SELLING THE PRIVATE BUSINESS

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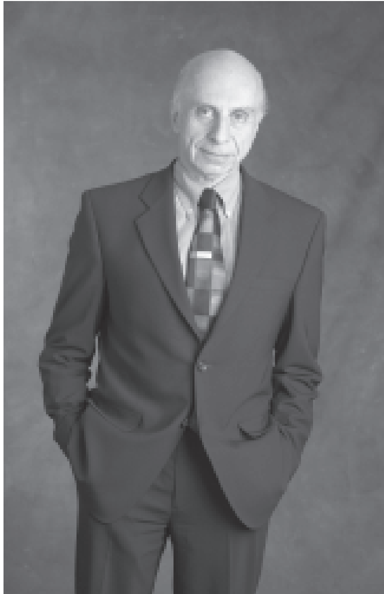
About The Author



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INTRODUCTION

Selling a company can be a profound emotional and psychological experience for clients. After all, many years have been invested in the growth of the company, in the relationships with employees and customers, and in the personal identification of the founders with the company. Much of our self-image and sense of self-worth is tied to work, and the environment in which we work.

The sale process also can seem complicated and drawn-out to businesspeople who are used to making and implementing their decisions quickly, with a minimum of fuss. There are reams of documents to prepare and review; there is endless information gathering, and agonizing over data; there are long discussions over legal points; there is a good deal of thinking about various contingencies which sound very remote to the client; there are difficult tax issues that seem to have no bearing on business as it really is conducted. For many clients, the process seems to be a mystery wrapped in an enigma.

In fact, it is a rational process that unfolds in well-established steps, from the first introduction of the buyer and seller to the closing, when the seller receives the purchase price and the buyer takes control of the acquired company. There are sound and comprehensible reasons for each phase. With experienced professional assistance, the client can move from the preliminary letter of intent to the day of sale, with a minimum of complexity and delay. Hopefully, this outline will introduce you to the steps these transactions often follow.

IDENTIFYING A BUYER

This can happen in a number of ways. A long-time employee, a competitor or a customer may make overtures. You may be approached by investment bankers or business brokers who are acting for unnamed principals. You may simply decide that for a combination of reasons (no apparent successor in your family; age or health considerations; estate planning needs; changes in the marketplace; retirement plans) that now is the time to plan your exit.

If you take the first step, it will often be with the help of your lawyer or accountant. They may know people who would have an interest in your company, either purely as a financial investment, or for strategic reasons. Often they will help you contact a financial advisor or investment banker who knows your industry and has broad experience in effecting the sale of a business. Commonly, these professionals have wide networks of contacts and know how to get the maximum exposure and the highest price for you.

The investment banker will usually spend some time getting to know your business. She will prepare a booklet of descriptive materials and financial and industry information. She will compile a list of possible contacts (using suggestions both from you and from your professionals, and her research and knowledge of your industry), and she will screen the list with you to make sure that you have the final say on whom she contacts.

Letters will go out to the companies and people on the list, describing the general nature of the company and its approximate location, without divulging its precise identity, and inquiring if the recipient has any interest. The letter may solicit ‘expressions of interest’ in what amounts to a controlled auction.

NON-DISCLOSURE AGREEMENTS

If the prospect responds to the letter, the investment banker will next ask the recipient to sign a non-disclosure agreement with you. This agreement requires the potential buyer to keep any information concerning the company, its finances or business confidential. It also requires the buyer to keep confidential the fact that any transaction is being discussed with you and your company, and what the possible terms of the transaction may be.

The non-disclosure agreement may also prohibit the buyer from trying to hire away your employees should there be no deal and, in specific cases, may prohibit that buyer from dealing with the customers or vendors of the company once you disclose their identities. You should be aware, however, that many buyers resist all but the most basic limitations, so you will have to make early judgments about what is, in fact, sensitive information, and the point in time when you can safely disclose it.

Non-disclosure agreements almost always require the buyer – who is receiving copies of your documents – to return those documents if the deal doesn't progress, and to scrub any of your data that the buyer has incorporated into his/her records. The latter process, called 'redaction', often requires potential buyers to confirm in writing that this has been done.

Perhaps your business is readily identifiable because of its unusual product line or because the relevant market is quite small, so no matter how broadly the letter describes it, recipients who are in the same field will be able to identify your company. In these cases, the investment banker will ask the potential buyer to sign a non-disclosure agreement before *any* details are provided.

In some transactions, the organization buying your company may be providing information to you. This would certainly be the case where the buyer wants to pay part of the price over time, or with shares of its stock. If the buyer is a publicly-traded company, the buyer's information will be freely available from the Securities and Exchange Commission. Even where the data is public, before that buyer discloses its information, it may also ask you to sign an agreement to refrain from purchasing or selling its shares because, in the course of negotiation, you may learn specifics about the buyer that aren't as yet publicly known.

KEY EMPLOYEES

Non-disclosure agreements rarely lead to litigation. Most buyers honor them. On the other hand, in many cases, word of a possible transaction may leak out sooner or later, usually through no fault of the buyer. Employees in particular have a sixth sense for when something is in the wind; seemingly minor incidents - for instance, unfamiliar faces showing up for several meetings within a week, an off-cycle visit by the accountant, a flurry of phone calls from the attorney - are enough to catch their attention. Once that happens, the employees inevitably draw the right conclusion, and then elaborate on it with exaggerated or non-existent specifics. If word gets out, it may compromise your negotiating position should key personnel or customers express concerns about ownership changes. So, it's wise to plan for damage control early in the process, even if you never need to resort to it.

Deciding how and when to inform key employees of your plans is one of the most difficult decisions you'll be faced with. It is also one of the most important, and one that you - with the best insights into their attitudes and concerns - must make, not your advisors. In many circumstances, a great deal of your company's equity value resides in the skills and commitment they bring to bear. Without them, the company's value to the buyer may be greatly reduced - or the buyer may not be willing to proceed at all.

If your employees have signed employment, inventions ownership, non-disclosure or non-competition agreements, they may be legally restricted from simply walking away. But many buyers want much more positive assurance that they are acquiring a stable workforce, not one figuratively chained to the galley. Employees who own equity in the company may have sufficient economic incentive to support the process. Where that is not the case, many business owners will take key

employees into their confidence at a very early stage and structure an accomplishment fee for them if they support the process to completion and agree to work for the buyer on reasonable terms post-closing. When the issue is not addressed at an early stage, you may find yourself in a situation where the key employees will use their leverage to their advantage and not in tandem with you.

There is no single formula for addressing key employee issues. The only imperative is to think these issues through at the outset of the sale process.

AGREEMENT IN PRINCIPLE

After the non-disclosure agreement is signed, you will be asked to make summary financial information available to the buyer. Your investment banker may have prepared a data book summarizing key operating and financial data. The buyer may also interview you and other executives about the business, or ask for additional information to support the buy/don't buy decision.

Once the buyer is comfortable that he has a good picture of historical financial information and the business in general, you and the buyer will negotiate price, payment terms and other business specifics. This may include your employment after closing (how long, what salary and benefits); non-competition assurances; a lease of company-occupied real estate, if it isn't also to be sold; and which company assets the seller may retain.

If circumstances warrant, you also may deal with some legal issues at this point. For instance, if the business is involved in litigation, you may negotiate the responsibility for defending the case, and for paying any judgment entered against it. You also will probably negotiate which form the deal will take – an outright sale of assets and operations; an acquisition of company shares; or a merger. The following discussion explains the most common alternative forms a transaction can take, and why a seller or a buyer may prefer one form over another.

LETTER OF INTENT

Once these deal points have been agreed to in principle, they may be incorporated into a letter of intent. The letter sets out the agreed-upon business terms in writing. It also likely contains additional provisions, which may include:

- your commitment to give the buyer access to the business for 'due diligence' purposes, with whatever limitations you think are necessary until the deal is confirmed (for instance, no contact by the buyer with your employees);
- a 'no-shop' or 'lock-up' provision, in which you agree not to discuss selling the company with anyone else for a fixed period of time. Thirty to sixty days is quite common.
- a provision permitting the buyer to terminate the letter if at any time, upon inspection, it concludes that the details of the business are unsatisfactory to it;
- a date when the letter terminates, if the deal hasn't closed or a definitive agreement hasn't been signed by then; and/or
- provisions for a deposit, if any.

The letter of intent can range from one that is completely non-binding (except that you agree not to shop the company, and promise to give the buyer access to the business) to one that is practically as comprehensive as a full agreement. However, it is usually not a comprehensive legal document. Even those letters of intent that are nominally non-binding usually place the parties under an implied legal obligation to try in good faith to bring the deal to fruition.

If you have been conducting parallel negotiations with several potential buyers that you must terminate once you sign a letter of intent with one of them, then customarily you will ask for a deposit from the buyer in return. Otherwise, requiring a deposit at this stage is less common.

Many lawyers prefer to simplify the letter of intent by reducing it to basic economic and legal provisions, or by foregoing it entirely. If the letter becomes too elaborate, it begins to resemble a definitive agreement, and the process - if drawn out too long - risks exhausting the goodwill of the parties at a point where they are not yet fully committed to the deal.

INFORMING YOUR PARTNERS

What if your company has other shareholders such as family trusts, key employees, early investors who helped the company get off the ground, even so-called 'angel investors'? Eventually, the shareholders are almost certain to become involved in any transaction you pursue, either because their approval is necessary for your company to sell assets, or because most share purchasers will want to acquire 100% of your company stock. After all, who wants to spend good money to go into partnership with a minority shareholder she doesn't even know?

This is largely but not completely a matter of business judgment. How do you balance the risk of premature disclosure against the risk of angering other shareholders by a perceived lack of candor? Of course, if you're called on to make a commitment that binds the company or all of its shareholders at this stage – an example would be a 'lock-up' agreement that prohibits any solicitation of offers from third parties – you won't have any alternative.

In any case, one thing is quite clear: as a prospective seller of the company, you shouldn't be reacquiring shares from other shareholders who are unaware of your plans without disclosing your existing negotiations to them. Federal and state anti-fraud rules (Rule 10b-5, for example) impose substantial liabilities on those who engage in securities transactions without disclosing the material facts known to them – and shares or interests in a closely-held business entity are securities, just like General Motors or Microsoft stock.

FORMS OF TRANSACTION

The sale transaction described in the letter of intent can take a number of forms. There are numerous federal and state tax considerations that influence the form of transaction, but any discussion of those factors falls outside the scope of this discussion. It's enough to say that the tax factors should be reviewed in depth by your professional advisors before any commitment is made concerning the form that the transaction will take.

■ ASSET SALE

In this form of transaction, the company sells its assets and operations to a buyer, or to a company formed by a buyer for this purpose. Usually the buyer also assumes some or all of the liabilities of the selling company. These liabilities may include payables and period expenses, bank debt or loans from other lenders to the selling company.

The buyer will often assume the name of the old company to maintain business continuity. This means you will have to change the name of your old company once the business has been sold.

Under New Hampshire law, asset sales require the approval of the directors and those shareholders holding a majority of the voting shares of the company. If your company has minority shareholders who object to the asset sale, they may have a legal right to be paid the 'fair value' of their shares rather than to take the price they would receive in the transaction. Many other states have similar requirements.

Since an asset sale involves the outright transfer of assets and assumption of liabilities, you and your counsel need to screen existing contracts and agreements quite closely to determine the procedures for obtaining consent of third parties such as lenders, customers or suppliers. Many bank loans, licenses and other business agreements contain some form of

restriction on their transfer or prohibition against assumption of debt by third persons without prior consent. Attempting, for instance, to 'assume' a bank loan without obtaining the lender's approval is almost always an event of default, allowing the lender to accelerate the note.

In an asset transaction, the purchase price is paid to your company, not to its shareholders. The company then pays its tax liabilities and any remaining creditors, and distributes the balance to the equity holders.

■ SHARE SALE

Here, none of your company's assets or liabilities are transferred or assumed; they remain with the company. However, you and the other shareholders sell all of your shares to the buyer, and that is how the buyer obtains control of the business. Even though the assets are technically not transferred from the original company, many of its contracts or operating permits may treat a 'change of control' of the company as equivalent to a prohibited assignment of a contract or assumption of debt. If so, this again requires review or consent by the contracting party before completing the transaction, so the buyer will be looking for many of the same assurances as in an asset sale.

If the acquired company has more than one shareholder, usually all of the shareholders must participate in the sale. If some shareholders are unwilling to go along, there are legal procedures to compel their cooperation. These procedures also require action by the directors and shareholders of the acquired company, and trigger the same minority rights to ask for the 'fair value' of their shares. Furthermore, some buy-sell agreements amongst shareholders contain so-called 'drag-along' provisions that require minority shareholders to join in a sale of stock that has been endorsed by the majority shareholder.

In a share sale, the shareholders and not the company receive the purchase price directly.

■ MERGERS

This is a legal process by which two or more companies are combined, with only one of them remaining in existence after the process is completed. The merged company ceases to exist. The surviving company automatically acquires all of the assets, liabilities and operations that were owned by any of the original companies before the merger. Again, many agreements and licenses will require approval from third parties before the merger is completed.

For New Hampshire companies, a majority of the voting shareholders of each of the participating companies must approve the merger. Again, many other states have similar requirements, and minority shareholders may have the right to object and to be paid the 'fair value' of their shares.

In a merger, as in a share purchase, the equity holders receive the purchase consideration directly.

DUE DILIGENCE

Once the letter of intent has been signed, you and the buyer will begin the due diligence phase of the transaction.

This is an in-depth investigation of all the things the buyer thinks s/he needs to know before making an irrevocable commitment to the deal. Most often, this will involve physical and environmental inspection of the real estate (owned or leased); inspection of important equipment; review of patents and trademarks; review of the seller's books and records by the buyer's accountants; contact with key employees, customers and suppliers to make sure they are satisfied with their dealings with the company and will be willing to work with the new owners after the closing; review of the corporate records of the seller, to make sure the buyer is in fact dealing with the people who presently own the business and have the right to sell it; review of significant contracts, orders, leases or licenses and permits of the business; a

study of your company's pension and employee benefit plans; a review of inventory to determine its overall condition and if there is insufficient or excess stock on hand for operational needs; analysis of insurance coverage for the business; and, at some point, an actual audit of its financial condition at, or close to, the closing date.

Quite commonly, there are matters you wait to disclose until you are sure the deal will go forward. These may include the identity of key customers, or price and terms for their work; trade secrets and shop knowledge; source codes and other intellectual property rights; sources of supply and purchase terms; or access to key employees and information about the terms of their employment. Procedures can be worked out to make the disclosures anonymous (for example, substituting the letter 'X' for the name of a key customer) or delaying disclosure until everything else is in order.

The due diligence investigation can be time-consuming. You and other managers or executives will receive a stream of requests for information. In most cases, buyers understand the need to prioritize the business considerations over their requests for information, and will do what they can to accommodate you, but some level of disruption is inevitable. It's inherent in the process. You should be very careful, however, to make copies of everything you give to the buyer, for your records and your lawyer's.

PURCHASE AGREEMENT

This is the formal legal document that sets out the final transaction between the parties. It is detailed and comprehensive, and is prepared and negotiated following signature of the letter of intent, quite often during the period when the buyer is conducting due diligence. When it is signed, it should supersede the letter of intent.

In some deals, it may be necessary to sign first and to close later. For example, the buyer may need to obtain the consent of a major customer, or to apply for an operating license, and you may not want that contact made until you know you have a binding commitment from the buyer. Many other purchase agreements may be signed on the very day of closing - there is no time gap from signing to closing. In these cases, the agreement will be somewhat simpler.

These are some of the major provisions you may find in the agreement, with a general explanation of the functions they fulfill:

■ WHAT ASSETS ARE BEING PURCHASED?

In a stock or merger deal, it's the shares. Ownership of the shares automatically carries with it ownership of all of the company's assets, so if you wish to retain certain assets, you have to identify them and make provision to remove them from the company. Otherwise, the buyer of shares receives everything.

In an asset purchase, the buyer doesn't acquire the shell of your company, it acquires specific assets, so there will be a description by categories and in further detail of the various assets being purchased, along with a list of asset groups which are to stay with you (cash, for instance - why pay cash for cash? And why would a seller sell cash in return for an installment note?).

The burden is on the buyer to be specific about what is expected. Anything not included will remain with the old company, which you continue to own. That's why many asset agreements contain so-called 'dragnet' provisions, transferring to the buyer "all assets used in or useful to the business operations". That shifts the burden to the seller to determine what it is that he wants to retain or exclude from the deal.

■ WHAT LIABILITIES ARE BEING ASSUMED?

In general, the same rules apply here, as well. In a merger or share purchase, the buyer automatically inherits *all* obligations, including contingencies like warranty claims, tax liabilities and patent infringement suits. In those

transactions, the burden of identifying what it *won't* assume falls on the buyer.

In an asset purchase, the roles are reversed - you remain liable for all debts that are not specifically assumed by the buyer, so your agreement must be quite clear about what the buyer will be responsible for. Otherwise, the obligations which the buyer does not assume remain with the old company. Since, in an asset sale, the proceeds of the sale usually go first into the old company, which was the seller of the assets, creditors can collect their debts from the sale proceeds before anything is distributed to equity holders.

It may be important for you to evaluate your buyer's creditworthiness if she is assuming your liabilities. The fact that the buyer assumes them doesn't discharge your company's obligations to the creditor (unless the creditor agrees to it), so the creditor will still expect your company to pay if the buyer doesn't.

Even if a buyer doesn't specifically assume certain indebtedness – for instance, a loan to the company by a friend or relative – it may still want assurances that *you* will pay it. That is because there are some circumstances in which a buyer of a business may automatically inherit the liability despite what the contract says, under what is called 'successor liability' theories. Furthermore, your failure to pay a creditor may mean that the creditor won't deal with the new buyer. Therefore, a buyer may insist on holding back a portion of the sale price to pay the debt off if you don't.

WHAT IS THE PURCHASE PRICE AND HOW IS IT PAID?

The price and mode of payment will be set in the preliminary negotiations, unless there has been a change in the deal along the way. Cash payments are usually made by wire transfer at closing, less often by check. If the price is to be paid over time, a promissory note will be delivered at closing, along with whatever guarantees, letters of credit, mortgages or other security have been agreed to by the parties.

If the buyer is issuing shares to acquire your assets or your shares, they will be issued to you at closing. Share-for-share and share-for-asset transactions are substantially more complex, but under the right circumstances, these transactions will, in effect, permit you to reinvest your sales proceeds without having to pay any federal tax until you dispose of the buyer's shares.

Quite commonly, a portion of the purchase price will be held aside in escrow pending the post-closing audit or as a pool for any indemnity claims; these are discussed on the following pages. Buyers require an escrow to make sure funds are readily available for these purposes but, in most cases, your overall responsibility for claims isn't limited just to what is in escrow. Escrowed funds are usually held by a third-party bank, which will invest and distribute them among the parties and the bank in accordance with an escrow agreement. The escrow agreement will set out precise procedures for the bank to follow regarding investing and distributing the funds, and will provide for payment of the bank's fees.

POST CLOSING AUDITS

Most (but not all) transactions predicate the initial purchase price on the company's balance sheet and results of operations at some date prior to actual closing, and require price adjustments to reflect changes in the period from that date to the actual closing. The parties will previously have agreed on a target net worth or some other financial standard that has to be met or exceeded at closing in order to support the agreed-upon price. The accountants for the parties come into the business immediately after closing to make a formal audit as of the closing date, from which the parties draw a final figure. If this figure varies from the target figure the parties agreed on, there are upward or downward price adjustments. Upward adjustments represent an increase to the

purchase price, to be paid by the buyer. Downward adjustments represent a reduction in price usually paid from either the escrow, or by the seller returning a portion of the purchase price.

These adjustments can be satisfied either by adding to or subtracting from the cash or deferred payment elements of the deal. Negotiation between the parties establishes precisely how these adjustments are to be made.

The agreement will contain detailed procedures for how the audit is to be conducted, and how disputes are to be resolved if the parties disagree on the result. Once the final net worth is determined, it also states how and when the adjustment is to be paid by one party to the other.

WARRANTIES AND REPRESENTATIONS

These are a series (sometimes a very long series) of promises that you will be asked to make to the buyer that all material facts concerning the business have been disclosed to the buyer, and that its operating history and present status are in 'apple pie' order. A typical warranty is what amounts to your promise to the buyer that there are no liabilities of the company existing as of closing, besides liabilities set out in the last audited balance sheet, or normal business obligations incurred since that date.

Very few deals close without any express warranties in the agreement. Generally this occurs only when the seller has substantial leverage and, even then, the law may imply that the seller has the responsibility to tell the buyer about matters known to the seller that are material to the business.

Warranties often refer to schedules. These are attachments to the agreement that either set forth a fuller description of items the buyer is inquiring about, and that you are describing in the warranty (the specifics of existing leases, for example); or they disclose matters that are exceptions to the warranty. For instance, there may be a warranty that there is no pending litigation against your company "except for matters listed on Schedule [X] to this agreement". If the company is being sued at the time, the pending lawsuit would be disclosed in some detail on the schedule as an exception to that warranty. Think of warranties as an x-ray of your business. The warranties may reflect a great deal of the information about your company that you made available during the due diligence process.

If the purchasing company is paying cash, it often gives a smaller number of warranties. However, if the buyer is paying over time, or paying in its own shares, the seller should be at least as interested in the buyer's affairs as the buyer is in the seller's. A publicly-owned buyer will simply cross-reference to its public filings with the SEC, which are required to be complete and accurate, and to include all material information. On the other hand, a private buyer that is paying in installments, or that is issuing its shares for your company (which is quite unusual) should be expected to disclose its finances and operations in some detail.

COVENANTS

Covenants are promises concerning future action that are legally binding. If you breach a covenant prior to closing, the buyer may be able both to terminate your deal and to sue for damages incurred through your breach. Damages may include anything from invested legal and accounting fees to the loss of the anticipated bargain. These covenants should be taken seriously by sellers.

There are two kinds of covenants. So-called pre-closing covenants are included where there will be a time gap between signing the contract and closing the deal. These are a series of continuing commitments that the parties make to each other concerning what they will and will not do during the period from the signing of the contract until closing. You may be asked to

commit that you will run the business in its historical fashion, and do the best you can to preserve relationships with customers, vendors and employees. If certain key contracts require the consent of the contracting party to transfer, you will be asked to devote good faith efforts to obtain that consent. The buyer will want continued access to the business, and to be kept informed of important business developments and results of operations. You may also be asked to refrain from major changes in the business - dividends or unusual salary increases - pending the closing. You should be prepared to negotiate specific exceptions – if, for instance, the company has excess cash that everyone agrees may be retained by the shareholders.

Other covenants may be required even where there is no time gap, because they are promises about how the parties will conduct themselves *after* closing. These are often referred to as post-closing covenants. For example, buyers require what are called "covenants of future assurance": if the buyer later identifies a document which was missed at closing that the buyer needs in order to obtain complete title to the assets, you are obligated to sign it. Non-competition and non-solicitation covenants are common, if not universal, in these transactions. Most buyers are not interested in paying a business owner for the privilege of competing with him for the customer base after closing.

■ CONDITIONS

There are occurrences that neither party can fully control, but which - if they do occur - will relieve one or both parties of the obligation to go forward. These are referred to as 'conditions' to that party's obligation to proceed with the deal.

One example: you are selling a government-regulated company. The agreement states as one of its conditions to the buyer's obligation that there be no material adverse change in the applicable regulations by an agency with oversight for the business in a way that makes doing business more difficult or costly. After the agreement is signed, the agency that regulates the business tightens the standards for inspecting its product before release. The buyer can terminate the obligation to complete the deal, if he thinks it appropriate to do so. However, you are not legally responsible or liable in any way for this change. You simply lose your deal. This isn't a breach - it was out of your control.

Not infrequently, a buyer will ask for a financing condition - that is, that it not be obligated to go forward if it can't get the debt or equity financing it needs to close the deal and operate the business. In such a case, you may ask for a non-refundable deposit to compensate you for the uncertainty these conditions create.

If the parties need consent or approval from third parties or government agencies before they close, a process neither can control, this section will discuss those specifics. The buyer may also ask for an 'out' if there is a "material adverse change" in the business operations or prospects between signing and closing.

One example of a "material adverse change" would be where a major competitor enters the market with a new product that obsoletes your product line. General changes in economic conditions or in your company's market sector are generally not sufficient to terminate a buyer's obligation.

■ ESTABLISHING THE CLOSING

The agreement will state where and when the meeting will be held for signing the documents to transfer ownership, and for paying the purchase price. This meeting is called the 'closing'. This section of the agreement also describes the various other documents necessary for closing: employment and non-competition agreements, leases and the like.

■ INDEMNITY

Indemnity is the process through which you

agree to make the buyer whole if one of your warranties doesn't hold true, or if you fail to do something you promised to do in the Agreement. Quite often, your responsibility will not be limited to the portion of the purchase price you deposited in escrow.

There is often a 'threshold' for unknown claims, which is like a deductible in an insurance policy. If the total of all claims that are discovered after closing doesn't exceed a certain amount, they are essentially ignored, and the buyer absorbs them. It's part of the business risk. Above that level, you must pay claims, either from the escrow or, if the escrow has been dissolved or fully utilized, from your own funds. Some agreements provide that the seller is responsible for all claims (and not just the excess over the threshold) if the threshold is exceeded.

The agreement usually sets time limits on this indemnity obligation. Any escrow fund usually is distributed (to the extent it hasn't already been applied to claims) within 6-15 months after closing, at the latest. Some escrows begin to dissolve shortly after closing.

But termination of the escrow doesn't mean that your personal responsibility for any excess automatically terminates at the same time. Escrows are simply mechanisms for segregating funds that may be needed to satisfy a legal obligation. There is a separate time period for measuring how long your underlying responsibility remains. This period is called the 'survival period'. For normal claims, 12-24 months is common. There are longer survival periods for environmental or tax liabilities.

If particular problems (like pending litigation or a defective roof) were identified in due diligence, they may be handled differently. There often is no deductible for these claims; you simply are expected to set them right. There is no time limit, either, since the claim is known at closing and there is no uncertainty as to what should be done. A separate fund may be set aside to cover the cost of identified problems.

You may set a maximum amount you will be willing to indemnify for - usually a percentage of the overall price. There will also be a statement that the procedure in the Agreement is the only recourse the buyer has for problems with the business, unless there is fraud involved in the transaction. The indemnity section will discuss a number of other specifics, all of which essentially bear on when the buyer can recover from you if things go wrong, and how much can be recovered.

■ TERMINATION

The agreement will state when and under what circumstances a party can terminate his/her obligations to proceed with the deal - for instance, if the other party breaches some obligation owed to her. The agreement may also terminate if the deal hasn't closed by a certain date, despite the best efforts of the parties to satisfy all conditions.

CONSENTS AND APPROVALS

In any particular case, the buyer may need special licenses before taking over the operation. Other licenses may simply be assignable without review. This will vary from case to case.

Certain very large transactions require what is called pre-merger notification to the Federal Trade Commission (FTC) under the Hart-Scott-Rodino Anti-Trust Improvement Act of 1976. The rules are quite complex, and are very fact-dependent, but stated broadly, filing will be required in any sale of a manufacturing company where one of the parties has total assets or total revenues in excess of $10,000,000, the other has total assets or total revenues in excess of $100,000,000 and, as a result of the transaction, the buyer owns more than $50,000,000 in value of your company's stock or assets. The compliance process requires fact-finding by attorneys and in-house people to

complete the application that is to be submitted.

There is a substantial filing fee, which the buyer pays (unless it has negotiated reimbursement from you). The FTC has 30 days to consider the application, although it can, if asked, grant 'early termination' in a shorter time period. The parties are free to close if the FTC grants early termination, or if the 30 days runs out without a request for further information from the FTC. There are very heavy penalties for ignoring the statute. The process is confidential, unless you ask for early termination. Then, the FTC will publish notice in the Federal Register.

If the company possesses technology with defense applications, and there is non-U.S. ownership of the buyer, the parties must give advance notification to the Department of Defense under the Exon-Florio Act. In a number of other industries, there may be special clearances required from governmental agencies.

As discussed above, consents may also be required to transfer contracts with or orders from private parties.

CLOSING ACTIVITIES

The final meeting is often a flurry of confusion and document-signing, followed by inactivity. Most deals involve a large number of moving parts, not all of which are controlled directly by the people in the room. Deeds and mortgages must be recorded. Money must be wired. Licenses must be re-issued to the new owner. Last minute questions must be resolved ("What are we going to do about the big order that was just canceled?"). Check-signing authority must be changed. Somehow it all gets done - most of the time. The attorneys can keep the delay to a minimum by holding a pre-closing in the day or so before the final closing, to take care of secondary paperwork and to streamline the final steps.

CONCLUSION

This discussion is based on what this author has experienced in many transactions over many years. There is only one universal rule, however - every deal will be different, and many of the issues we've discussed may not come up at all, or may require a different resolution, and many things can come up which I haven't tried to deal with. I hope that the reader will come away with a sense of what she may encounter, so she can more comfortably make decisions when the time arises. Needless to say, it is not advice for how a particular deal should be negotiated or structured. Only a team of experienced professionals working with you can provide that.

As I mentioned at the outset, the potential emotional impact of selling a company can't be overstated. It can be substantial. Many buyers simply don't understand this dimension, or can't recognize how important it is for them to show respect for your accomplishments while at the same time protecting their legitimate interests. Questions and concerns from the buyer can be perceived as basic mistrust for your competence, or even your integrity. In most cases, they shouldn't be.

Nothing can or should diminish the importance of this emotional dimension. But critical business decisions shouldn't be made amidst your strong personal reactions to a particular incident. You wouldn't run the business that way day-to-day, and you shouldn't sell the business that way, either. The support of sophisticated and experienced professionals can help keep the transaction on a proper professional footing. In the final analysis, both you and the buyer have a shared goal - to bring the transaction to successful completion on mutually agreed-upon terms. When that happens, everyone is a winner.

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