Top Considerations When Selling a Company

By:Joseph C. Marrow
July 13, 2017

Selling a business can be a once-in-a-lifetime opportunity to reap the rewards for years of efforts spent successfully growing a company, but it is critically important that the business is positioned to achieve a successful exit and there are a number of initial steps to be taken to prepare for a successful exit.

1. Keep the Trains Running on Time

The sale of a company is not a sure thing. Many transactions don't close, which can be caused by a number of factors – lack of a meeting of the minds regarding deal terms; personnel issues; intellectual property concerns; or pending or potential litigation matters, to name just a few. As a result of these or other obstacles, many anticipated transactions can drag on for a period of 6 months to a year or more. With the potential for a deal to fail, business owners should make every effort to conduct "business as usual" throughout the sale process. The vagaries of a transaction can feel overwhelming, but must not detract from the required laser-sharp focus making sure the business continues to meet its objectives.

2. Identify a Team and Map Out a Coordinated Effort

A prospective seller should assemble a "deal team" from within the company including the CEO, a finance representative and a member of senior management with expertise regarding the company's operations and assets including intellectual property, contracts and personnel issues. Additionally, the company should identify an external team consisting of an investment banker, experienced mergers and acquisitions legal counsel and a financial (accounting) professional. The global deal team should discuss processes, tasks to be completed and roles and responsibilities. In many instances, business owners prefer keeping the internal deal team as small as possible to maintain confidentiality, but it is generally a mistake to exclude key executives as the transaction can easily monopolize the time of one or two key individuals which could have adverse consequences on ongoing business.

3. Establish a Data Room

Buyers will want to examine the corporate records of the company being sold – including financial information, contracts, corporate legal documents, personnel-related documents and intellectual property. Since assembling responses to due diligence requests can consume a great amount of time and effort, prospective sellers would be wise to address this issue before commencing the transactional process. An electronic data room is an excellent way to organize a company's records and, even if a potential transaction fails to close, it can be beneficial to have documents stored safely and securely in this manner.

4. Make Sure Your Financial House is In Order

It is a certainty that a potential acquirer will want to inspect a target's financial records including annual financial statements, interim financial statements, tax returns and possibly an operating plan. Prospective sellers should engage a reputable outside accounting firm (if they haven't done so already) to assist in the preparation of all financial statements. If the company has not prepared financial statements in the past, or has not had them prepared by a reputable accounting firm, the company could be left scrambling to do so according to the transaction's timeline. As one can imagine, last-minute preparation of proper financial statements can result in significant delays.

5. Employment Issues

One of the most important assets of a company is its human capital. In many instances, the hiring of key employees is a critical component of a prospective acquisition. Be sure to confirm that all agreements with existing and former employees have been properly documented (including employment agreements, non-disclosure, non-solicitation and confidentiality agreements, equity award agreements and separation agreements/releases).

6. Intellectual Property Protection

If intellectual property (patents, trademarks, copyrights and trade secrets) is a key ingredient of the seller's business, the seller should confirm that all necessary steps have been taken to protect its intellectual property. Among other tasks, prospective sellers should check with their IP counsel to confirm all necessary filings are up to date, and the seller and its counsel should be prepared to address forseeable IP due diligence questions.

7. Confidentiality Agreements

When engaging in a transaction, the selling company should proactively enter into confidentiality agreements with all interested purchasers. A transactional attorney can prepare and help negotiate the confidentiality agreement. Notwithstanding the presence of a confidentiality agreement, sellers are advised to be judicious in disclosing information to a potential acquirer; consider waiting until the last possible moment to disclose the "crown jewels" to a possible buyer.

8. Review Your Contracts

A purchaser will want to review all of the prospective seller's material contracts, and will want to confirm that contracts are properly in place with key customers, vendors and third parties. Additionally, the purchaser will assess the need for consents from third parties, the inclusion of indemnification obligations, restrictive covenants and other potentially problematic contract terms. Sellers should conduct their own assessment of the contracts prior to commencement of due diligence in order to identify and address potential concerns.

9. Pre-planning (Tax and Estate Considerations)

Tax planning is integral to any transaction. Pre-transaction, the seller should confer with sophisticated personal and transactional tax counsel in order to understand the corporate and individual tax considerations of particular deal structures. There may be opportunities to address tax matters well in advance of a transaction. Similarly, individual sellers will want to consult trusts and estates professionals and wealth advisors to address estate planning opportunities before commencing the sales process.

For more information, please contact **Joe Marrow**.