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Items to Consider in Determining Whether to Sell Your Business in 2010 - Part 2 of 4

When business owners contemplate the sale of their businesses, initial questions of where to start, what types of activities are required, and how to negotiate the sale process are commonplace. This alert is the second in a series of four generally describing (i) the tax changes that will occur on January 1, 2011 and in later tax years as a result of the recently enacted health care legislation, (ii) many of the steps a business owner should consider taking in order to prepare his or her business for sale, (iii) the sale process, and (iv) several key factors to consider in this process in an effort to maximize the after-tax benefits to the owners and to help ensure a smooth sales process.

PREPARING YOUR BUSINESS FOR SALE

Pre-Sale Diligence. When preparing a business for the sales process, it is important to involve accounting, tax, and legal professionals early in the process. Under certain circumstances, it may also be advisable to engage the services of an investment banker or business broker. Early involvement of these professionals can save a business owner time and money by pointing him or her in the right direction with respect to what issues are most and least important from a buyer's point of view. Additionally, professionals can help manage expectations (*e.g.*, what is the market like for a sale and what purchase price and net after-tax proceeds can I expect for my business?).

One of the first and most important steps a business owner must take is to organize the minute books and corporate/partnership records of his or her company and make sure that these records are accurate and current. These are among the initial items a potential buyer will request. While organization is a simple task, many privately held businesses are not well-organized from a corporate records standpoint. Poorly kept corporate records create a bad first impression and may adversely affect the business valuation. Also, it is important to put together a due diligence "book" that contains a business owner's vendor and customer contracts, employment records, business licenses, financial and tax records, and other important items particular to a business owner's industry. Because this type of information typically is critical to your business, it is important that your attorneys draft and obtain from third parties appropriate confidentiality agreements before providing any information to such parties. Additionally, depending on the identity of the recipient (*e.g.*, is your potential suitor a competitor or is it a financial buyer), care should be given as to what information should be initially disclosed versus being disclosed later in the process. A business owner may also want to convert these and other due diligence documents into a digital format (*e.g.*, transferring the documents onto a CD or another format) as this step will ease the dissemination of materials to potential purchasers.

Another seemingly easy, but often overlooked, item to address is to make sure your business entity is in "good standing" in the jurisdiction where it was formed and in all jurisdictions where it is required to be qualified. If your business entity is not in good standing, take immediate action to cure missing filings or payments to return your business to good standing. Again, if your business is not in good standing when a prospective buyer checks, it creates a negative impression that will adversely affect the potential buyer's view of you and your business.

Determining Pre-Sale Goals. Another item to consider in connection with the sales process is the list of goals you hope to accomplish. To quote an apt old expression, "If you do not know where you are going, you will surely get there." One can accomplish many goals with a sale of a business—retirement planning, estate planning, and business succession planning to name a few—and it is wise to outline these goals in advance of the sales process.

Of course, one of the most important goals is obtaining the desired sales price for your business, but it is not always that simple. Your tax professional can help you take into account net after-tax dollars and potential increases in tax rates that may affect the timing of when you want to sell your business in order to minimize the government's share of your sale profit. Additionally, the structure of the transaction—*e.g.*, asset sale, merger, or stock sale—has both tax and legal consequences and should be examined and discussed early in the process in order to help manage expectations and increase the likelihood of achieving your goals.

Your professionals can also help you with pre-transaction financial and estate planning. Planning vehicles ranging from simple gifts to family members to Grantor Retained Annuity Trusts (GRATs) can be utilized to sharply reduce the government's share of your sale proceeds and to plan for your family's future.

Because your business is unique, many of the issues you will encounter during your preparation for sale and the sale process will also be unique. Your professionals will help to guide you through the process, including communicating to potential purchasers the unique aspects of your business. No two sales or purchases are alike. Your professionals can help you analyze these and other issues in greater detail and blend them with your business and financial situation, which will ultimately determine how you should proceed.

The next alert in our series will focus on the situation where a business owner has found a potential buyer and is presented with a purchase offer and the issues that arise from that offer, including entering into a confidentiality agreement and the evaluation of a letter of intent.

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