

## PRELIMINARY CONSIDERATIONS IN SELLING YOUR BUSINESS--PART 2

If you own a business, you may be reaching the stage where you are thinking about "cashing out" and selling your business. This newsletter is the second part of a two-part newsletter addressing preliminary issues you should consider as you get your business ready to go to market.

**Consider Obtaining a Valuation of your Business.** Your business is essentially worth whatever a willing buyer would be willing to pay for it. As mentioned in the previous newsletter, part of your "team" you would assemble to assist you in the sale process might be an M&A financial advisor. An M&A financial advisor could assist you in locating candidates interested in your business, and even overseeing an "auction" process if there is more than one potential candidate. Your M&A financial advisor might also recommend obtaining a valuation to assess the value of the seller's business and the appropriate method of valuation.

**Non-Disclosure Agreement (NDA) is a Must!** Before giving a potential buyer any information, you *must* get a non-disclosure (NDA) or confidentiality agreement from the potential buyer. You don't want to provide a potential buyer with any information that it or others could use to compete against you. You also want to make sure that word doesn't get out that you are considering selling your business--that could damage your customer and employee relations. You should have your attorney either draft the NDA or, if the buyer provides you a draft, have your attorney review it. A thorough NDA would cover such matters as: (i) a broad definition of what is "confidential information" (and not just information that happens to be marked "confidential"); (ii) the confidential information can be used by the recipient only to evaluate the acquisition transaction and not for personal benefit; (iii) disclosure by recipient can only be made to those representatives of recipient who need to know, and the potential buyer is liable for any disclosures by its representatives; (iv) the NDA should provide procedures if the buyer is ever compelled by law to make a disclosure; (v) the seller disclaims any representation about the accuracy of the confidential information (that would be addressed in the purchase agreement if the transaction proceeds that far); (vi) the NDA would include a covenant not to solicit for employment (or employ) the seller's employees for a stated period of time; and (vii) the NDA may have a "phased" type of disclosure, with the most competitively sensitive information being disclosed only upon or shortly before closing.

**Letter of Intent.** A letter of intent (also called a "memorandum of understanding" or "term sheet") can provide a good framework for the structure of the transaction and help the parties focus on and resolve the major deal points. The seller's negotiating leverage is highest right before signing the letter of intent, so if the buyer really wants the seller's business, the seller can use the letter of intent as a means to get important concessions from the buyer before letting the acquisition proceed any further. The buyer will usually want the letter of intent to include a "no-shop" or "standstill" clause that keeps the seller from entertaining other offers for a certain period of time until the buyer can complete its due diligence. The seller will want to keep this standstill period as short as possible to keep its options open. Other than certain binding provisions (such as confidentiality and the standstill provision), the letter of intent should be clear that the seller is not obligated to sell to the buyer. Any such an obligation should only be pursuant to a fully negotiated Purchase Agreement. As with the NDA, you should not enter into a letter of intent without careful review (or drafting) by your attorney.

We hope this newsletter has been helpful. If you are thinking about selling your business or buying a business, we can provide the experienced mergers and acquisition assistance you need.