

M&A Nuggets: Transparency

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Suppose you are in the process of selling your business, and you are aware of an existing issue or a new issue arises that you believe could have an impact on a purchaser's view of your company. Should you disclose the matter to the potential purchaser? The answer depends on where you are in the process of the sale. If you are at the preliminary discussion stage with potential purchasers, none of whom have committed to move forward, then disclosure is probably not called for. Prior to having a committed potential purchaser ready to move forward, many of these issues can be dealt with and disposed of. If, however, you are at the stage at which a potential purchaser is fully committed to move forward to acquire your business, then the answer is yes. You should disclose. The kinds of issues to be disclosed include an existing or new lawsuit, a difficult co-owner or key employee, or a provision in a key third party agreement, such as a right of first refusal, that has to be dealt with. Often, the perception of the severity of an issue is greater than reality. Further, purchasers of businesses are accustomed to hiccups along the way. Some of these kinds of matters may not be able to be resolved before closing and therefore a purchaser will have to deal with them after closing. Being transparent and communicating potential major issues to the purchaser early on allows both sides to determine whether to move forward and, if so, how to address the issue. Waiting to disclose a major issue to a purchaser could cause delays, higher expenses to be incurred and possibly the loss of a deal. A benefit of being transparent is that it engenders in the purchaser a sense of goodwill and fair dealing on the part of the seller. Certainly, throughout negotiations in the sale of a business, there are times when it is best to maintain a poker face and not let the purchaser know your reaction to an issue. In the event of a potentially major issue that the purchaser is likely to be concerned about, however, the chips are off the table and transparency is the better practice.

If you have any questions about this or any other M&A issue, please contact Glenn Solomon at gsolomon@offitkurman.com or 443-738-1522.