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■ I RECEIVED AN UNEXPECTED OFFER TO BUY MY BUSINESS. WHAT DO I DO NOW?

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Many business owners have been caught off guard by the receipt of an unexpected offer from a third party to purchase their business. Here are six immediate steps that you should consider taking if this happens to you.

1) Request a letter of intent. If you haven't received a signed letter of intent (LOI) from the prospective buyer, you should request one. The LOI should indicate the purchase price and the other material terms of the transaction. The LOI should also indicate the structure of the transaction (example: stock sale or asset sale), the expected timing of the transaction, and whether the prospective purchaser will need to raise funds from a third party to pay the purchase price. LOIs are also helpful in fleshing out whether there will be an "exclusivity period" during which you will be prohibited from shopping your business to third parties. LOIs are typically non-binding (except with respect to exclusivity as described above), but they are useful in establishing the parameters of the transaction and in identifying the key issues that will need to be resolved.

2) Request the execution of a confidentiality agreement. You should not discuss the possibility of selling your business to any party that has not executed a confidentiality agreement for your benefit. In addition to covering business and financial information about your company, the confidentiality agreement should restrict the prospective purchaser from disclosing the fact that discussions are taking place concerning the sale of the business or the status of any such discussions.

3) Commence seller due diligence. You should begin to identify, with the help of legal counsel, the "diligence issues" that may complicate the transaction. In broad terms, diligence issues are those transaction issues that can be identified by reviewing the seller's business records and contracts. Examples include: (a) the need to obtain the consent of third parties to consummate the transaction and (b) the existence of actual or potential liabilities that may be significant in amount. The prospective buyer will engage in extensive due diligence prior to signing a definitive agreement to purchase your

company, and will seek to resolve any diligence issues that it may identify either through a reduction of the purchase price or through contractual mechanisms. It is advisable for a seller to identify and attempt to address any such diligence issues before they are identified by the prospective buyer.

4) Discuss the offer with your tax adviser. It is impossible to determine whether an offer to purchase your business is attractive without an understanding of the tax liability that you will incur as a result of such transaction. Keep in mind that the structure of a sale transaction can be important in determining the tax consequences of the deal. Accordingly, it may be desirable to make a counteroffer with a more tax-efficient structure after discussing the offer with your tax adviser.

5) Consider whether to conduct a formal auction for the business. Sellers often seek a “market check” to determine if the offer that is on the table is truly the best offer. As a seller, you may be able to conduct a formal auction process where additional prospective purchasers are identified and competing bids are solicited from such parties. You should be mindful that conducting a formal auction process is time-consuming, and the ensuing delay may cause the party that made the unexpected offer to withdraw such offer. If you plan to conduct a formal auction process, it may be desirable to engage an investment banker to assist you with that process.

6) Be mindful of fiduciary duties. If you don’t own 100 percent of the business, you will need to be mindful of fiduciary responsibilities you may have to the other owners of the business. In general terms, fiduciary duties require persons to act in good faith, exercise due care, and refrain from pursuing self-interest at the expense of other shareholders. If a sale of the business is imminent, your fiduciary duties may require you to obtain the highest possible price for the business. You should navigate any fiduciary-duty issues with the assistance of legal counsel.

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