ISSUES TO BE CONSIDERED PREPARING A CLOSELY HELD COMPANY FOR A SALE PROCESS

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I. Overview.

There are a number of reasons the owner or owners of a business may make the decision to sell. This may be due to changes in ownership caused by death or divorce, the desire of the owner to retire, a change in the future plans of one or more of the owners, lack of succession planning, disagreements in management due to disputes or otherwise, a change in the risk profile of the business or the owners, a need for liquidity, or a strategic decision to sell due to a change in the market, just to name a few.

The purpose of this outline is to provide a list of some of the issues a client which is a proposed seller of a closely held company may need to address in connection with the process of preparing their business for sale.

NOTE: Throughout this outline reference is made to the "client". As discussed below in transactions of this nature the client may be the company selling assets or one or more persons selling an interest in a business entity. This will be an important distinction, in particular as it relates to who is the "client". For the purpose of this outline we use this term generically for both situations, and, in certain cases have pointed out where conflicts may arise.

We have broken the list into the following categories:

1. ***Determine the reason for the sale***

2. ***Establish preliminary expectations***
   a) *Sales price*
   b) *Post-sale involvement*
   c) *Management and employees*

3. ***Build a Team***
   a) *Sales Representative/Broker/advisor*
      (1) Broker
      (2) Valuation expert
   b) *Attorneys*
      (1) M&A
      (2) Tax/Deferred Comp
      (3) IP
      (4) Labor and Employment
      (5) Real Estate
   c) *Accountants*

4. ***Consider the Deal Structure***
   a) *Sale of equity interests in an entity*
   b) *Sale of assets*

c) *Tax issues relating to deal structure*

5. ***Determine the Authority to Seller and the Decision Makers***
   a) *Legal requirements*
   b) *Conflicts of interest*
   c) *Confidentiality*

6. ***Determine Post-Sale Involvement with Business***

7. ***Confidentiality, Non-disclosure and Non-Solicitation***

8. ***Preparation of Due Diligence***

9. ***Building the Data Room***

10. ***Operating in the Ordinary Course and Corrective Actions.***

II. Reason for the Sale. The reason for a client's sale of the business may be the single most important matter to fully understand before the client begin the sales process. During the sale process the seller will be confronted with a number of issues to be considered, some of which may have been anticipated while others have not. The decision to sell is often a very emotional decision. Along with the emotional aspect of the sale, the seller will also be confronted with the economics of the transaction, the parsing of risk, and the impact the sale may have on a seller and the employees on a going forward basis. Each of these factors may take on a different level of importance depending on the facts and circumstances surrounding the sale.

With every step taken toward the pursuit of the sale, the client should always consider, and reconsider, what is truly driving the sale. Through this thought process, the client will be able to make certain that the decision to sell remains appropriate in light of the path the sale may be taking. These motivating forces should act as a touchstone as a seller considers each of the matters discussed in this outline.

Sometimes, the best decision relating to a sale is the decision to not sell at all. This is often referenced as avoiding "dysfunctional momentum". Dysfunctional momentum is said to occur when people continue to work toward an original goal without pausing to recalibrate or reexamine their processes, even in the face of cues that suggest they should change course. Often the best advice a lawyer can provide to a client is to step back, re-assess and re-confirm they are on the right path.

III. Establish Preliminary Expectations. In determining whether a client wants to sell the business, the client should establish a level of "expectations" as to what a sale is to provide. The expectation that most immediately comes to mind is "price", that is, what is the client's expectation as to what they will receive in economic value from the sale. On its face this may seem somewhat simple. Most selling parties have spent some time in the industry of which they are a part and have heard, directly or anecdotally, the price others may have been able to obtain from what appears to be a similar sale. These expectations, however, can be appropriately managed with the advice of advisors the client may assemble to assist with the sales process. However, this process is often

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