

## **BUYING AND SELLING A BUSINESS**

Unless you inherited your family business or started your business in your garage, a business owner often purchases his initial business operation from another person. And, unless you are planning to pass your business to another family member or simply close the doors, a business owner often considers the sale of the business to another person. In either situation, purchase or sale, it is important to take precautions from the very beginning to avoid problems at a later date.

Use of professional advisors is a basic and prudent course of action. You should make the appropriate inquiries with your business associates, friends, relatives and banker regarding the credibility of the person from whom you are buying your business or to whom you are selling your business. Also, the assistance of your lawyer and your accountant can be valuable. Your accountant can assist you with the determination of whether the purchase price you are paying or receiving is appropriate and whether the business will be as profitable as you desire.

From a legal perspective, the initial step is to set forth in writing the general terms of the transaction in a manner that is clear and concise. These terms are referred to as the "Letter of Intent." Typically, a Letter of Intent is not a binding document, but only sets forth the overall important terms and structure of the transaction including the purchase price, the identity of the seller, the identity of the purchaser and the assets or capital stock that is being purchased. A Letter of Intent is used to make sure the buyer and seller has a basic understanding.

After the Letter of Intent is signed, a more definitive Purchase and Sale Agreement and the related documents are prepared. Typically, counsel for the purchaser prepares the documents. During the period of time after the signing of the Letter of Intent and before the closing of the transaction, it is important for the purchaser to make all appropriate inquiries and fully perform the "due diligence". Review of the general industry, the customers and suppliers, the workforce and the specific employees that are valuable to the company needs to occur.

### **PURCHASER'S PERSPECTIVE**

From the purchaser's perspective, the Letter of Intent and the definitive Purchase and Sale Agreement need to include provisions that protect the purchaser. These provisions include a hold back of the purchase price funds to address any unforeseen liabilities. The seller should be responsible for liabilities that are not disclosed to the purchaser or not assumed by the purchaser. Also, from a purchaser's perspective, it is important that the seller provide certain representations and warranties about the assets and capital stock to be purchased. These representations and warranties are fully set forth in the Purchase and Sale Agreement and include a full disclosure of any liabilities or conditions which would enable the purchaser to fully evaluate and understand the terms of the transaction and the assets or capital stock being acquired and the liabilities being assumed.

A purchaser of a business is often best advised to obtain employment contracts for key employees of the selling business. These key employees keep all information confidential, and

ideally, these employees would agree to not compete with this business if they terminate their employment.

Most importantly, the purchaser of a business should establish an entity that will serve as the buyer. This entity will provide limited liability to the purchaser. This entity should be formed prior to entering into written documentation with the seller, including the Letter of Intent. Such an entity could include a corporation, limited liability company, professional corporation or limited liability partnership.

### **SELLER'S PERSPECTIVE**

The first step for the seller of a business is to enter into a Confidentiality Agreement with the prospective purchaser. The Confidentiality Agreement will protect the information provided to the prospective purchaser, including specifically the identity of your customers, the dollar volume associated with your customers, the profits associated with your customers and any special sales strategies which have made your business successful.

The next step in the sale of your business is to document the general terms and conditions with a Letter of Intent, as previously described. Ideally, in the sale of a business you will receive cash at the closing for the sale of the capital stock of the company (rather than the sale of the assets of the company). However, there are beneficial tax strategies related to accepting stock of a publicly traded company in lieu of cash. Also, from a seller's perspective, it is important to limit the survival of any representations or warranties and the survival of any future obligations of the seller.

If the seller of a business must sell the assets of the business rather than its capital stock, then after the sale is completed it is important to proceed to properly liquidate your company and go through the dissolution process. This statutory dissolution process, including public notice in the newspaper, will limit the future liability of the seller and the remaining company.

The purchase and the sale of a business is a detailed legal process. The terms of the documentation are very important and you are encouraged to be specific with these terms and obtain professional input before signing any documentation.

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