



Regulatory Approval and Compliance Can Impact the Outcome of a Sale Transaction

Knowledge of, and demonstrated compliance with, all regulations is critical to a buyer.

by Michael Black

With very few exceptions, no merger or acquisition transaction requires either approval by regulating agencies or proof of compliance with current laws and regulations. There are consequences, though, for not doing so: the practical effect is that buyers are highly sensitive to the regulatory framework in which businesses operate, and fearful of taking the reins without first assuring themselves that all is well. The regulatory network of requirements for procedures, filings, notices, and approvals can be quite complex and it is not uncommon for business owners to have less than perfect knowledge of the labyrinth of laws and regulations that impact their business. Our experience has shown that even the most organized and sophisticated owners can have inadequate records, out of date licenses, or, in extreme cases, no knowledge of required regulatory filings.

Demonstrating clear knowledge of regulations and following a defined methodology for addressing the various requirements makes a statement about the discipline applied to management of the business. Surprises, on the other hand, communicate the opposite—they can raise concerns over the unknown that could affect the buyer’s approach to extended due diligence, indemnification, and the central negotiation of price and structure between buyer and seller.

Waiting until late in the transaction process to investigate the status of compliance and to begin plotting a course for gaining the necessary approvals can result in significant delays, opportunities for price renegotiations, or a failed transaction. With the potential for such drastic impact, the best course of action calls for pre-transaction planning, starting with a careful inventory of all regulatory constraints on the business, approvals and reporting requirements, approval and/or notification processes, and a timing strategy to successfully accomplish the ownership transition.

REGULATORY INVENTORY

The industry, customer base, and type of



Whether or not you are preparing to sell your company, you should have an updated check list to make sure the business is in compliance with all laws and regulations.



operations prescribe which laws and regulations apply to any particular business. Prior to considering any change of control transaction, owners should take a detailed and exhaustive inventory of the applicable laws and determine the company’s compliance and filing status. This process benefits from the scrutiny of a third party adviser, often an attorney, who is intimately familiar with the specific industry regulations.

Within a single industry, the type of operations performed may dictate different applicable laws. The aerospace and defense industry provides a good example. An aerospace coating or painting business will definitely need to comply with environmental regulations and provide documentation of compliance. Additionally, it is quite likely that the painting business will also need to conform to the International Traffic in Arms Regulations (ITAR) as many aerospace components have dual use in commercial and military applications. A

machining company that is a customer of the painting business would also need to comply with environmental and ITAR regulations, but would also be required to obey export control laws if components were being shipped internationally. In contrast, a distributor of aerospace fasteners may need to comply with export control laws but may not need to adhere to ITAR requirements. Even when armed with years of history and knowledge of the aerospace and defense industry, owners should consult with a knowledgeable attorney to assure compliance and updated documentation to address the current statutes.

APPROVALS AND NOTIFICATIONS

Federal, state and local governments place regulations on the business activity of all companies. An interested buyer will bring in legal and regulatory experts to create their own checklist and scrutinize the company’s procedures, records of actions, and compliance with each category of regulation. The number of regulatory constraints on businesses has grown considerably over the past several decades and varies depending upon the particular transaction and the related industry. All transactions must meet certain requirements, including those established by federal and state anti-trust laws and agencies (Hart-Scott-Rodino and state attorney general office), labor transitions (WARN Act), benefit reporting and compliance (ERISA), export control, state requirements to do business (business registrations), state taxation (state sales and income taxes), and environmental procedures and permit transfers. Within specific industries, there can be specific regulatory requirements imposed by national and state laws and regulations. Some of the most common industries with specific regulations are defense, insurance, fisheries, telecom, finance, and utilities. On the following page is a sample of the regulatory areas in which approval might be required.

STRATEGY

The seller of a business greatly benefits from being able to: describe the complete regulatory

Area	Law	Application
Labor	Employee Retirement Income Security Act (ERISA)	Retirement plan documentation and compliance
Labor	Worker Adjustment and Retraining Notification Act (WARN)	Can apply to asset transactions or in the case of a "plant closing" or "mass layoff"
Anti-Trust	Hart-Scott-Rodino (HSR)	Can apply to transactions above \$76.3 million
International	Foreign Corrupt Practices Act (FCPA)	Compliance with anti-bribery and related activity with foreign officials
Environmental	Various	Compliance with all disposal, usage, and facility permitting—transfers to be sought in a transaction
Taxation	Various federal and state	All taxes (income, operating, and personnel) current

CONCLUSION

Given the matrix of legal compliance possibilities, buyers universally seek satisfaction in an expert opinion confirming the totality of regulatory compliance. Therefore, thorough inspection of a seller's compliance systems and verification that all necessary regulations are addressed is required.

As part of good business practices, we highly recommend not waiting for a potential transaction to initiate this effort. Delinquencies or omissions can take time to address and it is not in the seller's best interest to have it interfere with a contemplated or opportunistic sale transaction process.

Bringing the company's records and compliance up to date, demonstrating knowledge of the ongoing requirements, and articulating a plan of execution for notifications and transfers takes away the unknowns, reduces risk for the buyer, and reduces the time required to reach a successful conclusion. **ZS**

framework surrounding the business; demonstrate historical and current compliance and timely reporting; and exhibit awareness of how or if this regulatory framework might change. In the case where permit transfers or formal

approvals are required, the seller's transaction team needs to develop a plan for timing of disclosure and tactical process for gaining joint cooperation to achieve the transfer within realistic expectations for third party approval processes.



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