

## DUE DILIGENCE: TIPS FOR SELLERS

Your prospective buyer or investor will want to ensure that the target business which they are looking to buy or invest in is worth the price they are proposing to pay.

In addition to financial, commercial and tax due diligence, it is therefore likely that they will carry out legal due diligence investigations into your business before parting with their cash.

The tips below are designed to help you and your business prepare for this process and respond to legal due diligence enquiries as efficiently and cost-effectively as possible.

### **Ask your buyer what their primary areas of focus will be**

It is always beneficial to clarify at an early stage whether there any areas of the business which are of particular interest or concern to your potential buyer or investor. This will give you an obvious starting place for collecting together documents and information ahead of receiving the inevitable (and often dauntingly long) due diligence questionnaire and will also help to highlight areas that may be the subject of further enquiries.

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Before the initial questionnaire is received we can guide you generally as to the types of documentation likely to be requested in respect of each area of the business, however, it is worth noting that due diligence questionnaires or requests for information are often used as fact-finding and information gathering tools, so are generally broad in scope. Usually legal due diligence questionnaires require you to provide information and documentation relating to the corporate structure of the business; its employees; key contracts; intellectual property rights owned or used; assets/property owned or used; any litigation in which the business is involved, and more. All of this information is likely to be requested, regardless of the actual scope of legal due diligence analysis which your buyer or investor has instructed their advisors to carry out (i.e. in-depth legal due diligence, light-touch “red flag” legal due diligence or anything in between).

### **Identify your team**

After establishing any key areas of focus, identify the relevant individuals and teams within your business or group who should be required to assist in order to deliver the requested information most effectively. Due diligence involves large volumes of information and therefore it is important that you have appropriately organised teams to collate the information (discreetly and with least disruption to the business), upload it fully and accurately to the data room and respond to any enquiries. You may have individuals familiar with specific areas of the business who can be called upon to assist (for example financial and HR managers usually have distinct responsibilities in the due diligence process). It will be important to have a strong system of communication, both within your team and with your advisors (legal and financial). It is usually best to have one central ‘co-ordinator’ to project

manage the process; someone who has a broad understanding of the business (even better if they have experienced a due diligence process before).

#### Provide complete, coordinated and accurate responses to due diligence enquiries

Giving complete and accurate replies to initial enquiries in a coordinated and consistent manner (either by email to us which we can send on to the other side, or by uploading replies and supporting documents directly into a virtual data room which can then be accessed by relevant parties) will expedite the due diligence process for all parties. Carefully considered responses delivered in the early stages of due diligence can also help to instil faith in your potential buyer or investor helping to avoid unnecessary negotiations further down the line (and may even put their mind at ease in respect of issues which they would otherwise have requested specific warranty or indemnity protection against). Well prepared responses to due diligence enquiries will also often help to avoid duplication as, if they are detailed enough, they can be used during the disclosure stage to form the basis of specific disclosures against warranties in a disclosure letter.

#### Use a good virtual data room provider

Choosing the right virtual data room can make a huge difference to the due diligence process; administrating a poorly designed data room can add a significant amount of time (and cost). Usually data rooms will be hosted by third party providers (especially where there are lots of documents). Please ask us for recommendations - we have experience of using a number of these platforms and are happy to advise as to which would be best (and most cost effective) to use on your particular matter. Below are a few general pointers:

- a) **Capacity:** the virtual data room must be large enough to host all of the due diligence data (this includes the initial documents to be uploaded in response to the due diligence questionnaire plus any extra documents added in response to further enquiries or as part of the disclosure process).
- b) **Security:** the virtual data room should be secure enough to protect your data, including by way of individual/document specific access controls and password protections.
- c) **Format:** a clear and logical indexing and folder system will help to organise your due diligence documents and will also greatly assist when referencing documents in your disclosure letter (we can provide tried-and-tested template folder structures and document numbering guidance). Ideally the virtual data room will also automatically update the index for you and, depending on the amount of information to be added to the data room, a Q&A function which allows questions and responses to be allocated to specific documents is also very useful.
- d) **Ease:** the data room should be easy to operate as you will need to update it at regular intervals. On larger deals it is useful to have 24 hour support from the data room provider as uploading documents to a data room is often an 'after-hours' task.

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#### Maintain data privacy

Due diligence (and disclosure) exercises involve the compiling and transferring of significant amounts of information about the target business and its employees.

Data protection issues need to be addressed early on, particularly in the light of the General Data Protection Regulation (GDPR) (in force from 25 May 2018). Transferring personal data has always been subject to data protection law, but the GDPR brought increased penalties for breach of its provisions and more onerous requirements to demonstrate compliance. We have summarised key points for sellers in this important area in a separate briefing note:

#### ["Data protection issues on due diligence and disclosure".](#)

#### Maintain confidentiality

An important consideration throughout the duration of a due diligence exercise is confidentiality. Documents being requested by a potential buyer will often contain sensitive information which you may wish to keep confidential for as long as possible. For example,

you might not want to disclose full copies of key customer or employee contracts in the early stages of the deal, especially where the potential buyer is a competitor. It is normal for sellers to redact or hold back certain documents from disclosure until a later stage when the deal is more progressed.

You should also check key contracts for non-disclosure provisions. If the terms of any key contract allow the other party to terminate the agreement if you disclose it to a third party, you should consider obtaining their consent before doing so.

You may also wish to consider using a personal email address to communicate with us (and other advisors) throughout the transaction. Communication through your business email address will mean that, following completion of the transaction, confidential emails may be accessible by the buyer and, subject to any ongoing employment arrangements, you may no longer have access to them. This may have adverse consequences after the sale and may compromise the confidentiality of communications between you and us.



### KEY CONTACT

For further information about any of the issues raised in this guide, please contact:

**James Waddell**

Partner

**T:** +44 (0)1483 734223

**M:** +44 (0)7747 037032

**E:** [james.waddell@stevens-bolton.com](mailto:james.waddell@stevens-bolton.com)

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## STEVENS&BOLTON

Wey House, Farnham Road  
Guildford, Surrey, GU1 4YD  
Tel: +44 (0)1483 302264  
Fax: +44 (0)1483 302254  
DX 2423 Guildford 1  
[www.stevens-bolton.com](http://www.stevens-bolton.com)

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