Houser Henry & Syron LLP

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Smoothing the Road to Closing

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Opportunities can arise very quickly in business. You may receive an offer to purchase another business or to sell your own; a lucrative promise of investment; a request to distribute a successful product; or you may make a significant sale. Unfortunately, while the opportunity may arise quickly, the road from the initial discussion to finalization of the deal can be a long and frustrating one.

After initial discussions, a deal must be formalized in written terms, agreements signed, and whether by the exchange of money, the investment of a price, or the beginning of a relationship, the parties must reach closing.

In this process there are many tripping points. We have highlighted a few of the 'red flags' which may upset or delay a smooth closing. Miscommunication, renegotiations and disorganization invariably lead to higher professional fees, delays in closing, and frustration.

These are steps business people may take to encourage smooth progress along the road from initial discussions to closing:

1. Know what you want to gain from the deal

If you don't know where you are going, it is always harder to get there! When you have clear intentions, you can tell your advisors what terms are essential to the deal and what can be compromised or adjusted. This will reduce both time and professional fees because it means your advisors can actively negotiate terms on your behalf.

2. Settle the business terms at an early stage

You should consider have a simple "letter of intent" to confirm the fundamental terms. A letter of intent can reduce the work required to produce the final agreement by serving as a foundation for the agreement and a framework for its terms. You should bear in mind those terms may evolve before closing.

3. Maintain open and honest communication

No matter how attractive a deal may be if you do not trust the other parties to do what they propose to do, then it is better not to get involved. If there is no trust, the transaction is unlikely to end well.

Even the best advisors cannot substitute for a solid and shared understanding between the parties. If differences or issues arise, they may sometimes be more quickly addressed through direct communication than through advisors.

4. Arrange your financing well in advance of closing

At an early stage you should ascertain whether or not you will require financing. If you require financing from a financial institution, such as a bank, it can often take weeks for the financing to be arranged. Further, if we receive unclear, lengthy or late instructions from the bank (for a mortgage, for example), then closing may need to be delayed until we can fulfill the bank's requirements.

Often banks will require extensive documents to be prepared, reviewed, and signed.

This takes time. Ideally, all this would be settled well before closing. If so, on the day of closing funds can be advanced without any problems.

5. Tidy up contingencies early

Third parties not directly involved in a deal often do not see the deal as a priority. They may not move as quickly as you would like. If there are third parties whose consents are

required, such as landlords for the assignment of leases or creditors confirming a description of their collateral, you should ensure they are kept informed about closing dates and what they are expected to deliver. It is important to engage with third parties quickly. This will ensure their co-operation before closing. Any other conditions should also be addressed as early as possible.

6. Prepare for due diligence

The 'due diligence' period is an essential part of all transactions. Sometimes due diligence searches reveal that the parties are not buying or selling quite what they were expecting to buy or sell. Due diligence may reveal problems with ownership, old mortgages or liens, intellectual property rights, environmental contamination, regulatory compliance or a whole range of other issues.

If due diligence does uncover issues, it is important that you decide quickly how you want to deal with them. Does this problem go to the very heart of the business opportunity? Or is it a minor concern which can be resolved by a slight reduction in the contract price? Depending on the issue, it may take a matter of hours to a matter of months to fix a problem uncovered during due diligence.

If you are selling a business you must try to anticipate the buyer's due diligence concerns and resolve them before they derail or delay the deal. A thorough understanding of issues will also convey that you are an informed seller. That should give the buyer more confidence in the deal. If the buyer has concerns, it will not usually be reassured if you reply that this is the way you have always done things. Expect to be held to a higher standard.

7. Personalities shape the deal

The pace and tenor of a deal are often reflections of the people and the organizations involved.

Sometimes, the party on the other side becomes disinterested in the process or so impatient, it simply wants to get any deal done. This person may react by delegating all decisions to others, or refusing to compromise. Either way, you should remember that dealing with another person who is not engaged and/or inflexible can result in delays and added expenses.

Difficulties may also arise with the other side's lawyer. If that lawyer is too busy, impractical, inattentive, inexperienced, constantly revising draft documents, or refusing to accept anyone else's wording, this will slow and could jeopardize the transaction. It will also likely increase your costs.

8. Sign key documents in advance

In a significant transaction there should be time set aside to sign key documents in advance of the closing. This is called a "pre-closing" and may be held in the days before the actual closing. A pre-closing helps to ensure any last minute issues which arise can be addressed. It, also, allows time for final details, arrangements and/or corrections. Waiting to sign on the day of closing runs the risk of creating stress and delays, particularly if revisions are required. Payments on closing need to be well planned. Everyone needs to bear in mind that wire transfers can take hours and sometimes days to arrive.

9. Keep running the business

For larger or strategic transactions, you should be careful not to become so immersed in the deal or to presume that it will close, that you lose your focus on the continuing running of your business. In that way, you will be able to weather unexpected delays and/or complications and to maintain leverage to negotiate the best terms

Inevitably, there will become a momentum to finish the deal. That is helpful but you should never feel pressured to compromise a key concern just to complete the transaction.

10. Be prepared to walk away

If you discover some intractable problems with the other parties or the deal, and a reasonable solution cannot be found, you should be prepared to abandon the deal. If you do abandon the deal, you lose time and money invested but this will be far less than the costs of completing a badly flawed transaction.

Summary

We hope this guide will assist you in smoothing the road to your next closing.

If we notice any of the above 'red flags', we will try to draw them to your attention as soon as possible. When any one or more of the above possible problems are not resolved quickly, you will likely incur higher fees and face delays.

However, working together, we can help you overcome challenges and smooth the way to closing your deal.

Please contact us if you would like more information on how Houser Henry & Syron LLP can help you with your next business opportunity.

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For more information, please contact one of the lawyers with our firm. You may also wish to visit our website, www.houserhenry.com, for an overview of our team and our services.

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