



United States: Eight Questions To Ask Yourself When Preparing To Sell Your Business

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Body

Considering a potential sale of your business can be a daunting prospect, both from a personal and a professional standpoint. However, if you properly prepare for the sale process and you are supported by experienced M&A advisors, a sale can be a fulfilling culmination of the efforts you have invested in your business. Below are eight questions to ask yourself, and some practical tips to consider, when preparing to sell your business.

1. Who will you choose as your advisors?

Experienced M&A advisors will generally ensure a smooth sale process that maximizes transaction value and results in protection of your legal interests. While there is expense associated with hiring M&A advisors, deciding not to hire specialized M&A advisors in order to avoid fees can make a deal more cumbersome and end up costing more in the long-run. There is no substitute for the market-based experience that quality advisors can bring to the table. Key advisors include (a) a business broker, investment banker or similar intermediary that will assist in properly valuing your business, identifying viable buyers and preparing marketing materials, (b) financial/tax advisors that will assist in preparing and compiling financial data and analyses for potential buyers and in identifying the most efficient and appropriate structure for the deal and (c) experienced M&A counsel that will assist at all stages of the deal from negotiating the letter of intent to drafting and finalizing the purchase and sale agreement.

2. Who are your potential buyers?

Broadly speaking, there are two types of potential buyers: strategic buyers (such as other participants in the industry, which could include a customer or a competitor) and financial buyers (such as a private equity firm or family office). Strategic buyers are generally interested in the long-term synergistic fit of your business with their own. A financial buyer, on the other hand, is more focused on the financial return that can be generated from acquiring your business and then eventually selling it. Given their industry knowledge and market experience, your business broker or investment banker can assist you in identifying the types of buyers that are likely to be the most interested in purchasing your business and help to facilitate discussions with those buyers.

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3. How will the sale of your business be structured?

There are many potential ways the sale of a business can be structured including asset sales (which can have adverse tax consequences and be messy unless there are specific liability issues that need to be managed), carve-out transactions (if you desire to sell only a certain division of your business), joint ventures (if you desire to acquire a partner in your business going forward), stock sales and mergers. The optimal structure depends on a variety of factors including anticipated tax consequences, potential liability issues and the specific interests of both the seller and the buyer. Your chosen M&A advisors can assist you in determining which structure will best meet your needs from a financial, tax, regulatory and legal perspective.

4. How do you prepare for a diligence process?

Buyers generally expect to conduct some level of financial, tax, legal and operational due diligence of the business they wish to acquire. In order to streamline this process, you should ensure that you have complete, up-to-date, readily available copies of the following information and documents: financial statements; tax records; material customer and vendor contracts; leases; legal organizational and equityholder documents (e.g., articles of incorporation/formation, operating agreement/bylaws, shareholders agreements, etc.); material permits and licenses; employment agreements; indebtedness documents; documentation of intellectual property arrangements; and employee and benefits-related documentation. Doing the upfront work to make sure this information is complete and organized will help ensure that the diligence process moves along smoothly for all parties and will generally reflect positively on how the buyer views the business.

5. Are there any confidentiality concerns that need to be taken into account?

The nature of a sale process allows prospective buyers to have access to potentially sensitive and confidential information relating to your business operations. Access to and protection of this information is normally addressed through the negotiation of a nondisclosure agreement. In addition to general confidentiality concerns, you should also consider whether your business involves any particular operations or information that may merit heightened confidentiality protections, such as restricting access to competitively sensitive information to only certain individuals who work at the buyer or potentially only the buyer's outside counsel. These areas should be discussed with your M&A counsel, who can draft a tailored non-disclosure agreement that will protect your interests both during the sale process and in the event a potential sale to a buyer who has been given access to your confidential information is not consummated.

6. What approvals will be required in connection with selling your business?

A key consideration in the timeline for completion of the sale of your business revolves around which, if any, third party and governmental approvals will be required to consummate the sale. If you operate in a highly regulated industry and hold regulatory licenses or permits, notice to, or the prior approval of, applicable governmental bodies may be required before the sale can be consummated. Similarly, your customer and vendor contracts may contain provisions requiring notice to or consent of those customers and vendors in connection with the sale. Additionally, if the purchase price for the sale will be in excess of \$90 million, federal antitrust approval may also be required. Finally, in most cases, you will also need to obtain the approval of your equityholders. M&A counsel can assist in identifying which of these approvals may be required and the anticipated timing for obtaining such approvals.

7. What type of post-closing indemnification risk are you comfortable retaining?

Many private M&A transactions include post-closing indemnification obligations requiring the seller to compensate the buyer for certain categories of losses or harm that may arise following the sale but that relate to the time during which the seller operated the business. Generally speaking, these potential post-closing obligations can be handled in one of three ways: (a) the seller can agree to make any post-closing indemnification payments out-of-pocket, (b) the seller can agree that a portion of the purchase price will be held in escrow for a defined period of time as either a complete or a partial source of recovery for the buyer or (c) the seller can (or can request that the buyer) obtain a representations and warranties insurance policy, which acts as a backstop for the seller's indemnification obligations. M&A counsel can provide you with an evaluation of the pros and cons of each potential option in the context of your sale transaction.

8. What will your involvement in the business look like going forward?

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In considering how to structure a sale, sellers should determine up-front what they would like their operational and economic involvement in the business to look like post-closing. Potential post-closing roles range from making a complete exit, to remaining on as a board member or advisor, to continuing to run the day-to-day business as a manager or employee (in which case you should consider in advance what duties, compensation and benefits you would like to negotiate for with the new buyer). Continued economic involvement could include retaining an ownership stake in the go-forward business, an earn-out arrangement (pursuant to which additional consideration may be paid to you at a future date based on the performance of the post-sale business), options or warrants to purchase future shares or other arrangements. Utilizing experienced M&A counsel will help you to advocate for a deal structure that will help you to achieve your desired post-closing role in the operation and economics of the business.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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