KEY CONSIDERATIONS WHEN SELLING YOUR PRIVATELY-HELD COMPANY

Originally published in The Daily Transcript

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In today's challenging business environment, opportunistic buyers are looking to acquire small and mid-sized companies at bargain prices. If you're looking to sell your privately-held company, there are a number of things you can do at the outset to increase your sales price, make the sale process flow smoothly and maximize your work opportunities once the sale is completed.

THINK ABOUT TIMING

Does it make sense to sell right now? Buyers will want to know why you're looking for an exit in a tough market. Be ready to show that the company has achieved strong financial performance or has reached other milestones in order to maximize the transaction value. If you aren't able to, you should consider waiting to sell until your business and the overall business climate improves.

ASSEMBLE YOUR TEAM

Get your legal counsel, accountants, and financial advisors involved at the outset of the sale process. They can assist with structuring the transaction and financial planning to help minimize the tax consequences of a sale. Make sure your legal counsel has experience representing sellers in mergers and acquisitions. Consider hiring an investment banker, even if you are contacted directly by a potential buyer. Bankers can help you determine the value of your company and can generate interest from multiple buyers, driving your sales price higher. Look for a bank that focuses on your specific industry (software, consumer goods, medical device).

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UNDERSTAND THE PROCESS AND BE PREPARED

Talk with your advisors about the sale process. If this is your first time selling a company, understand that the process is very involved and will take months, not weeks. It will become a full-time endeavor, requiring significant involvement of management, and it's important to make arrangements to minimize the disruptive effect of the sale process on the company's business. Also, make sure that your corporate records, employee stock options, tax returns, financial statements and material business agreements are in order before starting the sale process, because the buyer's discovery of problems with these items during their due diligence will delay the sale and increase your transaction costs.

LOOKING AHEAD

Do you wish to continue working for the company after the sale? If so, consider the terms of your involvement, and be prepared to discuss those terms with the buyer early in the negotiation process. If you wish to move on to a new venture, discuss with your counsel whether the buyer might consider the new venture to be competitive with the company, and if so how to handle that. Buyers often require sellers to enter into noncompetition agreements, especially where the sellers have actively participated in the company's business. Your legal counsel can help you narrow the scope of the noncompetition agreement so your post-sale activities are not severely restricted.

DON'T RUSH THE TERM SHEET

Often buyers and sellers are in a rush to sign a term sheet for a transaction, and they tend to focus on key financial terms (purchase price, payment terms and limits on indemnification amounts) while not paying as much attention to other seemingly less important provisions. This is a mistake, as key non-financial terms, including the duration of noncompetition agreements and the post-closing survival periods for seller's representations and warranties, will significantly impact sellers. You should always consult your legal counsel before signing any term sheet.

EARNOUTS

During challenging business times, buyers will push for an "earnout" component in the sale, which means that a portion of the purchase price is based on the performance of the company for a specified period of time after the sale. Usually earnouts require sellers (or key pre-sale management team members) to remain involved with the company during the earnout period. Earnout arrangements often lead to disputes, and from the seller's perspective, the preference is to receive the purchase price unconditionally. If an earnout is inevitable, sellers should push to

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keep earnout provisions simple and easily measurable, and should consider (i) the buyer's obligations during the earnout period to maximize the chances of attaining the earnout, and (ii) the consequences of the buyer's failure to meet such obligations, which can include payment of the full earnout amount.

Structure Matters

Because of tax differences, sellers generally prefer transactions structured as sales of their company stock, while buyers prefer to acquire assets from the company, and will often pay a higher price to do so. It is important that you discuss the tax consequences of any proposed transaction structure with your legal counsel and accountants before agreeing to a particular structure, as a tax-efficient structure will maximize your after-tax proceeds. If a portion of the sale proceeds is buyer stock, certain transaction structures will permit you to delay the payment of tax related to the receipt of buyer stock until you sell those shares.

While selling your privately-held company during these challenging times may seem a daunting task, careful consideration of certain key issues and working closely with experienced legal counsel and your accountants can ease the sale process and help maximize your sale proceeds.

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