

## Selling a Business in 2013? Here are 10 Vital Steps to Take NOW

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### Introduction

With the holiday season upon us, we turn to thoughts of the upcoming year. Small business owners with a goal of selling their business in 2013 should begin preparing for that transaction now. The following are ten steps potential sellers should put in motion before the end of this year to help ensure a smooth transaction next year.

### 1. Obtain Legal Counsel

Competent legal counsel is of utmost importance in the sale of a business. Most small and mid-sized businesses do not have in-house legal counsel and only work with lawyers when absolutely necessary. For a business considering a sale, it is important that they begin looking at qualified attorneys sooner rather than later. By doing so, you can ensure there is a good match between the attorney and your company. You will also be able to utilize the attorney for guidance in several of the steps that follow. Look for lawyer that both has the knowledge to steer you through the maze of a business sale and also one who fits well with you and your company personally, as a good relationship here is crucial. Do not be afraid to ask for an estimate of what the legal fees will be and ask about flat-fee or other alternative-billing structures.

### 2. Look into Business Brokers (or an Investment Banker)

Depending on the size of the business, either a business broker or investment banker will play an important role in the sale of the business. Generally, small businesses will utilize a business broker, while larger businesses will need an investment banker. While their function of facilitating a sale is similar, these two types of professionals offer substantially different services. A business broker will essentially act in a manner similar to a real estate broker by listing the business for sale, helping find a buyer, and receiving a commission based on the sales price. Investment bankers generally offer a more sophisticated and interactive process, with a more structured approach. Investment bankers also receive a commission based on the sale, but will often also receive a negotiated up-front payment. Retaining a broker or banker is similar to retaining an attorney - meet with several and do not be afraid to ask about fees and for references.

### 3. Ensure Corporate Records are Complete

Prior to closing the deal, you will need to represent that the company is properly organized, in good standing and appropriately capitalized. To make these representations, it is important to actually have all corporate records properly organized and in good order. Many small businesses do not have a system for good record-keeping which can cost time and money to assemble if put off until negotiations are underway. Furthermore, where the company is a corporation, poor record-keeping can be a basis for "piercing the corporate veil," which can open the business

owner up to personal liability for the company's debts. Therefore, ensuring a complete and accurate record of the company's history is in place should begin as soon as possible.

#### **4. Organize and Analyze Contracts**

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Contracts are a substantial asset for many businesses. As such, the purchaser of a business will want to review the company's "material" contracts. While materiality can be somewhat subjective, it is generally best to gather all contracts with key employees and significant customers and vendors. Any and all financing agreements, regardless of amount should also be accounted for. Finally, businesses who work with the government should uncover all of their government contracts. If not already using a contract management system, now would be a good time to begin doing so. Having such a system in place is not only a good business practice, it also demonstrates to potential buyers that the company is well organized. Once the contracts are gathered, a review should be done to determine the *assignability* provisions. Many agreements restrict whether and how the contract may be transferred to another party. Requesting assignability and providing notice can be a time consuming process – something you don't want to be concerned with while negotiating the sale of the business, so getting contracts in order now will save trouble later.

#### **5. Intellectual Property**

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Like contracts, intellectual property can be a substantial asset for many companies. Now is the time to gather the records of all intellectual property assets to ensure that there are no surprises when the buyer does their due diligence. A problem with an intellectual property asset found by the potential buyer can be substantial, cost time and money to remedy, and potentially cause the deal to fall through.

#### **6. Analyze Financial Records**

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Businesses are bought and sold based on their financial outlook. Providing a prospective buyer with accurate and complete financial statements is therefore a prerequisite for any sale. While some buyers will accept unaudited financial statements, depending on the size of the transaction, most will demand audited statements for the past fiscal year, and possibly more. Auditing statements can be a significant undertaking – therefore, the business need to get their house in order now as regards their financial policies and procedures, controls and any issues that could cause a delay in the auditing process.

#### **7. Prepare a Form Confidentiality Agreement**

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Before engaging in any detailed discussions with potential buyers, it is recommended they sign nondisclosure agreements, which will require them to keep all of the information they receive about your company confidential for a period of time and to return all this information if the deal is not consummated. The agreement should also prohibit the potential buyer from soliciting any of your employees should the deal fall through, as they would potentially have access to employee salary information.

#### **8. Consider the Structure of the Deal**

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When it comes time to sell the business, the parties will negotiate a purchase and sale agreement. This agreement can be structured in two primary ways: a sale of the company's assets or a sale of the company's stock. Generally speaking, sellers prefer a stock sale and buyers prefer an asset sale. For non-incorporated companies, the only choice is an asset sale. Those with the choice, however, should discuss with their attorney what the best means of [www.apexcounsel.com](http://www.apexcounsel.com)

sale would be, as this will have an impact on financing, taxes for both parties, and the seller's ongoing liabilities. While this is not the time to fully review this type of agreement, knowing what is in store and what will be expected of you will be beneficial when it comes time to negotiate the numerous provisions in the agreement.

### **9. Consider Means of Financing the Transaction**

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Some sellers will only consider a sale to full-cash buyers, while others may consider accepting stock if the purchaser is a larger corporation. You will also need to think about whether you will offer some means of financing to potential buyers and what the risks are with each of these. Now is also a time to think about whether you are amenable to an "earnout," where a portion of the purchase price is withheld and paid in the future based on the performance of the company after the sale.

### **10. Consider Life After The Business: Continued Employment and Noncompetition**

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Will you want to stay with the company for a period of time after the sale as a consultant to make a smooth transition? Will you want to stay indefinitely as an employee, or do you want a clean break after the deal closes? Depending on what option you choose, employment and/or noncompetition agreements may be necessary. If you would like to stay on after the sale, discuss with your attorney what type of employment agreement would be appropriate. Whether you remain with the company or not, you will most likely have to sign a noncompete agreement which will prohibit you from engaging in a similar business for a certain period of time in the same area as the business you just sold. Start thinking about these issues now so you have a better idea of what to expect when the time comes.

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