

Buy-Sell Agreement Drafting Checklist

1. Type of buy-sell agreement:

Redemption? Cross-purchase? Hybrid?

2. Parties: Who should be a party to the buy-sell agreement?

All of the owners?

Less than all of the owners? List: _____

What owners won't be parties? List: _____

The entity?

Spouses of owners?

Prospective owners? If so, list: _____

3. Right of first refusal: Yes? No?

If yes, what are the terms?

Terms contained in a third party offer?

Does the third party offer have to be a proven "bona fide offer?"

What proves the bona fide offer?

A deposit of earnest money?

Proof of financial ability to consummate the purchase?

Does the right of first refusal provide relative to whether it is the buy-sell agreement price and terms?

Is the rights exercise price the **higher** of the third party offer or the buy-sell agreement?

Or is it the **lower** of the third party offer or the buy-sell agreement?

Will the owner who exercises a right of first refusal be able to pay in installments, or is that owner bound by the terms of the third party offer, such that if it is a cash offer, then the rights terms are all cash at the closing?

4. Transfers:

Does the buy-sell agreement prohibit **all** transfers except those made pursuant to the buy-sell agreement? If not, what are the exceptions?

- [] Are there any permitted transferees to whom transfers won't trigger the buy-sell agreement? If so, who are they? Family members? If so, which ones, i.e., descendants, in-laws, spouses, etc.?

5. Triggering Events:

- [] **Death:**
- [] **Disability:** What is definition of disability? Own occupation? Total disability, e.g., Social Security disability? If so, who determines disability?
- [] The insurance company?
- [] The leadership of the entity?
- [] Is there any ground of presumptive disability? What happens if there is a presumptive disability determination?
- What is the definition of "disability?" Is it an "own occupation" or does it require absolute disability? How long must the disability last before the buy-sell agreement is triggered?
- [] Must disability be permanent?
- [] **Retirement:**
- [] **Termination by company for cause:**
- [] **Termination by company without cause:**
- [] **Termination of employee with competition:**
- [] **Competition by non-employee owner:**
- [] **Divorce:**
- [] **Gift/other disposition:**
- [] **Bankruptcy:**
- [] **Action by shareholder to cause loss of S status:**
- [] **Loss of qualification as owner, professional license or S shareholder limitations, etc.**
- [] **Attempt to dissolve entity:**
- [] **Grant of proxy or other voting control rights:**

-] **Public offering:**
-] **Assignment of rights in buy-sell agreement:**
-] **Gift/sale/other disposition of property used in entity operations:**
-] **Voluntary termination of employment for reasons other than retirement or disability:**
-] **Conviction of a serious crime:**

6. Responses to triggering events:

] **Death:**

-] No action?
-] Unrestricted permitted transfer?
-] Restricted permitted transfer?
-] Right of first refusal?
-] Mandatory sale but with only a purchase option?
-] Mandatory purchase and sale?
-] Put option right but not a mandatory offer?
-] Co-existent call option right and put option right?
-] Does the buy-sell agreement require all of the interests of the deceased owner be purchased or sold?

] **Disability:**

-] No action?
-] Not Covered?
-] Right of first refusal?
-] Mandatory sale but with only a purchase option?
-] Mandatory purchase and sale?
-] Put option right but not a mandatory offer?
-] Does the buy-sell agreement require all of the interests of the disabled owner be purchased or sold?

] **Divorce, or death or bankruptcy of a spouse:**

-] Not covered?
-] No action?
-] Call option right in favor of the spouse owner?
-] Call option right in favor of all owners?
-] Call option right in favor of the entity?
-] **Involuntary termination of employment for cause:**
 -] Not covered?
 -] No action?
 -] Call option right in favor of the other owners?
 -] Call option right in favor of the entity?
 -] Put option right in favor of the terminated employee owner?
-] **Involuntary Termination of employment without cause:**
 -] Not covered?
 -] No action?
 -] Call option right in favor of the other owners?
 -] Call option right in favor of the entity?
 -] Put option right in favor of the terminated owner?
-] **Competition with the entity:**
 -] Not covered?
 -] No action?
 -] Call option right in favor of the other owners?
 -] Call option right in favor of the entity?
-] **Disclosure of confidential information to a competitor:**
 -] Not covered?
 -] No action?
 -] Call option right in favor of the other owners?
 -] Call option right in favor of the entity?
-] **Retirement:**

-] Not covered?
-] No action?
-] Call option right in favor of the other owners?
-] Call option right in favor of the entity?
-] Put option right in favor of the retired employee owner?
-] **Voluntary termination of employment:**
 -] Not covered?
 -] No action?
 -] Call option right in favor of the other owners?
 -] Call option right in favor of the entity?
 -] Put option right?
-] **Seizure of an interest:**
 -] Not covered?
 -] No action?
 -] Call option right in favor of the other owners?
 -] Call option right in favor of the entity?
 -] Put option right?
-] **Loss of license or other qualification:**
 -] Not covered?
 -] No action?
 -] Call option right in favor of the other owners?
 -] Call option right in favor of the entity?
 -] Put option right?
-] **Deadlock among the owners:**
 -] Not covered?
 -] No action?
 -] Call option right in favor of the other owners?
 -] Call option right in favor of the entity?

- Put option right?
- Attempted transfer:**
 - Not covered?
 - No action?
 - Call option right in favor of the other owners?
 - Call option right in favor of the entity?
 - Put option right?

Other triggering events:

- Not covered?
- No action?
- Call option right in favor of the other owners?
- Call option right in favor of the entity?
- Put option right?

7. Valuation:

Is the price the same for every triggering event? If not, what are the differences? _____

Appraisal?

If so, who determines the value and who picks the appraiser?

- Are there any minimum qualifications for the appraiser?
- Is the appraiser given any valuation guidance?
 - If so, standard of value?
 - Level of value, i.e., whether valuation discounts are to be applied?
- What is the date as of which the appraisal is to be conducted, i.e., the “as of” date?
- Who pays for the appraisers?
- Is there a floor minimum value, e.g., the amount of the life insurance proceeds on the death of an owner?

Book value?

-] If so, are there any adjustments to book value of assets to bring them to fair market value?
-] Are there any other adjustments to book value? If so, what are they?
-] As of when is the book value to be determined, i.e., the “as of” date?
-] Who determines book value?
-] The CPA for the company?
-] The leadership of the entity?
-] **Formula?**
 -] What is the formula?

 -] Has it ever been tested or used?
 -] Who makes the formula calculation?
 -] Is there any failsafe opt-out valuation procedure in the buy-sell agreement where the formula produces an absurd result?
-] **Fixed Price?**
 -] If so, how often is the price redetermined?
 -] Who determines the price?
 -] What happens if the owners are incapable of agreeing on a price?
 -] How long will the price last, i.e, can it go stale?
 -] Is there a failsafe alternative backup price determination plan if the price has gone stale or where the owners can’t agree on a price?
-] **Special Deadlock Pricing:**
 -] Does the buy-sell agreement provide for a special pricing procedure if there is deadlock between the owners on a significant event?

Payment for interests:

- Cash only?
- Installment payout?
- Cash to the extent of life insurance death proceeds with the balance payable in installments?
- Another combination of cash and installments?

Whose option is it on how to pay?

- The seller?
- The buyer?
- Or does the buy-sell agreement stipulate how interests are to be paid for?

Miscellaneous:

S corporation:

- Is the entity an S corporation for tax purposes?
 - If so, does the buy-sell agreement protect the S election against loss?
- Does the buy-sell agreement stipulate a method for allocating income in a year where an owner transfers some interests?
 - If so, is it the pro rata method or the per diem (per day) method?
- Are there any restrictions the entity from issuing different classes of ownership other than voting and non-voting?
- What about not taking on debt other than “safe harbor debt.?”

Minimum Distributions:

- If the entity is an S corporation or a partnership for income tax purposes, does the buy-sell agreement mandate any minimum cash distributions to the owners?
 - If so, how much?

Corporate Redemption Limitations:

-] If the entity is a corporation and the buy-sell agreement is a redemption agreement, does the buy-sell agreement provide what happens if the corporation can't redeem stock for any reason, e.g., to do so would violate the minimum capital requirements or would violate a loan covenant?
-] **Alternate Dispute Resolution:**
 -] Does the buy-sell agreement allow for either mediation or arbitration, or both, for disputes about the buy-sell agreement, or is the buy-sell agreement silent?
-] **Termination:**
 -] Does the buy-sell agreement provide for when it terminates?
 - If so, when?
-] **Tag along (co-sale) or drag along call rights:**
 -] Does the buy-sell agreement provide for either "tag along" or "drag along" provisions, or for both?
-] **Amendment:**
 -] What is the procedure for amendment of the buy-sell agreement?
 -] What is the required vote?
 -] Unanimity?
 -] A mere majority?
 -] A super majority?
-] **Governing Law:**
 -] Does the buy-sell agreement provide for which jurisdiction's laws govern?
 - If so, what jurisdiction?] **Legend:**
 -] Does the buy-sell agreement contain language about its existence that must be placed on all outstanding certificates of ownership?

[] Purposes of Buy-Sell Agreement:

[] Does the buy-sell agreement list out the purposes for the buy-sell agreement? If so, what purposes are listed? _____