

**Items TO CONSIDER IN THE BUY-SELL VALUATION OR
FORMULA**

AND

122 ITEMS TO CONSIDER FOR BUY-SELL AGREEMENTS

Items TO CONSIDER IN THE BUY SELL VALUATION OR FORMULA

ASSETS TO CONSIDER

Accounts Receivable	Investments (other than marketable securities)
Advances	Land
Air and Water Rights	Land Improvements
Autos and Trucks	Lawsuit Receivable
Bargain Purchase	Layaway Accounts Receivable
Barter Receivable	Leasehold Improvements
Brand Name	Library
Brochures/Pricelists	Licenses
Building Improvements	Marketable Securities
Buildings	Mineral Exploration Rights
Buyouts on leased assets (purchase options)	Net Operating Loss Carryforwards
Cash	Notes Receivable
Cash Advances	Oil and Gas Deposits
Cash Undeposited	Overfunded Pension
Certificate of Need	Pallets
Claims Receivable	Patents
Client Costs Advanced	Pineland Credits
Containers	Pledges
Copywrites	Premiums Advanced
Costs Incurred on Uncompleted Contracts	Prepaid Advertising
Covenant Not To Compete	Prepaid Expenses-other
Customer/Patient Lists	Prepaid Insurance
Debt Issue Costs	Prepaid Maintenance Agreements
Deferred Charges	Prepaid Rent
Deferred Income Taxes	Prepaid Royalties
Deposits Placed	Prepaid Taxes
Development Rights	Put Options
Dies Inventory	Receivables Sold/Collateralized
Displays	Related Party Receivable
Dividends Receivable	Research and Development
Due From Shareholder/Officer	Reserve for Bad Debts
Employee Receivable	Restricted Cash
Equipment	Retainage
Fees held in Trust	Retained Interest in Sold Assets
Financial Instruments	Retentions Receivable
Foreign Currency Translation	Return of Premium Disability Insurance
Franchise Fee	Royalties Receivable
Furniture and Fixtures	Self Constructed Assets
Goodwill	Software or Software Development Costs
Income Tax Refunds	Sport Tickets

Installment Sale Receivable

Stock Rights

CONSIDER IN THE BUY SELL VALUATION OR FORMULA

ASSETS TO CONSIDER (cont.)

Insurance Policy Values	Stock subscriptions Receivable
Intellectual Property	Subscription Lists
Intercompany Accounts Receivable	Supplies
Interest in Affiliate	Sweetheart Leases
Inventory in Transit	Tools Inventory
Inventory on Consignment	Trade Secrets
Inventory-Finished Goods	Trademarks
Inventory-Parts	Travel Advances
Inventory-Raw Materials	Unbilled Contracts in Process
Inventory-Supplies	Unbilled Costs
Inventory-Work-in-Process	Unbilled Work-Process

LIABILITIES TO CONSIDER

Accounts Payable	Employee Garnishments Payable
Accrued Bonuses Payable	Financial Instruments
Accrued Commissions Payable	Fire, Burglary and Other Loss Claims
Accrued Expenses-other	Foreign Currency Translation
Accrued Interest Payable	Intercompany Accounts Payable
Accrued Payroll Payable	Lawsuit Payable
Accrued Payroll Taxes Payable	Leases Payable
Accrued Pension Payable	Letters of Credit
Accrued Taxes Payable	Line of Credit Payable
Accrued Vacations Payable	Loans Payable
Advances Received	Loss Contingencies
Bank Overdrafts	Mortgages Payable
Bonds Payable	Notes Payable
Capitalized Leases Payable	Payroll Taxes Withheld
Contingent Liability – Malpractice	Premium Due
Contingent Liability-Environmental	Purchase Commitments
Contingent Liability-OSHA	Related Party Payable
Contingent Liability-Other	Reserve for Bad Debts
Contingent Liability-Product Liability	Retentions Payable
Credit Cards Payable	Royalties Payable
Deferred Compensation	Sales Tax Payable
Deferred Income	Self Insurance Liability
Deferred Income Taxes	Stock Redemption Payable
Deposits Held	Unearned Income
Dividends Payable	Unfunded Pension Liability

Due To Shareholder/Officer
Employee 401K Deferrals

Warranty Work Payable

REVIEW ITEMS TO CONSIDER FOR BUY-SELL AGREEMENT

CLIENT: _____
ATTORNEY: _____

DATE PREPARED: _____
PREPARED BY: _____

The following checklist should allow us, to assist our business owner clients and their attorneys in addressing fundamental issues relating to the continuity of their venture and an orderly transition of ownership. It should hopefully identify key areas of substantive business, tax and estate planning for all such closely held businesses. Our ideal approach would be to complete the checklist with the client and then review it at a follow-up meeting with the client and their attorney. Clients and counsel are also recommended to utilize the two other questionnaires we make available: "*Financial and Estate Planner - Inventory of Personal Assets*" and our "*Annual Fiscal Checkup*". The effectiveness of these three checklists/documents results in their playing key roles in our personal planning for business clients.

	<u>YES</u>	<u>NO</u>	<u>N/A</u>
1. Does agreement identify entity, all current owners, trustee(s), escrow agent(s), and insurance policies?	____	____	____
2. Is the agreement binding on all new shareholders/partners throughout the life of the entity?	____	____	____
3. Is there a statement that the agreement supersedes all other agreements to redeem or purchase an ownership interest?	____	____	____
4. Does the agreement consider all other parties who might have an option to purchase stock or an interest in the entity?	____	____	____
5. Does the agreement include a statement binding future owners to accept the terms and conditions of the agreement?	____	____	____
6. Is the admission of new shareholders/partners subject to a unanimous, majority or supermajority vote?	____	____	____
7. Does the agreement set forth the requirements for ownership such as professional qualifications, membership in certain organizations, having a certain amount of client/customer billings, capital to invest, etc.?	____	____	____
8. Should the agreement address the amount and timing of salary payments?	____	____	____
9. Does the agreement identify the method of accounting and the accounting periods for determining profits, losses, cash flow, capital contributions, distributions, loans made to the business, loan repayments, etc.?	____	____	____
10. Does the agreement avoid the use of vague, incomplete and inappropriate accounting policies and definitions?	____	____	____
11. If the agreement identifies an agreed upon value, is it clear how and when such value is to be determined (ensure accounting policies and definitions are clear and understandable)?	____	____	____
12. Does the agreement provide alternative valuation methods where the stated or agreed upon value has not been reviewed or changed for a pre-determined period (i.e. consider closing books, unusual variations on interim basis, adjustments typically deferred until year end such as inventory write downs, profit sharing accruals, bonus computations, accounts receivable write offs, etc.)?	____	____	____

Review Items to Consider for Buy-Sell Agreement (Continued)

	<u>YES</u>	<u>NO</u>	<u>N/A</u>
13. Does the agreement address a method to break a stalemate if the owners cannot agree on the value to use in establishing or updating the agreement?	_____	_____	_____
14. If the agreed upon value is directly or indirectly tied to life insurance, does this same value apply to triggering events other than death such as disability, retirement, bankruptcy, etc. (need to consider adequacy of funding)?	_____	_____	_____
15. Are there different valuation methods/standards identified for different purposes (i.e. death, disability, normal retirement, early retirement, voluntary termination of employment, involuntary termination of employment, loss of license, bankruptcy, other circumstances, etc.)?	_____	_____	_____
16. If an appraisal method is to be utilized, does the agreement specify the qualifications required of the person chosen as appraiser?	_____	_____	_____
17. Is the method of selecting an appraiser adequately explained in the agreement (i.e. mutual consent of parties, each party selects an appraiser and they then select a third appraiser, averaging two appraisals, etc.)?	_____	_____	_____
18. Does the agreement state who pays for the cost of the appraisal(s)?	_____	_____	_____
19. Does the agreement properly address how key man life insurance is to be <u>valued</u> when death occurs (i.e. should the estate of the deceased shareholder/partner be entitled to a pro-rata share of the life insurance proceeds or should such proceeds, intended to fund the buyout, be excluded in the valuation)?	_____	_____	_____
20. Is it preferred to state in the agreement specific formulas or guidance on constructing a realistic liquidation balance sheet based on net realizable values? Such might address:			
-investment assets at realizable value after estimated broker commissions or other costs of disposition	_____	_____	_____
-goodwill at a predetermined formula	_____	_____	_____
-valuation of inventory (LIFO treatment)	_____	_____	_____
-life insurance at cash value or face amount	_____	_____	_____
-accounts receivable (perhaps at face multiplied by a ratio of receipts to billings for past 6 months or discounting based on aging or specific write off policies, etc.)	_____	_____	_____
-unbilled/uncollected cash disbursements on behalf of clients at realizable value	_____	_____	_____
-unbilled work-in-process, net of reserves for uncollectable	_____	_____	_____
-recoverable costs at realizable value after deducting conversion costs	_____	_____	_____
-include the present value of the unamortized cost of leasehold improvements if they can be recovered by subletting the improved space at a premium (similar for prepaid expenses or organizational costs)	_____	_____	_____
-unapplied client retainers or deposits	_____	_____	_____
-identifiable intangibles (patents, copyrights, licensing agreements, royalty agreements, etc. which may require special appraisals)	_____	_____	_____
-fixed assets at resale value, as a specific percentage of original cost or by professional appraisal (who bears cost)	_____	_____	_____
-supplies inventory or small tools typically not carried on books as an asset	_____	_____	_____
-present value of any bank debt obligations	_____	_____	_____
-normal trade and other accounts payables	_____	_____	_____
-present value of any equipment or space lease obligations	_____	_____	_____

- present value of guaranteed payments to retired shareholders/partners
- accrued liabilities for estimated severance payments to existing employees
- accrued liabilities for estimated costs of winding down if liquidating the business such as file storage, accounting fees, etc.

Review Items to Consider for Buy-Sell Agreement (Continued)

21. Does the agreement specify the factors to be used in determining profit sharing allocations, the mechanism for applying them and how precise share amounts are to be decided and, if necessary, disputed? _____
22. Does the agreement provide definitive guidance to the appraisers on using or not using valuation discounts (i.e. marketability, minority, loss of key person, blockage, etc.)? Is each shareholder/partner entitled to the proportionate value of the entire entity or is each interest to be reduced by any or all of the discounts? _____
23. Does the agreement include a clause that requires all major decisions be made by all shareholders/partners and then define "major"? _____
24. Similarly, does the agreement define which decisions must be made by a majority, supermajority or unanimous consent of the equity owners? _____
25. Does the agreement provide a method for designating a managing partner/member? _____
26. Does the agreement designate a managing partner/member and delineate his or her rights, responsibilities and perhaps compensation? _____
27. Does the agreement specify the rights and responsibilities of each shareholder/partner to bind the entity, accept clients, incur incidental expenses relating to his professional activities, perform tasks that are part of the profession, prepare client bills, maintain professional certifications, etc.? _____
28. Is there a clause detailing the cash or other assets each owner has contributed to the entity or withdrawn from the entity? _____
29. Does the agreement discuss the responsibility of the equity owners to make additional capital contributions, including notice requirements and penalties if capital requirements are not made as required? _____
30. Is there a need to include a statement of management duties and responsibilities, especially if several of the owners are involved in all phases of the business? _____
31. Is there a mediation or arbitration clause included for resolving conflicts that can't be solved informally? _____
32. Should the agreement address which shareholders/partners have the first option on continuing to use real estate, leases and equipment should the existing entity not occupy the facilities or use the equipment? _____
33. Does the agreement address who gets to continue use of telephone numbers, fax #, domain name and/or website, or which party has the first option to so choose? _____
34. Should the agreement address unvested retirement plan benefits in the event of an early termination of employment by an owner (i.e. if one owner is only 20% vested, the other gets a windfall)? _____
35. Will the death of an owner result in an automatic buy-out of his ownership interest or will a legal heir or spouse be allowed to continue as a shareholder/partner? _____
36. On a similar note, will the heirs have altered or reduced voting rights? _____
37. Does the agreement consider allowing the owner to purchase the non-owner spouse's marital interest if it doesn't pass under the will or is not awarded by a divorce court? _____
38. If such a purchase option exists but the owner fails to exercise it, does the entity or other owners have the option to buy the interest? _____
39. For a buyout upon death, will the entity use term life insurance, ordinary life, paid-up life, universal life or an endowment policy to fund the buyout? _____
40. If insurance is unavailable, insufficient or not used, should the beneficiaries be paid from earnings and profits, a distribution of corporate/partnership assets followed by a leaseback, a private annuity, etc.? _____

Review Items to Consider for Buy-Sell Agreement (Continued)

YES NO N/A

41. Has a life insurance trust or partnership been established to hold the insurance and then receive and distribute the proceeds? If not, does the agreement include a clause to ensure that one of the owners or heirs does not keep the insurance proceeds?

42. For a buyout upon death, will all of the proceeds from life insurance be used to purchase the interest as opposed to retaining some or all to mitigate the business' loss of a key person?

43. Does the agreement address the disposition of shareholder/partner loans or advances?

44. Does the agreement clearly spell out if the remaining owners or the entity have an option or an obligation to buy a decedent's interest?

45. Does the agreement have a provision for an extended payout schedule when a lump sum redemption amount may be a hardship for the enterprise?

46. If the buyout is optional, does the agreement clearly spell out who has the right to exercise the option (i.e. the entity, the heirs and/or the remaining owners)?

47. Is there a specified period of time to exercise such an option?

48. Are the terms and conditions for exercising the option clearly spelled out (i.e. written notice, payment amounts and timing, closing date, etc.)?

49. Are the terms and conditions for exercising the option to purchase defined including written notice, payment amounts, timing, closing date, etc.?

50. If there is a bona fide offer by an independent, third party to buy an interest, does the entity or the shareholders/partners have a right of first refusal to purchase at the same terms and price?

51. Does the agreement identify a deadline to exercise such a right of first refusal?

52. Does the agreement stipulate proper written notice be given to the entity and other owners of any such offer?

53. If the party with the right of first refusal fails to so exercise the option, does the remaining party or parties have such an option to exercise a right of first refusal on the portion of the equity that was not purchased?

54. Does the agreement address the possibility of purchasing part of the interest on such an option or must the entire interest be purchased?

55. If the right of first refusal is not exercised, does it become available again if the independent third-party deal does not proceed during a stated period of time?

56. Does the agreement indicate how and when payment is to be made for any buyout where insurance is not sufficient or available (i.e. at closing, over a period of time, terms of payment, interest rate, security, etc.)?

57. Does the agreement formulate a procedure for determining disability and is the term "disability" clearly defined?

58. Does the agreement spell out what the period of disability is before the other shareholders/partners or the business has the right to buy out the disabled shareholder/partner?

59. Under a disability buyout, does the agreement adequately spell out if a buyout is required or optional?

60. If the disability buyout is optional, who holds the option (i.e. the entity, the disabled shareholder/partner or the remaining shareholders/partners)?

61. Under a disability buyout, does the agreement define the deadline for exercising an option to force a sale?

62. Does the agreement clarify when a voluntary retirement is allowed and when an involuntary retirement is required?

Review Items to Consider for Buy-Sell Agreement (Continued)

YES NO N/A

63. Does the agreement spell out if a sale is optional or required for an involuntary disposition (i.e. bankruptcy, insolvency, loss of professional license, failure to make required capital contribution, failure to meet designated minimums in hours worked or billed or billings to clients, etc.)? _____
64. Does the agreement address expulsion of a shareholder/partner for “cause” as well as for “without cause” to avoid protracted and acrimonious disputes? _____
65. Does the agreement detail how such expulsion would occur (i.e. specify if vote is by per capita or weighted in some basis such as by partners’ varying capital contributions, etc.)? _____
66. Does the agreement consider a different or reduced purchase price under such a scenario? _____
67. Does the agreement spell out if the purchase of an ownership interest is optional or mandatory in the event of termination of employment? _____
68. If the purchase is optional, does the agreement address who holds such an option, when it must be exercised, how it is to be exercised, if the striking price differs for a voluntary termination versus for cause, etc.? _____
69. If termination of employment is involved, will a covenant not to compete be used? _____
70. Does the agreement embody or dovetail into a separate employment agreement that specifies the terms of employment, responsibilities and basis for termination? _____
71. If a covenant not to compete is used, does the agreement define a reasonable geographic area and indicate the period it involves? _____
72. Does the agreement require that stock certificates have restrictive language to clearly identify the existence of a buy sell agreement? _____
73. Does the agreement have a provision that automatically negates any invalid, unenforceable or illegal provision from the agreement? _____
74. Does the agreement identify which state’s laws govern and where a case should be tried in the event of a dispute? _____
75. If a pass-through entity such as an S corporation, partnership or Limited Liability Company, does the agreement have a provision requiring mandatory distributions at least sufficient to cover the shareholders/partners/members personal tax liabilities resulting from the entity? _____
76. Does the agreement have a provision detailing how the flow-through entity’s income or loss is allocated in the year any owner withdraws, especially one owning less than a 50% interest (i.e. based on the actual books and records or based on the per share, per day allocation)? _____
77. Does the agreement state that the partnership or Limited Liability Company’s year closes with respect to a partner/member who disposes of his entire interest? _____
78. Do the tax allocation and distribution sections of the agreement ensure proper priority return to the contributing partner/member and proper capital account maintenance? _____
79. Does the agreement require partners or members of a Limited Liability Company to make a Section 754 election, stepping up or stepping down the new partner/member’s basis in the entity’s property? _____
80. Similar to life insurance for death buyouts, does the agreement consider disability buyout insurance? _____

81. Does the agreement require a physician's written statement confirming the disability of a shareholder/partner? _____
82. Is the business afforded the opportunity to obtain its own medical evaluation? _____
83. Does the agreement provide for a procedure if the two medical evaluations do not agree on whether the equity owner is disabled? _____

Review Items to Consider for Buy-Sell Agreement (Continued)

- | | <u>YES</u> | <u>NO</u> | <u>N/A</u> |
|---|------------|-----------|------------|
| 84. Does the agreement spell out how long salary or benefits will be continued for a disabled shareholder/partner? | _____ | _____ | _____ |
| 85. Will a shareholder/partner have the right to transfer or assign his ownership interest to a trust or family limited partnership for estate planning purposes? | _____ | _____ | _____ |
| 86. Does the agreement consider the cash surrender values on life insurance policies of retiring or terminated owners? | _____ | _____ | _____ |
| 87. Will such policies be transferred to the insured with or without consideration? | _____ | _____ | _____ |
| 88. Does the agreement require the entity to guarantee obligations to a departing or deceased shareholder/partner? | _____ | _____ | _____ |
| 89. Does the agreement entitle the "policy rollout" for all such life and disability policies on the departing shareholder/partner? | _____ | _____ | _____ |
| 90. Does the agreement require the remaining shareholders/partners and/or their spouses personally guarantee the obligations to a departing/deceased owner? | _____ | _____ | _____ |
| 91. Is there a statement that the attached document is the entire agreement? | _____ | _____ | _____ |
| 92. Does the agreement indicate that it cannot be changed or revoked without written agreement by all parties? | _____ | _____ | _____ |
| 93. Does the agreement provide addresses for notices to all parties and the method to provide such notices (certified, return receipt requested first class mail, fax, etc.)? | _____ | _____ | _____ |
| 94. Does the agreement call for a security interest in the ownership interest while a payment obligation remains outstanding? | _____ | _____ | _____ |
| 95. Does the agreement identify who is entitled to benefits of the ownership interest while any payment obligations are outstanding (i.e. dividends, distributions, voting rights, etc.)? | _____ | _____ | _____ |
| 96. If an escrow agent is used, does the agreement specify the agent's compensation? | _____ | _____ | _____ |
| 97. Does the agreement spell out if and how the escrow agent is indemnified and what happens if the agent does not act, resigns or becomes incapacitated? | _____ | _____ | _____ |
| 98. Does the agreement name a joint or alternate escrow agent or trustee? | _____ | _____ | _____ |
| 99. If there is more than one escrow agent or trustee, does the agreement require unanimous or majority approval by the agent or trustee and offer a method to resolve disagreements? | _____ | _____ | _____ |
| 100. Does the agreement consider malpractice tail coverage and who is responsible for the payment of such premiums (i.e. the entity or the departing professional)? | _____ | _____ | _____ |
| 101. Does the agreement address benefits/health coverage of the departing owner? | _____ | _____ | _____ |
| 102. Does the agreement deal with the long-term lease commitments of the entity and or guarantees by the shareholders/partners? | _____ | _____ | _____ |
| 103. Does the agreement deal with the obligations to retired partners/shareholders? | _____ | _____ | _____ |
| 104. Does the agreement deal with incremental costs consequential to a departing owner? | _____ | _____ | _____ |
| 105. Does the agreement specify each owner's obligation to bring opportunities to the firm and refrain from diverting business to his/her own account? | _____ | _____ | _____ |
| 106. Does the agreement describe situations in which an owner can engage in an economic activity for his or her own benefit, such as adjunct teaching? | _____ | _____ | _____ |

107. For a voluntary separation, does the agreement require a specified period of time for written notice of withdrawal? _____

108. Does the agreement prohibit contacting clients or customers before the entity so the business can contact them first to retain their business? _____

109. Is there a required forfeiture of any termination or retirement payment if a withdrawing shareholder/partner violates the non-solicitation or non-competition provisions of the agreement? _____

Review Items to Consider for Buy-Sell Agreement (Continued)

	<u>YES</u>	<u>NO</u>	<u>N/A</u>
110. Does the agreement address obligations to the business for future capital (i.e. distinguish between owners' potential liability to outside creditors and to themselves)?	____	____	____
111. Does the agreement cover required capital infusions, setting maximum and minimum amounts that owners must contribute to keep a deficient firm in business?	____	____	____
112. Does the agreement contain a deficit restoration obligation requiring partners/members pay off any deficit capital account balance on partnership/LLC liquidation?	____	____	____
113. Does the agreement consider any attempt to voluntarily withdraw except by normal retirement to be deemed a breach of the agreement?	____	____	____
114. If so, is such a breach addressed by discounting the withdrawing owner's redemption amount and allowing the entity to deduct any monetary damages caused by the withdrawal?	____	____	____
115. Does the agreement obligate the business to refrain from increasing salaries, paying dividends, making distributions or making loans until all outstanding liabilities to departing owners or their beneficiaries are paid?	____	____	____
116. Is there a dissolution provision which sets a specified termination date, describes an event that would make it impractical or illegal to continue or determines that failure to reach certain performance levels would trigger termination?	____	____	____
117. Is there a provision that would specify how the assets are to be liquidated and distributed?	____	____	____
118. Is there a provision that, under a separation or termination, provides for future access to transferred files and the actual preservation of client/customer files?	____	____	____
119. Is there a need for the agreement to include a provision that a sale of the business, in whole or in part, <u>after</u> a shareholder/partner's interest has been bought/redeemed at a higher price might trigger an adjustment (i.e. tag along rights)?	____	____	____
120. Is there a need to consider having a clause that states if a partner/shareholder leaves to join a competitor and takes another employee/associate, the firm can deduct from his separation payment an amount equal to 35% of the employee's salary to cover employment agency fees to replace the person?	____	____	____
121. Should the agreement have a provision that assesses economic penalties when a partner or group of partners depart with a hard copy or magnetic media copies of proprietary firm materials (i.e. model forms, automated systems for drafting documentation, client/customer lists, etc.)?	____	____	____
122. Does the agreement reflect that each party has had independent legal, accounting, and financial advisors or the opportunity to consult with their own independent attorneys, accountants and financial advisors?	____	____	____