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SOME MEASURES TO TAKE TO PROTECT YOUR CONFIDENTIAL INFORMATION IN THE CONTEXT OF THE SALE OF YOUR BUSINESS

The process of selling a business may pose some risks to the seller, particularly those related to the disclosure to third parties of confidential information concerning the operation of the business. In order to better identify these risks and exercise adequate control over the flow of information exchanged as part of the selling process, the seller is advised to take some protection measures such as:

- identifying the confidential information, the disclosure of which may pose risks to the seller;
- entering into a confidentiality agreement with the purchaser;
- taking some precautions and implementing procedures aiming to protect the confidentiality of the contemplated transaction;
- establishing a disclosure strategy respecting the confidential information related to the seller or the targeted business.

IDENTIFY YOUR CONFIDENTIAL DOCUMENTS AND INFORMATION

The team brought together by the seller should first establish a list of the relevant information and documents for a potential purchaser according to their contents and relevance. In order to anticipate the requests of a potential purchaser and classify the information in the most optimal way, it may be useful to refer to a due diligence list template. A lawyer with experience in mergers and acquisitions should be in a position to provide you with such a list.

Second, the seller's team should identify the documents and confidential information, including documents and confidential information protected by professional secrecy or which contain confidentiality clauses or sensitive information respecting the competition such as documents and confidential information pertaining to the prices, cost prices or market shares of the business. The purpose of this step is to avoid that the disclosure of documents or information pertaining to the business results in (a) the loss of the protection of professional secrecy respecting some items of information, such as those pertaining to litigation in which the business is involved or (b) liability of the business related to the violation of a confidentiality clause or applicable laws, such as those pertaining to competition law or personal information of the employees.

PROTECT YOURSELF WITH A CONFIDENTIALITY AGREEMENT

Prior to confidential information pertaining to the targeted business are disclosed to the purchaser by the seller or the targeted business, the seller should enter into a confidentiality agreement with the purchaser. This agreement will usually contain terms pertaining to (i) the definition and use of confidential information, (ii) the persons who have access to the confidential information, (iii) the term of the confidentiality agreement (usually from one to three years), (iv) the return or destruction of

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confidential information upon the end of negotiations, and (v) the right of indemnification of the seller in case of violation of a commercial secret disclosed to the purchaser, including his employees and advisors, in the context of the contemplated transaction. The confidentiality agreement may be unilateral and restrict the disclosure or use of the confidential information provided by the seller or the targeted business or be bilateral and restrict the disclosure of confidential information provided by the seller or the targeted business and the purchaser. From the point of view of the seller or the targeted business, the confidentiality agreement should define the confidential information as widely as possible in order to include all the information provided to the potential purchaser in any form whatsoever, including in writing, verbally or electronically, whatever its nature, even if such information is not identified as such at the time of disclosure. Depending upon the quantity of items of information pertaining to the employees which will be disclosed prior to the signature of a letter of intent or a purchase agreement between the parties, the seller or the targeted business could require the addition of a non-solicitation clause respecting his or its employees in the confidentiality agreement. The purchaser also frequently seeks to limit the possibility for the seller to solicit or enter into other offers for the purchase of the targeted business through the use of an exclusivity clause.

MAINTAIN THE CONFIDENTIALITY OF THE CONTEMPLATED TRANSACTION

In order to maintain the confidentiality of the contemplated transaction, the seller's team should take some precautions and implement procedures, such as:

hiring a broker or an investment banker who is in a position to identify serious potential buyers;
identifying officers, employees or external advisors who may be made aware of the transaction and notify them that they must not disclose its existence to third parties;
giving a code name to the transaction and all the involved parties;
holding meetings related to the transaction outside the premises of the targeted business.

The identification of the employees who may be made aware of the transaction is a particularly sensitive issue. Although most employees are generally informed late in the sale process, it is sometimes preferable for the seller to notify them at the beginning of the process when the seller is of the view that it is necessary to avoid the employees experiencing loss of confidence.

ESTABLISH A STRATEGY FOR DISCLOSING YOUR CONFIDENTIAL INFORMATION

The seller should establish a confidential information disclosure strategy which takes into account the risks related to its disclosure. Such strategy should include the following:

that the persons having access to confidential information only get it to the extent needed to perform their work;
the identification of the officers, employees and advisors of the seller of the targeted business who will communicate or receive confidential information;
the signature by some advisors, such as brokers or investment bankers of a confidentiality agreement – since lawyers are bound by professional secrecy, it will not be necessary to have them sign such an agreement;
the creation of a traditional due diligence room, preferably outside the premises of the business, or a virtual due diligence room;
if the confidential information will be available in electronic form or in paper form;
if the purchaser will be allowed to print electronic documents or make copies of paper documents.

The seller may also stipulate that the disclosure of confidential information will be made gradually, when certain steps have been completed. For example, the seller could decide that (i) first, after the signature of a confidentiality agreement, to disclose basic information pertaining to the business, (ii) in a second stage, after the signature of a letter of intent with the purchaser, to disclose more information pertaining to the operation of the business and (iii) lastly, after the signature of a purchase agreement, to disclose more sensitive information. Such an approach of disclosure by stages may provide the seller with better control over the flow of confidential information which is exchanged.

Your legal advisor can provide you with customized solutions. Do not hesitate to consult him or her.

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