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### **Early Planning For An Exit Transaction**

Basic premise is all of the issues outlined below are best reviewed and where possible addressed (either by solving or by developing an explanation to assure Buyer you have the issue managed) well in advance of going to market. Some of these items that involve issuances or transfers of equity (estate planning; incentive compensation; dissident stockholder(s)) are more effective if addressed well in advance of going to market; others are best resolved without having Buyer's counsel involved (which can ultimately unintentionally shift leverage), or possibly even having to be made aware of the issue. One of the worst things that can happen in the due diligence process is for Buyer's counsel to discover issues that the owner and/or owner's counsel was not aware of. At best this can lead to difficult negotiations over representations and warranties and indemnities and at worst it can cause a Buyer to question the quality of the potential investment opportunity and move on to others.

1. Review Owner(s) Estate Plan
  - Gifting options
  - Transfer value at pre-market discounted valuation
2. Review Stockholder Agreement.
  - Any issues to address/resolve (drag/tag along rights)?
  - Any dissident stockholders to deal with?
3. Review Employees Issues
  - Consider new incentive compensation for key employees to retain through sale; or even post sale (to protect earn-out; seller notes). Can also be used as new consideration if you need to put Non-Competes; Non-Solicitations in place with key employees (stay bonus; equity based)
  - Employment Agreements (are they in place? will buyer want?)
  - Any deferred compensation plans that will be triggered by the sale?
  - Non-Compete Agreements
  - Non-Solicitation Agreements
  - Assignment of Inventions Agreements

- Develop strategy for communications with employees
  - Union issues
  - Warn Act
4. Review Material Contracts – Develop Data Room
- Any issues (better to identify and resolve before buyer’s review)
  - Anticipate necessary third-party consents and develop strategy
  - Develop strategy for communication with customers
5. Review IP Issues
- Fully protected?
  - Any risk of infringement?
  - Any inbound licenses needed?
6. Environmental Issues
- Any recent Phase I’s?
7. Regulatory Issues
- Any licenses or certificates to be transferred?
  - Any consents/approvals required?
  - Any compliance issues/history to be addressed?
8. Anti-Trust Issues – analyze based on size of deal and size of target.
9. Tax Issues
- Confirm validity of S-election, if applicable and conduct due diligence to ensure still valid. If not, consider corrective action with IRS (can take several months).
  - If the Company has not always been an S, did it elect within the last 10 years?
  - Will a Section 338(h)(10) election add value to a Buyer and can that be factored into the purchase price?
    - Is there significant appreciation in assets over the tax basis of the assets based on purchase price and the Buyer can then amortize the assets, creating a tax shield. We would normally do a mock-up of the possible benefit in advance of going to market so that the Company and the bankers can decide how to “sell” it to the possible bidders.

- Will the (h)(10) election have additional tax cost to the sellers?
  - If the Company made the S election within the last 10 years, there may be a corporate level tax due if the election is made.
  - Do the holders have “historic” basis or did they inherit the stock (and thus have a high basis) or buy the stock thus have a high basis? A high outside basis in the stock can cause a mismatch of capital gains and ordinary income.
- State and local taxes can be significantly more in an (h)(10) sale.
- We would normally do a mockup of the cost before going to market so it can be factored into the pricing.