

The Sale of an Agribusiness Company: An Issues Checklist for Sellers

The following checklist is meant to act as a guide to parties looking to sell their farming operation or agribusiness company. However, each transaction will be specific to the parties involved; accordingly, some of the items addressed below may not be relevant to a given matter. Similarly, the below list does not attempt to address all matters that may need to be addressed in a sale of a farming operation or other agribusiness company. It is recommended that any seller or buyer of an agribusiness company consult with counsel in connection with any such transaction.

1) Description of The Company; De-Integration of Related Business Components - What aspect of the business is included in the sale? If the seller intends to keep or hold back certain aspects of the company, how will the parties address interrelated contracts, operations and employees that correspond to both the conveyed portion of the business and the portion being retained by the seller? Will the seller need the buyer to cooperate on a post-closing basis on de-integration matters (for example, will the buyer handle certain accounting matters for the seller until the seller is able to set up an independent accounting system; will the buyer need to allow seller some time to physically move from the sold buildings, perhaps with a post-closing lease arrangement)? If an essential component of the retained company is sold to the buyer, consider the need to contract for services that were otherwise part of the original agribusiness conglomeration (for example, if the seller retains a grain elevator division but sells its trucking operations, the seller will need to either contract with the buyer for trucking services or locate a third party trucking company to use with the grain elevator).

2) Seller's Data Room - How is the seller going to provide documents to the buyer for its due diligence of the business? The seller should consider setting up an online data room, where documents and records can be uploaded for the buyer's review. When setting up the data room, create files for different types of due diligence (real property, personal property, intellectual property, employment and benefits, taxes, etc.) and establish agreed-upon naming conventions for documents; set these rooms up from the beginning, so that all parties involved know where to look for a given type of diligence. The seller may want to identify one or two people that are charged with uploading documents to the data room - this way the seller can better ensure that the right materials are uploaded, and that there are not any duplicates. Note - even if materials are sent via email between the buyer and seller business contacts, the materials should be uploaded to the data room; this way you have one site that is comprehensive, provides an objective standard for a sale agreement representation regarding completeness, and is the 'official' delivery mechanism between the buyer and seller.

3) Buyer's Due Diligence Access - The buyer may need access to certain government or quasi-government files (e.g., FSA files, and/or water district records). However, these records may not be available to anyone other than the seller (as the owner/operator of the subject property). While the seller could accompany the buyer to these agency offices, that can prove cumbersome in practice. Another option is for the seller to sign a letter of authority granting the buyer access rights to the seller's files, naming the individual buyer representatives that can access the files and the expiration of the review right. The buyer can then take this letter of authority with them when requesting to access the agency files.

4) Purchase Price - How is the purchase price being structured? For example, is the seller getting paid 100% at closing? Or is there a portion of the purchase price that is paid post-closing based

**The Sale of an Agribusiness Company:
An Issues Checklist for Sellers**

on company performance? (Commonly known as an “earn out”.) With the purchase of an operating company, the buyer may want to reserve paying all of the consideration until they can prove-out the performance of the company for a few years; alternately, the seller might get all of the anticipated consideration, but have the ability to get bonus payments of additional consideration if the company hits certain performance metrics post-closing. In both of these scenarios, the buyer pays some money post-closing; the difference is whether the post-closing payment is part of the base consideration, or a bonus paid over and above the base consideration amount. There may be tax consequences to how the post-closing earn out payments are structured, for both the buyer and the seller parties. The parties will need to be very specific as to milestones, metrics and triggers for any post-closing earn out payments. Note that certain earn outs may be tied to the continued employment of certain seller individuals on a post-closing basis; the seller should make consider if those individuals are likely to stay on with the company post-closing, and how long they will be willing to stay.

5) Related Party Transactions - If the seller is a family-owned, private company, consider whether there are any related party transactions or contracts that need to be reflected in the transaction. For example, if one of the seller individuals is commonly taking culls from the processing plant to reuse with her dairy farm, consider memorializing this arrangement and having buyer agree to assume this cull sale arrangement. As another example, if the seller individuals commonly use company trucks as their personal vehicles, the seller needs to consider whether or not to exclude those trucks from the transaction. These arrangements are likely to be oral only, and may not be considered by the seller individuals as material to the larger transaction. However, it will make the sales process that more efficient if the seller takes the time to memorialize these agreements (and/or carve the rights out of the transaction).

6) Non-Competes; Non-Solicitation - Is the seller planning to continue agribusiness operations on a post-closing basis? If so, the buyer may want to limit the seller’s right to compete in the same sector (or with the same customers). Similarly, if the seller is planning to maintain a business, the buyer will want some assurances that the seller won’t ‘hire-away’ the employees from the sold business. Accordingly, if the seller wants to conduct a post-closing business, then the seller should exclude the specific business lines or activities from any non-complete agreement with the buyer. Note, the buyer may have different tolerances for the seller’s activities in a separate but related agribusiness area, vs. a continuing operation in the same industry and area. Consider the differences in the sale of a dairy farm where the seller (a) continues dairy farm operations in another state; (b) operates a business selling milking equipment; or (c) continues dairy farm operations in the same area as the sold business, but on a smaller and non-commercial (personal) level. Similarly, if there are any employees of the business being sold that the seller might want to work with post-closing, consider excluding those identified people from any non-solicitation agreement. These excluded activities/employees may need to be identified early in the process, so that the buyer can consider how these exclusions affect the business as part of its due diligence. Finally, consider how long the seller is willing to grant these non-compete and non-solicitation protections. State law will also guide the term, geographic area, and scope of the non-compete agreement.

7) Communication with Employees/Customers - The seller may want to control the messaging of the potential transaction with its employees or customers. If the transaction isn’t publicly known, consider how the seller is planning to explain the buyer’s presence on the property during due diligence. At some point, however, the parties will need to communicate the transaction with the employees and customers. The seller should consider when they want this communication to occur - after the buyer’s due diligence period expires? A set number of days prior to closing? Also, how is the

**The Sale of an Agribusiness Company:
An Issues Checklist for Sellers**

communication to occur - sent from the seller, from the buyer, or from both parties? Who will answer questions that arise about the transaction, both parties? Perhaps the parties can agree on a form letter or notice to be sent to all third-party landlords, tenants, vendors and customers. Closely related, consider whether either party wants the right to review and approve any press releases related to the transaction.

8) Inventory - Does the transaction include some existing inventory? If so, how much of the inventory is obsolete, damaged, or otherwise not of any value to the buyer? How accurate are the seller's inventory counts? If the purchase price for the transaction includes a per piece/inventory reimbursement, then consider how the parties are going to count and confirm the inventory. Will the parties jointly do an inventory count prior to closing? Or will there be a post-closing 'true-up' where the buyer will do an inventory review, with the purchase price to be adjusted to reflect the final inventory amount? If the parties agree to a post-closing true-up, then consider how the parties will calculate viable inventory and the process for auditing any disagreements.

9) Equipment - The purchase agreement (and related bill sale) will need a detailed list of equipment being conveyed with the transaction. Also, if the seller is specifically excluding certain equipment from the transaction, the parties will want to reference the excluded equipment. For purposes of these schedules, the seller should prepare a list of equipment that includes any serial numbers, make and model (and VIN for titled equipment). The purchaser will likely request this list early in the diligence process, to consider the value and condition of the equipment being conveyed. When preparing this list, the seller should make note of any equipment leases or other liens that might attach to the equipment; the seller then should determine if the equipment liens or financing agreements will be paid off or settled at closing, or if the buyer will need to assume these agreements at closing.

10) Permits; Licenses - The buyer will want some assurances that the seller is operating the business in compliance with applicable laws, and that includes proper permits and licenses. As part of the data room upload, the seller should consider how to locate and track the various permits and licenses connected with the business. When reviewing the permits and licenses, consider whether any of them are assignable to the buyer or need to be renewed prior to the closing. Also, if the buyer needs to obtain its own operating permits, those permits may not be in place in time for closing; this could be an opportunity for the seller to accommodate the buyer's operations for a period of time using seller's existing permits or licenses (either for a nominal charge, or at a market rate). However, the approval of the transfer/non-modification of some permits may need to be a condition to closing.

11) Oral Contracts - In the event the seller's operations include verbal contracts or leases, the buyer will likely require that those oral contracts are memorialized prior to closing. One method of confirming oral contracts is to compare the seller's accounts payable (A/P) and accounts receivable (A/R) against the list of contracts and leases; check each entry/counterparty to confirm that there is a corresponding contract or lease. If the arrangement is one that is likely to continue post-closing, such that the buyer is being expected to assume the obligation or relationship, then many buyers will want to have the oral contract converted to a written agreement. Consider creating some form contracts (e.g., standard lease agreements or grower agreements), and have both parties agree to the form in advance of memorializing. Also, the seller may want to consider how to address situations where the counterparty refuses to sign a contract; for example, the seller could deliver to the buyer a rep and warranty that sets forth the material terms that would otherwise be included in the memorialized contract. Special consideration should be paid to situations where on-site managers have use of on-site housing provided they continue employment. Such agreements are often oral and may need to be memorialized by Seller prior to closing.

**The Sale of an Agribusiness Company:
An Issues Checklist for Sellers**

12) Going Concerns - The seller should consider the status of any ongoing sales activities, permitting or licensing applications, or construction/capital expenditures. Given the time period between buyer's initial diligence and the closing date, the buyer will often require certain approval rights over seller's acts outside the ordinary course of business activity. Accordingly, if the seller knows of any activities that would otherwise be outside the ordinary course (and therefore subject to buyer approval), consider excluding those items from buyer's approval right. For example, a buyer may want approval right over any new sales contracts; consider carving out certain express counterparties, provided that the sales agreements are entered into using the seller's standard form and/or are contracting under a certain dollar threshold. Also, if the seller is in the process of a building renovation or construction, carve that activity out of the buyer's approval rights, provided that the seller conducts such renovation or construction in compliance with applicable permits and licenses. Finally, if the seller is in the process of obtaining a permit or license that will apply to the business following closing, consider involving the buyer in this process (perhaps only for the buyer's knowledge and input, but not for the buyer's approval), so that the buyer understands this permit will finalize during their tenure as the owner of the operations.

This material is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

Marisa Bocci is a partner with K&L Gates LLP, where her practice focuses on real estate matters in commercial real estate, hospitality and agricultural sectors. In addition to her work on real estate matters, Ms. Bocci also represents clients on agribusiness M&A transactions. Prior to her role at K&L Gates, she was in-house counsel at a private client investment office. While in-house, she handled legal matters for an international portfolio of agribusiness assets, including direct farming operations, grain elevators, and food processing companies. She is admitted to the Washington State Bar and the New York State Bar.