

REVIEW ITEMS TO CONSIDER FOR BUY-SELL AGREEMENT

CLIENT: _____
 ATTORNEY: _____

DATE PREPARED: _____
 PREPARED BY: _____

The following checklist should allow us, as CPAs, 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 ABO AND COMPANY, LLC 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 of time (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.)?	_____	_____	_____

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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 uncollectability	_____	_____	_____
-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 actually liquidating the business such as file storage, accounting fees, etc.	_____	_____	_____

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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 aforementioned 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 in connection with 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? _____

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Review Items To Consider For Buy-Sell Agreement (Continued)

	<u>YES</u>	<u>NO</u>	<u>N/A</u>
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?	_____	_____	_____

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Review Items To Consider For Buy-Sell Agreement (Continued)

	<u>YES</u>	<u>NO</u>	<u>N/A</u>
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 actually 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 time 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?	_____	_____	_____

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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?	_____	_____	_____

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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?	_____	_____	_____

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Martin H. Abo, CPA/ABV/CVA/CFF is Managing Member of Abo and Company, LLC – Certified Public Accountants / Litigation & Forensic Consultants - with offices in Mount Laurel, New Jersey and Morrisville, Pennsylvania. He has comprehensive experience in individual and corporate financial, business and tax planning. His previous experience includes several years with the tax department and audit staff of a Big Four CPA firm as well as regional firms before he founded the present enterprise.

Mr. Abo is an active member and chaired for several years the Litigation Services Committee of the New Jersey Society of CPA's and its Litigation Support & Forensic Accounting Interest Group. Mr. Abo holds the professional designation of Certified Valuation Analyst from the National Association of Certified Valuation Analysts and has been awarded the designation of ABV, Accredited in Business Valuation, and CFF, Certified in Financial Forensics, by the American Institute of Certified Public Accountants. In addition, he volunteers his time and expertise to many other business and professional organizations: He served as President of the Estate and Financial Planning Council of Southern New Jersey; served as a Director of the Chamber of Commerce of Southern New Jersey; serves on the Matrimonial Accounting Interest Group of the NJSCPA; served as a special advisor to the New Jersey Small Business Development Centers; and serves as a Director of the nationally renowned hospital, Deborah Heart and Lung.

Mr. Abo had previously served as a director of a local bank and, fourteen times, has been one of 150 participants selected by the S.E.C. from CPAs, lawyers, bankers, venture capitalists and economic development experts, from across the nation for its annual conference on issues relating to Small Business Capital Formation.

Mr. Abo has also developed a specific expertise in performing dispute resolution and other consulting services. Clients, as well as the banking, insurance, judicial and legal community, have increasingly called upon him to provide technical assistance, arbitration or expert testimony on financial accounting matters, business valuations, structuring buy-ins and buy-outs, divorce, estate controversies, insurance claims and other forensic/investigative analysis covering a wide range of topics and industries. He has operated in a supportive capacity to attorneys, judges, adjusters and/or clients in providing ongoing facilitation in the negotiation and/or litigation process. Mr. Abo assists attorneys to strengthen their cases by clarifying language and economic concepts, preparing useful exhibits and reports, and testifying as an expert witness.

Mr. Abo received his B.S. in Accounting from Syracuse University.

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