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Advising a Closely Held Client on a Merger or Acquisition

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PRIVATE COMPANY MERGERS AND ACQUISITIONS
A Summary of General Considerations for Advising Sellers and Buyers

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This outline summarizes my thoughts regarding certain important considerations associated with advising sellers/owners and buyers/investors in connection with a possible sale or recapitalization of a private target company in the middle market (which generally is referenced in terms of companies that earn between $10 million and $1 billion of annual revenue), with an emphasis on companies in the lower middle market (which generally is referenced in terms of companies that earn between $10 million and $100 million of annual revenue). See, D. Farren & A. Makhija, The Middle Market is Stressed, But Resilient, Harvard Business Review (03/08/2021), A. Hayes, Middle Market Firm, www.investopedia.com (05/17/2022). The specific considerations that are most important for any particular transaction (including considerations that are not discussed in this outline) will depend upon the particular facts and circumstances associated with the transaction. This outline generally is organized in terms of a transaction life cycle (and the rough order in which issues tend to arise), and tends to focus on considerations from the seller's/owner's perspective.

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[1] I would like to acknowledge and thank my partner Mandy Diaz, who has co-authored numerous papers with me some portions of which found their way into this outline. However, she has no responsibility for any errors in or shortcomings of this outline. Those are all mine alone.

A. Pre-Transaction Planning. The most successful transaction processes generally involve participants who have planned for and taken steps to participate in a transaction process well before the transaction process is initiated.

1. Pull The Team Together. It takes a diverse team to buy or sell a business. Investors who actively participate in the market for middle market target companies (for example, private equity funds and family offices (sometimes called financial buyers) and their portfolio companies) typically have sophisticated acquisition teams in place before entering into a transaction process. Owners, on the other hand, often do not have sophisticated transaction teams in place before entering into a transaction process. They often (though not always) have a sophisticated operational team in place that drove the success leading up to the point of determining that a transaction may be appropriate. However, selling a business is very different from running a business, and requires a specialized set of skills and understanding in order to be done well. The sooner that an owner accepts the need for a sophisticated transaction team, the more likely a transaction process will be successful. A standard transaction team for an owner will include most if not all of the following members (and may need to include other specialists depending on the circumstances):

(a) Investment Bankers. Every owner who wants to sell a business, or is deciding whether to sell a business, should thoughtfully consider engaging an investment banker to guide the process. An experienced investment banker can help prepare a business to endure a sales process, analyze the valuations that a business is likely to attract from investors, create a competitive bidding environment, and help identify a suitable investor. My anecdotal experience and view is that the help of an appropriate investment banker is invaluable in most every instance. That applies for many investors as well, particularly an investor who wants to enhance the opportunities to source target companies on a priority basis.

(b) Accountants. The owner's team needs to include accountants, both financial and tax, who are experienced in selling businesses. The issues that arise in connection with selling a business generally are different from the issues that arise in connection with ordinary compliance matters. Oftentimes the accountants who have historically handled compliance matters for a business will also have appropriate experience selling businesses. However, if they do not, it is important to consult in accountants with appropriate experience selling businesses.

(c) Insurance Advisors. The owner's team should include a knowledgeable insurance agent, who hopefully is (but does not need to be) the legacy insurance agent for the business. It is important to review the nature and extent of insurance and bonding arrangements applicable to the business, and ensure that appropriate coverage will be in place at and after the closing of any transaction. It also can be helpful to include an advisor who understands transaction insurance (such as "Representation and Warranty Insurance") as part of the team in order to evaluate and/or prepare for the use of such insurance in any transaction.

(d) QOE Advisors. It can be helpful for the owner's team to include advisors who specialize in preparing "quality of earnings" ("QOE") studies/reports, which often are required by investors (and their lenders or financial sponsors), in order to anticipate and address issues that may arise in connection with the investor's financial due diligence process. Appropriate

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