BUYING OR SELLING A BUSINESS

STOCK PURCHASE OR ASSET PURCHASE

By Gianfranco A. Pietrafesa

A buyer and a seller of a business often focus on the purchase price, and sometimes they neglect to discuss whether the deal will involve the purchase of stock or assets. In general, a buyer can purchase either the shares of stock from the shareholders of the corporation or the assets of the business directly from the corporation. This article explains the different legal consequences between the two deal structures.

Purchase of Stock or Assets

In an asset deal, the buyer purchases assets from the selling corporation. The buyer can purchase specific assets, with the other assets remaining with the corporation. Even when the buyer purchases "all" of the assets of a business, the selling corporation often excludes certain assets from the deal, such as cash, real estate and vehicles used by the shareholders of the corporation.

In a stock deal, the buyer acquires the corporation by purchasing the shares of stock from the shareholders. Typically, the corporation will distribute its cash and transfer certain assets, such as personal vehicles, to the selling shareholders immediately before the closing.

Responsibility for Seller's Liabilities

In an asset deal, the buyer is usually responsible only for the liabilities that it expressly agrees to assume. The remaining liabilities of the business remain with the selling corporation. In a stock deal, the buyer purchases the corporation, including all of its assets and liabilities. Often, the corporation is delivered debt free at closing, except for trade payables. Although the buyer is not personally liable, the liabilities remain with, and will be paid by, the corporation. The buyer will often require the selling shareholders to indemnify the buyer for certain liabilities, including undisclosed liabilities.

Transfer of Assets

In an asset deal, the corporation will have to transfer title of its assets to the buyer. In a stock deal, there is no need to do so because the assets will continue to be owned by the corporation, which will have a new owner – the buyer.

Third Party Consents

The corporation may have important or favorable contracts, licenses or permits. In an asset deal, the buyer and seller will need the consent of third parties to transfer the contracts, etc. from the selling corporation to the buyer. For example, the landlord must consent to a transfer of a lease from the selling corporation to the buyer.

In a stock deal, there is no need to get the landlord's consent because the tenant will remain the same – the corporation which will be owned by the buyer. Sometimes, however, such contracts, etc. contain change in control provisions requiring the consent of third parties, no matter how the deal is structured.

Conclusion

There are significant differences in the legal consequences between an asset deal and a stock deal, which may affect the purchase price. A buyer and a seller of a business should discuss the structure of a deal with legal counsel before engaging in discussions to buy or sell a business.

For more information on deal structures, or on buying or selling a business, please contact Franco at gpietrafesa@archerlaw.com or 201-498-8559.

Gianfranco A. Pietrafesa is a partner in the corporate group of Archer & Greiner, in Hackensack. Franco represents small and middle market businesses in most aspects of corporate and business law, including business formation, governance, mergers and acquisitions, employment contracts, protection of confidential information, IP licensing, and commercial real estate leasing, as well as litigation involving business divorces and disputes. He is a former chairman of the Business Law Section of the New Jersey State Bar Association and a trustee of the Hudson-Bergen Inn of Transactional Counsel. Franco has taught the mergers and acquisitions transactional skills course at Seton Hall University School of Law, and the law of business organizations at Fairleigh Dickinson University. He is also a frequent speaker and author on the topics of business and corporate law, litigation and legal ethics.

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