conform to the structure identified in the "Organize Company Records" section above (i.e., employment agreements in one folder, commercial contracts in another, tax documents in another and so forth). Having an organized data site is not only an efficient way to share information, but also demonstrates to the potential buyer that you are a serious company.

However, prior to providing any potential buyer access to your company's data site, you will want to ensure any potential buyer signs an ironclad Confidentiality Agreement or Non-Disclosure Agreement/NDA. An NDA ensures that the potential buyer is bound by certain parameters, terms and provisions that limit when, how and with whom they may share any of the information about your company you are sharing. This is a vital, and sometimes overlooked, piece of the sale process that is in place to protect you and your business, both during the process and for a period of time after. While we would all like to assume that the sale process will be amicable and run smoothly, in the event the sale does not take place with a potential buyer whose been given access to your confidential information, you will want to ensure that third parties cannot utilize your confidential information to their benefit and your detriment.

KEY ISSUES

Irrespective of your industry or how clean and buttoned up of a company you have, there are a few areas that potential buyers will pay very close attention to: intellectual property, the capitalization table and potential triggers.

The intellectual property your business owns is often a major reason why potential buyers are interested. Accordingly, any potential buyer will want to see that you legally own such intellectual property and have taken steps to protect it. In order to prepare for this, you should confirm that all employees, contractors and inventors have signed proper agreements assigning such rights to the company, verify that all contracts for the intellectual property of third parties used in the business are available and ensure all trademark(s), patent(s), copyright(s) or other filings have been made.

The capitalization table sets forth who owns what percentage of the company, what stock, what equity, what options, etc. Any potential buyer will meticulously comb through the capitalization table to ensure that all stock, options or other issuances were duly board approved, authorized and executed. Ensuring that your capitalization table is accurate and up to date, along with other financial records, is essential for building trust with potential buyers.

Finally, when reviewing your records, identify any potential triggers that will be of note for a potential buyer. This can include any shareholders having a right of first refusal on the sale, any change of control clauses in contracts or something as simple as knowing what percentage of shareholder vote is required to approve the transaction.

PROFESSIONAL ADVISORS

Once all of the aforementioned have been organized, addressed, set up and ready to roll, the last key piece is setting up a team of professional advisors to help you make informed decisions and maximize the value of your business. This includes, but is not limited to, accountants, investment bankers and attorneys. Depending on the size of your company, accountants or investment bankers may not be necessary; however, having a team of attorneys on your side is essentially mandatory in any M&A transaction to ensure that any potential risks have been properly screened and mitigated prior to closing. The M&A attorneys' role is to build a "road map" from start to finish—through drafting, negotiation and the execution of contracts—to help you achieve the best possible outcome.