**CHECKLIST OF CONSIDERATIONS OF MATTERS FOR INCLUSION IN A BUY-SELL AGREEMENT**

1. **Equity Interest Holders**
   1. Who are the parties who own the equity interests in the entity?
   2. What percentage of partnership, membership interest or capital stock is owned by each?
   3. Are all equity interests of one class, or different classes? (Note this may bar Subchapter S election in the case of a corporation.)
   4. What are the rights of different classes?
   5. Possible redemption of one class at some future date?
   6. What consideration was paid or will be paid for each unit of equity interest?
      1. Cash?
      2. Labor? (Possible taxable income resulting from interests issued for labor?)
      3. Materials or goods or equipment? What are the values for “basis” purposes?
      4. Are there guarantees of debts to banks or other third parties?
      5. Is there some combination of the above?
      6. Will there be differing consideration per share for different interest holders?
         1. Is that justified by time considerations sufficient to avoid tax problems for interest holders who get their interests at much less cost per unit than do other holders?
         2. Consent by each interest holder to such differential?
   7. Subchapter S election (corporations only)?
      1. Is it possible given:
         1. Persons owning shares? (No corporations [except qualified retirement plans or charitable organizations] or trusts as holders [except a “small business trust” making a proper election].)
         2. Capital structure? (No election where there is more than one type of capital stock.)
         3. Is it desirable given the income structure of:
            1. All shareholders?
            2. Any significant shareholder?
   8. *How will the agreement deal with the all-important question of how to handle the need for additional capital at some point in the future:*
      1. *How will the decision be made as to when and what type of capital shall be sought (*i.e., *equity or debt)?*
      2. *What will happen to those interest holders who do not come up with their pro-rata share of additional capital?*
2. **What is the Role of Each Interest Holder in the Governance of the Entity**
   1. Who will the directors or governors or “managing partners” be?
   2. All equity holders, all the time?
   3. Some equity holders, with others committed to vote for them?
   4. What happens when a governor or a director or an officer ceases to be an interest holder in a limited liability company or a corporation?
   5. Who will the officers be?
   6. Are equity holders committed to elect governors or directors who will elect the specified slate of officers?
   7. What happens when an officer ceases to be an equity holder?
3. **Equity Holder Compensation**
   1. How much compensation shall be received in the form of salary?
      1. (Potential IRS problems if salary is linked to percentage of ownership of the corporation’s shares; less potential problems in the case of limited liability companies or partnerships)
   2. What about fringe benefits? (Same caveat as immediately above.)
   3. Written employment agreements for officers? (Highly recommended)
   4. What are the limits on compensation?
      1. How and when can they be changed?
         1. By directors or governors?
         2. What margin required for approval of change?
   5. Fringe benefits?
   6. Car? (More potential IRS problems in this area.)
   7. Other perks?
   8. Insurance on Officers and other equity interest holders?
      1. Amount?
      2. Type? (Term or whole life types of insurance?)
      3. Beneficiary?
         1. The entity itself; or
         2. The individual whose life is subject to insurance?
         3. Other partners, membership interest holders or shareholders?
   9. Termination of employment?
      1. At will of directors or governors?
      2. For cause? Possible definitions of cause:
         1. Abandonment of office and duties:
            1. Length of time?
            2. Proof of abandonment?
         2. Direct insubordination to board of directors or governors or the partners?
         3. Fraudulent or illegal business practices?
            1. On behalf of the entity?
            2. On behalf of officer’s own business?
         4. Other actions resulting in criminal prosecution?
         5. Continued personal behavior resulting in material discredit to the entity?
4. **Other Entity Control Restrictions**
   1. Restriction on dividends? (Not really applicable in the case of limited liability companies or partnerships unless they elect to be taxed as corporations.)
   2. Limitation on borrowing?
   3. Cash borrowing only?
   4. Capitalization of leases and other long-term obligations (considered to be the same as borrowing)?
   5. Annual budget approved by board of directors or governors or the partners?
   6. Selection of accountants?
   7. Unanimous board or partner approval of initial selection?
   8. Majority required for any change of accountants?
   9. Fiscal year?
   10. Bank depository?
   11. Limit on check amounts with:
       1. One signature?
       2. Two signatures?
5. **Restrictions on Transfer of Equity Interests**
   1. General restrictions?
   2. Imposed forever?
   3. Imposed only so long as present parties own at least 51 percent?
   4. Application to voting equity interests only or to all equity securities?
   5. Legending of stock certificates or on the limited liability company records?
   6. Right of first refusal in the event an equity holder has a bona fide written offer to purchase?
   7. Offer first to the entity? (Possible tax considerations.)
   8. Offer to other equity holders of the portion which any specific remaining equity holder does not take (i.e., a “round-robin” offer)?
   9. Time periods in which the remaining equity holders have to exercise right?
   10. Time periods between notice of exercise and closing?
   11. Considerations of total price involved?
   12. Considerations of ease of financing of any buyout and personal financial needs of equity holders?
   13. Right of initial offeror in the event that none or less than all of the offeror’s shares are purchased by the other equity holders?
   14. Should right of first refusal apply to equity interests which are subject to court ordered transfer in, e.g., marriage dissolution? (Recommended)
   15. Other triggers of buyout rights?
       1. Insolvency of an equity holder (not bankruptcy, due to power of trustee to void executory contracts)?
       2. Disability of equity holder?
          1. Length of disability period?
          2. Who determines disability?
             1. Designated physician?
             2. Panel of three physicians?
          3. Who pays the physicians?
       3. Death of equity holder?
       4. Retirement of equity holder?
   16. What if some equity holders are active and other merely passive?
   17. Termination of an equity holder’s position as an officer?
       1. Who makes the determination that an equity holder’s position as an officer should be terminated?
   18. Entity reaching certain performance goals, so that a passive investor may be bought out (in whole or in part) to limit gain accruing to passive investor and to increase gain to active participants in the enterprise?
6. **Valuation Where There Is No Bona Fide Written Offer**
   1. Present value of shares?
   2. Method of determining future value of shares?
   3. Formula price? (Must be tested on a very wide range of pro forma condition as concern that events can “skew” a formula!)
   4. Appraisal of shares?
      1. One appraiser?
      2. Three appraisers with a provision to throw out the most disparate of the three appraisals?
      3. Who pays for the appraisals?
   5. Should there be a right to have appraisal notwithstanding the existence of and agreement on a formula price?
   6. Possible insurance funding of buyout on death of an equity holder?
   7. Differing terms for buyouts under different triggers?
7. **Tax Treatment of Various Buy-Sell Scenarios**
   1. Tax advisers for the parties should review the Buy-Sell Agreement.
8. **Dispute Resolution**
   1. Majority rule?
   2. Possibility of majority running roughshod over minority?
   3. Encouragement of alliances to detriment of the entity?
   4. Independent tie breaker vote?
   5. Who will serve?
   6. How is the voter to be compensated?
   7. Will the voter be protected against suit by all parties?
   8. What if the voter refuses when put to the test?
   9. How is a replacement voter to be selected?
   10. Arbitration?
       1. Who pays the cost of the arbitrator?
       2. How do you select a fair arbitrator?
9. **Termination of Agreement**
   1. By unanimous consent?
   2. When all present equity holders own less than 51 percent?
   3. When all present equity holders own nothing?
   4. Upon liquidation or bankruptcy of the entity?
10. **Addresses for Notices to be Given Under the Agreement**