

Executive Action Report

FROM THE DESK OF:

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101+ Reasons Why You Will Want to Use a Specialist

The checklist can help you anticipate the problems likely to be encountered in the purchase or sale of a business.

In an ongoing effort to keep clients and fellow professionals informed, the following Executive Action Report written by David Ostrove, an attorney and CPA, is a valuable aid for business owners, as well as for their attorneys, accountants, and other advisors. This checklist is a simple, easy-to-use tool that will help you stay on top of the situation. It tells you what to look for and what to check in order to protect your interests properly.

Preliminary matters. A. What is the date of the agreement? B. Who are the partners to the agreement? C. Is this a sale of stock or assets? D. Have the parties signed a letter of intent?

Assets to be sold. 1. Have you obtained a complete and detailed description of all assets to be sold (real property, personal property, stock, bonds)?

Encumbrances. 2. Is the property to be sold free and clear of all liens and encumbrances? If not, what liens and encumbrances is it subject to?

Transfer documents. 3. What documents will be signed to transfer legal title from seller to buyer?

Purchase price. 4. What is the purchase price?

Terms. 5. What are the terms, down payment, balance of purchase price? Secured or unsecured? If secured, what is the description of the security?

Escrow. 6. Is any part of the purchase price to be escrowed? If so, what are the terms of the agreement?

Closing date. 7. What is the closing date, and where is the closing to take place?

Deposits. 8. Are any advanced deposits to be made by buyer, and are they refundable or nonrefundable?

Standing of Corporation. 9. If seller is a corporation or if corporate stock is being sold, is the corporation in good standing under the laws of its state of incorporation and the states where it's conducting business?

Ownership of stock. 10. Does the corporation own stock in any other corporation, partnership, or other business, or have the power to control any business entity?

Standing of foreign corporation. 11. Is the corporation qualified to do business and in good standing as a foreign corporation in all jurisdictions where its business or ownership of property makes such qualification necessary?

Outstanding stock. 12. How many shares of stock are outstanding and who owns them? 13. Has all issued and outstanding stock been validly issued under state law and is all stock fully paid and non-assessable? 14. Is all stock being transferred pursuant to this agreement to buyer? 15. Are any securities that are being transferred subject to any options, calls, contracts, or commitments relating to any issued or unissued securities?

Corporate charter. 16. Have you reviewed the articles of incorporation and bylaws of the corporation?

Financial statements. 17. Have you obtained financial statements of the corporation? Are they audited or unaudited? Are the financial statements true and complete in all material respects, and do they present fairly the financial position and results of operations of the corporation at the dates of and for the periods covered by the financial statements? 18. Are there any undisclosed liabilities not reflected in the latest financial statements? 19. Are all federal and state tax liabilities current?

Changes since last statement. 20. Since the latest statement submitted to you, has there been any change in the financial position, results of operation, assets, liabilities, net worth, or business of the corporation other than changes in the ordinary course of business that have not been materially adverse? 21. Since the latest financial statement submitted to you, has there been any increase or establishment of any bonus, incentive compensation, service award, or like benefit to officers or employees of the corporation or any salary increase granted to any officer or executive of the corporation? 22. Has there been any significant labor difficulty involving employees of the corporation? 23. Has there been any external event that has materially and adversely affected or might so affect the properties or business of the corporation?

Accounts receivable. 24. Are accounts receivable current? Is there an adequate reserve for bad debts?

Tax return examination. 25. Have you examined the real property tax assessments and the federal and state income tax returns for the last three to five years?

Provision for taxes. 26. Are the provisions made for taxes on the latest balance sheet sufficient for the payment of all unpaid federal, state, or other taxes?

IRS audits of tax returns. 27. Have the federal or state income tax returns ever been audited? 28. Has the corporation entered into any agreements extending the statute of limitations with respect to any federal, state, or other taxes?

Litigation. 29. What litigation, if any, is pending, threatened, or contemplated? 30. Is seller subject to any order of any court, regulatory commission, board, or administrative body? 31. Does the business of seller violate or will it violate any law, zoning ordinance, administrative regulation, restrictive covenant, or judicial or administrative order?

Patents. 32. Does seller own any patents, patent applications, trademarks, registered trade names, or copyrights? Are any of these items licensed by or to seller or corporation for use in the business of seller or corporation? 33. Does the seller have any reason to believe that its operations conflict with, or infringe upon, any patent, patent application, trademark, trade name, or copyright?

Conflict with contracts. 34. Does the sale conflict with any term of any contract or other instrument to which seller is a party or by which any of seller's assets are bound or of any judgment of court? 35. Will the sale result in the creation of any lien or encumbrance upon any of seller's properties or assets?

Board of director's approval. 36. Has the signing of the sales agreement been duly authorized by the board of directors of the corporation?

Right to sell. 37. Does seller have the full legal right to make the sale and deliver to buyer all stock or assets?

Validity of agreement. 38. Is the sales agreement valid and legally binding and enforceable?

Title to properties. 39. Does seller have good and marketable title to all of its property and assets, including real property and personal property, as well as all assets reflected in the latest balance sheet?

Liens. 40. Except for the lien of current taxes not yet due and payable, are the assets owned by seller or corporation free and clear of all liens, encumbrances, claims, easements, mortgages, pledges, charges or encroachments, or imperfections of title?

Leases. 41. Are all leases of real property in connection with the seller's business valid and binding in accordance with their respective terms? 42. Is there any existing default under any lease?

Legal descriptions and serial numbers. 43. Have you obtained a description of all of the property and other assets owned by seller and in current use, including all tangible property--real, personal, and mixed--notes, accounts, prepaid costs, inventory, supplies, leaseholds and leasehold improvements, tools, fixtures, machinery and equipment, vehicles, furnishings and fixtures, claims, contract rights, license, trademarks, trade names, copyrights, patents, books and records?

Manufacturer's representatives' agreements. 44. Does seller have any agreements with manufacturers' representatives or other agents relating to seller's business?

Employment contracts. 45. Are there employment contracts with any officer, consultant, director, or employee of seller?

Selling agent's agreements. 46. Are there any contracts with any independent agents or other persons soliciting business for seller?

Fringe benefits. 47. Are there any plans or contracts or arrangements providing for bonuses, pensions, options, deferred compensation, retirement payments, profit sharing, or any other employee benefit plan for the employees of seller?

Labor union contracts. 48. Are there any contracts or agreements with any labor union?

Leases. Are there any leases of seller's real or personal property?

Agreements for purchase of materials, etc. 50. Are there any agreements for the purchase or disposition of any materials, equipment, supplies, or inventory except for purchase orders and other executory contracts that seller shall describe in a backlog schedule?

Purchase orders. 51. Are there any purchase orders except those received in the ordinary course of business, which have an aggregate contract price of more than \$10,000?

Lien instruments. 52. Is there any instrument creating a lien on any of seller's property or evidencing indebtedness for borrowed money secured by seller's property?

Conflicting contracts. 53. Is there any contract containing promises that will prevent or modify the transactions contemplated by the agreement?

Licenses. 54. Are there any licenses necessary to conducting the business of seller?

Covenant not to compete. 55. Is there any contract limiting the ability of the seller to complete in any line of business or with any person?

Copies of instruments. 56. Are all written instruments in full force and effect, and has a copy of each been delivered to buyer?

Defaults. 57. Is seller in default under any agreement with any party?

Disclosure of relevant facts. 58. Has seller disclosed in writing all facts relating to its financial position, operations, market, or competitive position? 59. Has

seller delivered to buyer all the information that is material to seller's business or proposed business?

Repairs. 60. Has any insurance company or governmental agency notified seller to make any repairs or that any materials or equipment must be installed or removed?

Representation of seller. 61. Is buyer purchasing "as is," based on buyer's own inspection, or based on seller's representations and warranty contained in the selling agreement? 62. Does seller warrant that all machinery and equipment is in good working order and that there are no material defects in the condition of any seller's assets?

Inspection of premises. 63. Have buyer's representatives visited seller's premises and inspected the machinery and equipment? 64. Has buyer had machinery and equipment inspected by experts?

Backlog. 65. Has buyer obtained a schedule of all backlogs?

Status of customers. 66. Has any customer given notice that it plans to reduce or terminate business with seller after the closing date?

List of insurance policies. 67. Has buyer obtained a complete list of all insurance policies in force insuring the assets of seller, products sold by seller, or the lives or health of employees of seller?

Suppliers list. 68. Has buyer obtained a complete list of the names and addresses of seller's suppliers during its last three fiscal years?

Sole source of supply. 69. Has buyer obtained the names and addresses of any sole source of supply of goods or services? Are any alternative sources available?

Labor disputes. 70. Is there presently pending or threatened any labor dispute, strike, or work stoppage? 71. Are seller's employees represented by a labor union or covered by collective bargaining agreements? 72. Is seller in full compliance with all applicable laws affecting its employees, and has it paid federal withholding and other taxes? 73. Are the inventories shown on the most recent balance sheet and those thereafter acquired by seller all usable or salable in the normal course of business? Is the value of all inventories reflected at the realizable market value and do said values reflect seller's normal inventory evaluation policy? Are the inventories reflected at cost or market value, whichever is lower?

Prepaid expenses. 74. Are the prepaid items shown on the most recent balance sheet consistent with past practice, and are they stated in their proper values?

List of reports. 75. Has seller furnished to buyer a complete and accurate list of all reports, including tax returns, filed or required to be filed by seller concerning his business or assets with any federal, state, or local governmental department or agency during the past five years?

Status of pension plans, etc. 76. Has seller furnished to buyer all information with regard to pension matters, including descriptions of all employee pension, profit sharing, stock bonus, and similar plans? Has seller made copies of all such plans available? Have all required contributions to said plans been made in a timely fashion? Do such plans comply with the Employee Retirement Income Security Act of 1974 (“ERISA”) and the Internal Revenue Code, as well as with the State Revenue and Taxation Code?

Marketability of stock. 77. If corporate stock is being sold, does seller have good and valid marketable title to all of the stock?

Standing of buyer. 78. If buyer is a corporation, is it duly organized, validly existing, and in good standing under its state laws, and does it have corporate power to carry on its business as it is now being conducted?

Buyer’s conflicts. 79. Will the signing of this agreement by buyer conflict with any terms of any contract, judgment of court, or administrative order?

Buyer’s board’s authority. 80. Has the signing of this agreement been duly authorized by the board of directors of buyer? Is any stockholder’s consent required?

Securities laws. 81. Does stock sold under this agreement have to be registered under any securities law? 82. Is buyer acquiring the stock only for its own account for investment and not with a view to, or for sale in connection with, any distribution within the meaning of the securities act of 1933?

Buyer’s agents’ inspections. 83. Have buyer’s accountants or other representatives inspected the seller’s properties, books, contracts, commitments, and records? 84. Does seller agree to give buyer’s representatives the opportunity to communicate during normal business hours with seller’s controller, accountants, attorneys, insurance agents, officers, directors, and key employees?

Employment agreements with buyer. 85. Will seller’s key employees enter into employment contracts with buyer?

Operate in ordinary course pending closing. 86. From the time that buyer and seller sign an agreement until the closing date, does seller promise to operate its business only in the ordinary course and in a manner consistent with its current and previous practices?

Covenant not to compete. 87. Should seller sign a covenant not to compete?

Guaranty of receivables. 88. Is seller guarantying the collectability of its accounts receivable?

Termination of retirement plans. 89. Is the pension plan to be terminated before the closing date?

Items needed for closing. 90. Has seller restated all of its representations and warranties as of the closing date?

91. Has buyer obtained from seller a favorable opinion of its counsel with regard to all of seller’s representations?

92. Have any and all permits and approvals necessary to consummate the transaction under local, state, or federal laws been obtained?

93. Have all permits necessary to close the transaction been obtained?

94. Have all licenses necessary for the continuation of seller’s business been obtained?

95. If this is a corporate stock transaction, have all required consents been obtained from the State Department of Corporations and SEC?

96. As of the closing date, has anything happened that renders it impossible or inadvisable for buyer or seller to consummate the transaction?

97. As of the closing, has there been any material adverse change in the seller’s financial statements?

98. As of the closing date, does seller have any reason to believe that any of its customers or suppliers will cease dealing with it after the closing date?

99. As of the closing date, have seller’s key employees made arrangements satisfactory to buyer for future services?

100. As of the closing date, have seller's key employees entered into personal services contracts with buyer?

101. As for the closing date, have any and all leases been properly assigned to buyer?

102. As of the closing date, has buyer complied with all of its promises?

103. As of the closing date, has seller received from buyer a favorable opinion of buyer's counsel as to all of buyer's representations?

104. As of the closing date, has buyer furnished to seller all documents required for the closing?

105. Does seller agree to indemnify buyer and hold buyer harmless from and against any and all damages, losses, and expenses arising out of the operation or ownership of seller prior to the closing date?

106. If buyer intends to make an election pursuant to Section 338 of the Internal Revenue Code, does buyer agree not to seek any indemnification from seller for any federal and state income tax liability as a result of the allocation of the purchase price to assets under Section 338?

107. Is there any brokerage commission, finder's fee, counseling, or advisory fee due to any person, and if so, is seller or buyer responsible?

108. How are legal and accounting expenses to be apportioned between seller and buyer?

109. To whom are notices to be given in connection with the agreement between buyer and seller?

110. Have all of seller's and buyer's written exhibits been attached to and made a part of the agreement between buyer and seller?

111. In what manner may the agreement be amended, modified, or terminated?

112. Has the agreement between buyer and seller been made binding upon buyer and seller, as well as their respective successors and assigns?

113. Under what state's law will the agreement be governed, construed, and enforced?

114. In the event of a dispute under the agreement, will the prevailing party be entitled to recover his court costs and reasonable attorney's fees?

115. In the event of a dispute, will the matter be submitted to binding arbitration?

116. Under what circumstances will a public announcement concerning the agreement be made?

117. If the transaction does not close, have the parties agreed to treat all information obtained by either of them as well as their representatives as confidential?

118. Have the parties agreed that any covenants, indemnities, representations, or warranties of the parties survive the closing and, if so, for what period?

119. May the agreement be assigned by buyer or seller, or both? If so, is the other party's written consent required?

120. Have all tax elections been made in a timely manner?

121. Have all tax permits been applied for and received?

122. Have all federal and state tax identification numbers been applied for and received?

123. Have all closing documents been signed, including documents transferring property or securities?

124. Have all monies been paid by buyer to seller?

125. Has a closing memorandum been signed by buyer and seller, setting forth all persons present and setting forth everything done at the closing?

126. If any monies were required to be escrowed, has the escrow agreement been signed and have the monies been deposited with the escrow agent?

127. Have buyer and seller exchanged a favorable opinion letter from their respective legal counsel?

Dr. L. Nolan Duck, Founder & CEO of DBG Advisors, has 11 years of progressive experience in mergers, acquisitions, with service and communications industries. Dr. Duck has a proven record of selling privately held-companies. He has been a keynote speaker for many organizations and published several articles on businesses acquisitions. Dr. Duck holds a B.A. degree in History with a minor in Finance from the University of Arkansas, Fayetteville, Arkansas, a Master of Divinity, Master of Arts in Religions Education, and a Doctor of Ministry from Southwestern Baptist Theological Seminary, Fort Worth, Texas. He is also a member

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Should you need additional information, or if you would like to arrange for a confidential meeting, please contact Dr. Duck at 972.900.0991. Email nolan@DBGadvisors.com.

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