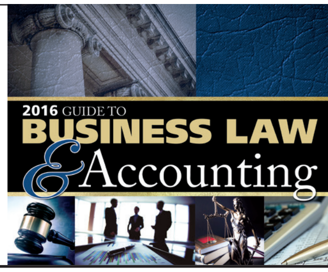
ROCHESTER BUSINESS JOURNAL
RBJ



SMALL BUSINESS

VOLUME 32, NUMBER 9 WWW.RBJDAILY.COM JUNE 3, 2016

Preparing for Investment or Sale

Laying the groundwork for an investment in or the sale of a small business can seem like a daunting process. Owners and management have to continue to focus on the day-to-day operations of their company, and the time and effort it takes to prepare a business for investment or sale can seem like a second full-time job. However, there are steps that a business owner or manager can take in preparing the company to make the process easier and ultimately maximize the value of the business.

The first step that management of a business should take when it decides to sell or involve an outside investor is to surround itself with a team of experienced advisors who will help see the company through the process. This team may include accountants who can assist the company in preparing its financial statements and projections, in valuing the business as a whole, and in preparing documents for the due diligence phase. It may include lawyers, who can assist in drafting and negotiating the key contracts in the sale of or investment in the business, facilitating the due diligence process, and addressing certain issues that may arise, including tax, intellectual property, real property, labor and employment, or environmental issues. It may also include investment bankers or brokers, who can assist in identifying potential buyers or investors, in valuing the business as a whole, and in marketing the company.

Another critical step in the preparation process is for the company to complete its own internal due diligence process to review its corporate documents, financial statements and other important records before allowing any potential buyers or investors to access such documents. Potential buyers and investors will review company records in depth so they can evaluate the value of the company and any risks associated with buying or investing in the business. Taking the time to ensure that these records are organized, up-to-date and in order before buyers or investors get involved will ensure

PROFESSIONAL OPINION

Christopher R. Rodi, Esq.
Partner

Jamie K. Winnick, Esq.
Associate
Woods Oviatt Gilman LLP

that the external due diligence phase goes quickly and smoothly, allowing management to continue to run the company instead of devoting all of their time and effort to the external due diligence process.

This organizing and cleaning up process can touch all aspects of the company. A primary area of focus should be ensuring that up-to-date financial statements that accurately reflect the income and expenses of the company exist. The company should confirm that proper documentation exists for all issuances of shares, stock options, or other equity interests. It should also include a confirmation that copies of key executed agreements exist, including employment agreements and customer and supplier agreements. The process may also include confirming that accurate minutes exist confirming shareholder and board meetings to document prior company actions.

Depending on the type of business, the cleaning up process may need to include confirmation that valid intellectual property

assignments exist from employees and contractors to ensure that the company owns the rights to its intellectual property, including patents, trademarks or copyrights. The company may also want to conduct a lien search to determine if there are any outstanding liens against any of its assets. The company may also review any of its permits or licenses required to conduct its business and make sure that they are valid, in effect and up-to-date.

The company should also review any potential or actual litigation claims against the company, evaluate the risks posed by the claim and determine whether it can be settled or otherwise resolved prior to approaching potential buyers or investors.

Another important area of focus is the rights of any other owners of the company, including minority owners. A careful review of all shareholder, voting and related agreements should identify any purchase or voting rights that exist, including rights to approve an investment or sale. A plan should be discussed on how any such rights will be dealt with in a potential investment or sale.

Depending on the nature and size of the business, there could be additional areas that will be of interest to potential buyers and investors, and require additional focus in this process as well.

The final step is cleaning up issues that are identified in the internal due diligence process. The company should identify and address any issues that arise before seeking out a potential buyer or investor. Resolving these issues early will expedite the external due diligence process, and can even increase the value of the company or make the sale or investment more attractive to a buyer or investor.

For example, part of the process of ensuring accurate and up-to-date financial statements exist may include inventory write-downs, uncollectible accounts receivable write-offs, and cleaning up any loans to and from owners or employees. Reviewing the key business agreements may identify change-of-control provisions, anti-assignment provisions or non-compete provisions that impact the ability of the company to take investments, compete or enter into certain geographical territories or lines or business, which provisions can be discussed or negotiated. The review of existing liens may identify invalid liens from old, paid-off debts that need to be removed. The review of existing permits may identify restrictions on the ability to transfer these permits to a potential buyer, or limitations on who potential owners or investors in the company can be.

The items listed above are only examples of steps that it may take to properly prepare a business for sale or investment. The industry, size and specific interests of the owners may change the areas of focus for a particular company. By thinking about these issues early on and involving a team of advisors who are experienced in sale or investment transactions, the owners and management of the company can ensure that the sale or investment process will go smoothly.

Christopher Rodi is a partner and Jamie Winnick is an associate in the Business and Tax Practice Group of Woods Oviatt Gilman LLP in Rochester, NY. For more information call (585) 987-2800 or visit www.woodsoviatt.com. ■

Christopher R. Rodi, Esq. *Partner*
Jamie K. Winnick, Esq. *Associate*
Woods Oviatt Gilman LLP
585-987-2800
crodi@woodsoviatt.com
Jwinnick@woodsoviatt.com
www.woodsoviatt.com