

The Road to Exit: Essential Planning for Business Owners



By **Mitchell R. Cohen, Esq.**
Partner at **US Capital Global**

In this article, Mitchell Cohen explores the journey of a successful business owner contemplating an exit strategy after years of growth. Cohen highlights the crucial steps in preparing a company for sale, including tax planning and assembling a skilled professional team. By addressing key questions and potential pitfalls, business owners can navigate the complexities of the process and maximize value.

Two decades ago, a seed of ambition took root within you. Growing weary of the uninspired atmosphere within your corporate environment, you longed for something more—a chance to pioneer, to carve out a niche in the market, and to build an enterprise that epitomized dynamism and profitability.

Fast forward to 2024, and you find yourself at the helm of a middle market juggernaut. With over 500 employees and a footprint spanning all 50 states and 15 foreign territories, your company stands as a paragon of success. In 2023, revenues soared to \$65 million with an EBITDA of \$14 million, and projections for 2024 paint an even rosier picture at \$82 million and \$18 million, respectively.

Yet, amidst these triumphs, a familiar whisper beckons—a call to take your “winnings” off the table and shift focus towards family and personal fulfillment. Though past acquisition offers failed to sway you, the notion of an exit now increasingly enters your thoughts.

As you delve into research on potential avenues for your company’s future, you stumble upon a sobering statistic: more than half of today’s business owners intend to exit within the next decade, yet a staggering 75% lack a concrete exit strategy.

Armed with this newfound awareness, you’re confronted with four pivotal questions:

Retain or Sell: Should you hold on to your business or entertain the prospect of a sale?

Readiness Check: If the decision to sell is made, are you adequately prepared?

Next Steps: Assuming a sale is on the horizon, what actionable steps must you take to navigate this transition successfully? How can you optimize the value of your business? How do you structure and finance the transaction?

Avoiding Pitfalls: What are typical errors in this process and how do you avoid them?

These questions serve as guideposts along the path to your company's future, urging introspection and strategic planning as you navigate the complexities of potential exit scenarios.

RETAIN OR SELL?

What factors might prompt you to consider selling your business? These could range from retirement, health issues, or a shift in lifestyle, to receiving unsolicited offers, a desire to pursue a new and unrelated venture, or recognizing a favorable economic climate for selling. Other reasons may include addressing business succession concerns, estate planning, pending litigation, ongoing partnership disputes, the need for liquidity, or anticipating challenges ahead. As an alternative to a traditional sale, you might explore options such as a merger, establishing an Employee Stock Ownership Plan (ESOP), strengthening your management team to delegate responsibilities, or ultimately closing the business.

DECIDING TO SELL – ARE YOU PREPARED FOR AN EXIT?

Is the current moment opportune based on your company's performance indicators (such as revenues and EBITDA) over the past 1–3 years? What do your projections indicate for the upcoming year and the subsequent three years? Are your financial records meticulously organized? Do you boast a high-caliber executive management team? Have you enlisted the support of external professionals, such as legal counsel, accounting firms, and investment bankers? If you're not prepared yet, when do you anticipate being ready?

YOU'VE MADE THE DECISION TO SELL – WHAT'S NEXT?

Legal Authority to Sell

The first step is to consult your legal counsel regarding the ability to unilaterally make the decision to sell the company. It's crucial to ascertain whether your company's Operating Agreement delineates the authority responsible for making the sale decision—is it solely your prerogative, does it require consensus among all members, or does it rest with the Board of Directors, Executive Committee, or another entity?

Valuation

Assuming your Board has approved the potential sale of your company, the next step is to ascertain its value. Begin by requesting an informal valuation from your accounting firm to obtain a preliminary understanding of your company's worth. Subsequently, engage an external corporate valuation company to determine your company's enterprise value. Both your accounting and law firms will be key participants in this valuation process.

Trends

A thorough examination of your financial figures is imperative. If your company's revenues and/or EBITDA are declining, it will adversely affect your valuation and potential sales price. Consider delaying the sale until you stabilize your financial situation. Conversely, if your company is experiencing growth this year or over an extended period, it may be an opportune moment to pursue an exit strategy. Additionally, if you have significant upcoming contracts or product launches, waiting until their positive impact is reflected in revenues and EBITDA could be advantageous.

Board

Imagine that you are dissatisfied with the current composition of your Board of Directors, consisting solely of insiders. You therefore plan to collaborate with your legal counsel to instigate changes. Your aim is to introduce several "outside" Board members, each a leader in their respective field, covering areas such as banking, logistics, A-1, and international trade.

Management Team

Reflecting on your management team's effectiveness in recent years, it's crucial to evaluate each member's suitability for their role. Consider upgrading the team, both in personnel and coverage within the company. Additionally, address the absence of employment contracts and "loyalty incentives" for your management team. Your legal counsel advises implementing executive employment compensation agreements for each member, outlining duties, compensation, bonuses, and participation in the company's profits through an equity rights plan. Furthermore, ensure these agreements include provisions for non-compete clauses, confidentiality, protection of intellectual property, and non-circumvention, as prospective buyers will scrutinize your management team extensively.

Human Resources

Imagine that HR has presented challenges at the staff level, with significant turnover observed within the workforce in terms of both quantity and skillsets. While attention has been directed towards addressing concerns regarding the executive management team, it's imperative to address issues within the broader workforce. Guidance from counsel and HR consultants may underscore the necessity to enhance the employee interview and background check processes, develop and implement a comprehensive company handbook, and introduce merit-based incentives for mid-level and upper-level management.

Compliance

Legal counsel emphasizes the importance of conducting an Employee Retirement Income Security Act (ERISA) compliance check before proceeding with any sales initiatives. Non-compliance with ERISA regulations pertaining to pension and profit-sharing plans could jeopardize sale plans and potentially lead to significant delays. Ensuring ERISA compliance is crucial for the smooth progression of sales endeavors.

Consulting with a Professional Team

Collaboration with legal counsel, accountants, and other third-party advisors is essential to address several critical sale-preparation issues comprehensively. Engaging in detailed discussions with these professionals will facilitate thorough examination and resolution of pertinent matters, ensuring a well-prepared approach to the sales process.

Company Structure: Legal counsel should assess your current company structure to ensure it aligns with your goals of being an attractive acquisition target. Consideration should be given to various entity forms, including limited liability companies, corporations, partnerships, limited partnerships, and sole proprietorships. Let's say you are presently a Michigan corporation. Reforming as a Delaware limited liability company may be advisable due to Delaware's favorable business and tax laws, especially given your international operations where foreign buyers often prefer US entities formed in Delaware.

Corporate Formalities: It's essential to address any issues related to entity regulatory formalities, such as qualifying to conduct business and filing tax returns in all relevant state jurisdictions and foreign countries where your company operates.

Tax and Accounting Planning: Involve your external CPA firm and financial consultants early in the exit strategy planning process. They can advise on necessary steps, some of which may require implementation over the course of your company's next fiscal year. These steps could include restructuring your entity, writing off bad debt, and timing certain cost-cutting measures strategically.

Financial Statements: While your company's financial statements may have been prepared thus far, it's crucial to have all future statements reviewed or audited to attract sophisticated buyers. Recognize that transitioning to reviewed or audited financial statements may delay putting the company on the market until at least mid-2025, as prospective buyers may require one to two years of such statements.

Quality and Reputation of Third-Party Professionals: Prospective buyers may scrutinize the quality and reputation of your current accounting and legal firms. Consider upgrading to a larger, more reputable firm, such as one of the big four accounting firms, to instill confidence in potential buyers. Similarly, ensure your legal representation has a national or regional reputation to meet the expectations of buyers in this significant acquisition.

Structuring the Transaction

Your legal counsel will emphasize the need for close collaboration to determine the appropriate sale structure. The most common options include a stock sale, an asset sale, or a merger, each with distinct legal risks, financial implications, and post-closing responsibilities. For instance, in an asset sale, the buyer

assumes only the specified liabilities and contracts outlined in the asset purchase agreement. Conversely, in a stock sale, the buyer assumes all assets, liabilities, contracts, and associated risks and rewards of the company. If a merger is considered, numerous factors must be evaluated, including your role in the merged entity and your decision-making authority.

Post-closing Involvement

Consider whether you are open to staying on with the company in a consulting capacity for a specified period after the sale, if requested by the buyer for transition purposes. Such arrangements typically involve compensation for your consulting services.

Seller Financing

Prospective buyers may request seller financing for the transaction. However, your legal and accounting advisors may caution against this arrangement due to the potential risks, as such structures sometimes result in buyers failing to fulfill payment obligations, leading to disputes and litigation between parties. Here is a place where an investment bank can add some unique value. First, because an investment bank is FINRA licensed, it can provide institutional debt financing for the buyer, giving more certainty of close. Second, the investment bank can provide an institution debt vehicle for any seller financing you may want to provide. It can add a layer of protection, collateral management, and covenant monitoring to make your seller note much safer than just a private note. Seller financing can make a dramatic difference in additional sale proceeds to the seller estate.

Pre-sale Planning

Planning from a tax, estate planning, and wealth management perspective is crucial in preparing for a potential sale, yet it's often overlooked. Failure to plan adequately could result in delays of a year or two in your exit timeline. Your tax and estate planning counsel, along with wealth management advisors, may advise implementing measures now, such as gifting membership interests, establishing family trusts, potentially creating an Employee Stock Ownership Plan (ESOP), and more. There's a possibility you may need to change the form and state of formation of your company to leverage favorable tax laws. Additionally, you may consider relocating your residence to states like Florida or Nevada for income and estate tax benefits. Moreover, before proceeding with the sale, it's essential to understand the implications of receiving significant cash or stock as consideration and how to structure the transaction to optimize income and mitigate risks.

Team of Outside Professionals

Beyond legal, tax, and wealth management planning, assembling a team of outside professionals is vital for effective sale preparation and value maximization. Begin by assessing the qualifications, experience, and reputation of your current professionals. Your team should comprise outside legal counsel, an accounting firm, a corporate valuation firm, and an investment banking firm with M&A expertise. These professionals

can assist in preparing the company for sale, identifying potential buyers, and facilitating the sale process in collaboration with legal counsel.

AVOIDING PITFALLS

Throughout your career, you will have carefully prioritized both creativity and growth alongside downside protection as your guiding principles. Your legal counsel, external accountants, and investment bankers will now be instrumental in steering clear of potential pitfalls that could jeopardize a successful exit. Key considerations in preparing for a sale include:

- Recognizing that preparing for a sale may require up to a year or two.
- Implementing fundamental changes to attract a broad range of buyers and maximize the sales price.
- Seizing the opportunity when conditions are favorable, rather than delaying the decision.
- Assembling a cohesive team of third-party professionals and coordinating their efforts to plan and execute the sale effectively.

With meticulous planning and the right professional support, you can successfully exit your company and reap the rewards of your hard work and innovation.

***Mitchell R. Cohen**, Partner at **US Capital Global**, leads the group's Philadelphia office, offering a comprehensive suite of financial services encompassing M&A, corporate finance, and real estate financing. With a focus on M&A and corporate finance, Mr. Cohen assists domestic and international companies in achieving successful exit events or dynamic expansion strategies through acquisitions, mergers, or joint ventures.*