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Covering Your Rear, Part II

By Don Ray

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PM

Last month we discussed what you need to consider when developing an APA (Asset Purchase Agreement).

We scratched the surface so, as promised, here is more, based on a presentation by Robert Bass of Myers & Fuller, P.A. and Robert Davis of Dixon Hughes, PLLC.

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I know it's not the most exciting reading, but knowing these things may save your hide in a dealership transaction.

Miscellaneous items to consider transferring:

- Telephone numbers and yellow pages advertising
- Shop manuals
- Sales and service records
- Customer lists
- Marketing supplies
 - Collection of Seller's Accounts Receivable
- There should be time limit and a definition of the limits on buyer's responsibility
 - State Tax Considerations
- Determine what will be subject to sales tax and who is responsible for paying.
- Determine how to deal with any bulk sales laws in the applicable jurisdiction.

- If a lease is involved, are the payments subject to sales tax?
 - Assumption of contracts and leases and other liabilities
- These should be clearly defined.
 - UCC searches should be conducted and the arrangement for releases should be coordinated at or prior to closing
 - How will the build up of any equity in financing type leases be recognized in the closing documents?
 - Are deposits are going to be assumed on vehicles?
 - How about vehicles not yet in production?
 - Who will receive the gross profit on those vehicles?
 - How is gross profit defined?
- Tail Liabilities to be determined on programs
 - Consider escrows in the agreement for these programs in-lieu of a tail liability determined at closing
 - Assumed gift certificates
 - Assumed prepaid maintenance
 - Assumed in-house warranties
 - Assumed employment contracts
 - Assumed vacation
- Do you want to transfer the seller's
 - Seller-Employer FICA payments?
 - Seller-Employer Unemployment Experience Rating?
 - Risk of Loss/Material Adverse Change
- What constitutes a material adverse change?
 - Generally, a mass exodus of employees probably should not as this is expected in many cases.
 - Does union activity constitute such a change?
 - Confidentiality
- What if the word gets out and the target's financial performance deteriorates?
 - How are damages defined?
 - Warranties and Representations
- Three basic purposes
 - Information gathering for disclosure schedules
 - Provides the roadmap/rights for termination of the APA
 - Provides the roadmap for legal remedies and allocation of risk

- Define various survival periods of the reps and warranties with differences for
 - Good title
 - Taxes
 - ERISA liabilities/obligations
 - If indemnification buckets are used, then make exceptions for sales taxes and other items with successor liability
- Define who is responsible for any building repairs and when they have to be completed.
- How are property taxes prorated?
- Who pays the various closing costs?
- Define time periods for all of the items to occur, the time periods for curing, the time periods for opting out of title insurance, EPA, survey, etc.
 - Specialized situations requiring assistance
- Completion of the Form 8594 required by Section 1060 of the IRC.


Don E. Ray is a CPA and a senior vice president at AutoStar. He can be reached at 901-907-0134.

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