

CORPORATE

M&A UPDATE: CONSIDERING A SALE?

6 KEYS TO MAXIMIZING VALUE

by William L. Rosin

Today's M&A environment continues to be a seller's market in many industries. Financial buyers (i.e., private equity), with formidable sums of cash on hand, are on the hunt for investment opportunities and strategic buyers (i.e., existing operating companies) are aggressively seeking growth through acquisitions which add capacity and/or capability. While this market presents great opportunities for the business owner considering a sale, any prospective seller must proceed carefully to ensure that the seller's objectives are achieved.

With over 25 years of experience in representing buyers and sellers of companies, including just recently closing on a private equity client's business acquisition and on another client's sale of its business to a strategic buyer, I am often approached by business owners asking: "what are the most important factors to consider if I want to sell my business?" In response, I recommend that they review (and act upon) the following 6 key points which are intended to help the seller maintain deal leverage and, ultimately, business value, throughout the sale process:

1. Seize Control of the Timing

Nobody can predict how, when and to what extent, internal and external events may impact the marketability of your company. The longer it takes to get a deal closed, however, the more likely it is that a seller will encounter one or more disruptive events. Accordingly, if you are considering a sale, I recommend that you take control of the deal timing and kick the process off sooner rather than later. Waiting for some outside force to trigger the sale process is not recommended. You want to sell while the business and key individuals are in a relatively stable and comfortable operating condition. If you wait too long and the business is in trouble and/or significant personal or health issues have surfaced, you may be forced to accept less than favorable deal terms in any sale transaction.

2. Engage Experienced M&A Professionals

The time you begin seriously contemplating a potential sale is the time to assemble and consult with your legal and financial team. Your deal advisors must be experienced M&A professionals – even if this means replacing your existing lawyers and accountants if they are not experienced in the buying and selling of businesses. Today's buyers

also prefer sellers with experienced M&A counsel. It sends a message to the buyer that you are a serious seller and that the deal will proceed on a more efficient and cost effective timeline. During this period, do not sign anything relating to a potential sale (even "non-binding" letters of intent) before reviewing such documents with your legal counsel to ensure that key issues such as the seller's objectives (see item 3 below), valuation, exclusivity, break-up fees, protecting proprietary information, deal structure, etc., are properly addressed. The seller who waits too long to engage professionals may waste time and money pursuing a deal structure that fails to meet the seller's objectives or worse, the seller may be irreparably out-manuevered by a sophisticated buyer in the early deal negotiations. Keep in mind that a seller's deal leverage typically peaks just before the seller signs a letter of intent.

3. Identify Objectives

Understanding your deal objectives is necessary to structuring the transaction correctly and selling to the "right" buyer. Do you simply want to "cash-out" to the highest bidder or do you (and/or other key individuals) want to remain engaged/employed for some period of time after the sale? Have you fully evaluated (and prepared for) the estate planning considerations and tax implications of a transaction? Have you considered selling to an ESOP? Is there a preference between a strategic buyer and a financial buyer? Would a stock sale be better than an asset sale? Experienced legal counsel can help you evaluate, refine and achieve your objectives on a cost effective basis.

4. Know Your Business - No Surprises

You must know your company and its business – the good, the bad and the ugly. Information provided by you and relied upon by the buyer must be accurate, thorough and complete. If information you have provided proves to be inaccurate, misleading or if there are surprises such as unexpected liabilities, your credibility will be undermined and your leverage will be compromised. Experienced legal counsel can assist you in the assembly of the "normal and customary" due diligence information and help to identify potential deficiencies before they become an issue for the buyer and a deal distraction.

5. Business as Usual through Closing

You need to be able to walk and chew gum at the same time. By that I mean you must continue to operate the business in the ordinary course while at the same time participating in the sale process. Too often a seller presumes the closing will occur and "checks-out" from operating responsibilities too early in the sale process. Any such performance drop-off can result in a material deterioration in the business potentially

leaving the seller with no alternative but to sell at which point all negotiating leverage is lost (see item 6 below) while a frustrated buyer tries to “fix” the situation. Experienced legal counsel can help the seller and key individuals remain focused and engaged in the operation of the business throughout the sale process.

6. Preserve the Nuclear Option - Just Say “No”

It is inevitable that tough issues will arise during the sale process and a buyer may ask you for deal concessions as the parties get closer to executing the purchase agreement and/or closing that could result in a material erosion in the deal for you. If you cannot say “no” (and risk the buyer not proceeding with the deal), you have lost the negotiating leverage and may be forced to agree to the buyer’s demand(s) and accept terms that you would not otherwise have agreed to.

The sale of your business should be a very rewarding experience following many years of hard work, investment and sacrifice. To help you succeed in your sale, or if you have any questions regarding the sale process, please contact me or any member of the Dickinson Wright Mergers & Acquisitions practice group.

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