

Reprint

Deal Killers

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By Loren Smith

I'm often asked what is the most common deal killer. My response is that although there is no single culprit most often responsible for thwarting the process of selling a company, an underlying phenomenon to be wary of is "deal fatigue."

Think about it. Selling a business is always rigorous and sometimes excruciating. From the point that a letter of intent (LOI) is signed until money changes hands at the closing, the buyer and seller have to surmount numerous hurdles together. They need to reach agreement on a multitude of issues. And all that hurdle jumping creates fatigue.

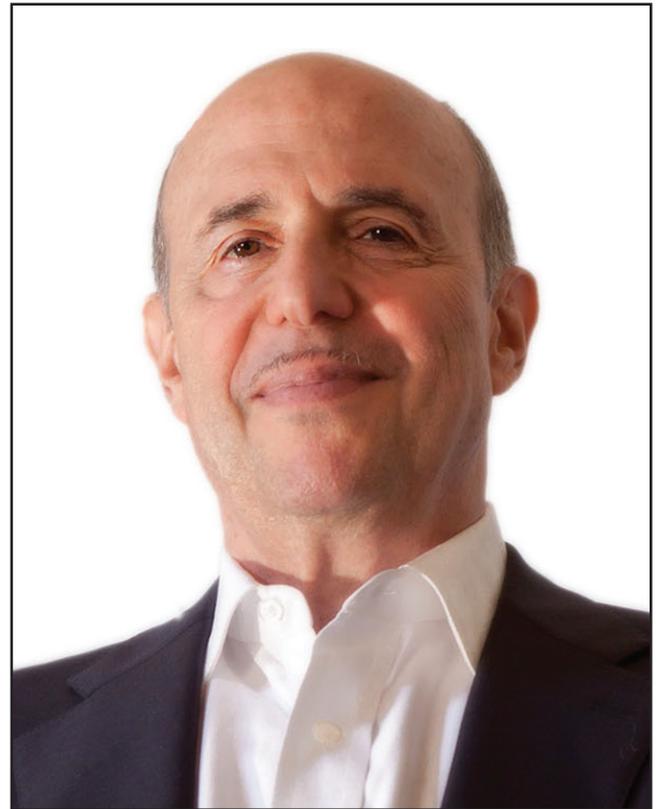
Moreover, for the buyer there is another fatigue component: risk reduction. Worrying about whether a deal is just as it appears and taking pains to minimize the possibility of negative surprises post-closing saps one's energy.

So what is the most effective antidote against deal fatigue? Trust. Whether we are the buyer or seller, the more we can build trust throughout the sales process, the better we can keep deal fatigue in check and increase the chances of clearing those looming hurdles.

Here, then, are the most common potential roadblocks. Any of the following, combined with sagging energy and patience, can sink a deal.

Reps and warranties. An asset or stock purchase agreement is usually a requirement of a sale. So to satisfy the agreement, the seller is expected to warrant (or guarantee) a variety of items while the buyer is typically seeking a level of certainty that exceeds the tolerance of the seller. Likely results are push-back, creating tension.

Holdback. Deals customarily call for the seller to set aside a portion of the purchase price in escrow for a specified period to provide a ready pool of dollars in case the buyer deserves to be compensated for post-closing discoveries. Disagreement on the holdback is always a challenge.



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Employment agreement. The seller is often required to remain involved with the business past the closing. All aspects of this agreement - such as compensation, role in the business and number of hours per week - are negotiable, but the most common sticking point is the length of time of overlap - especially when the seller is seeking a path to retirement. Differences on this key point can sour a deal.

Seller note. It's quite normal for a business to be sold with a portion of the sale price to be paid over time based on the amount, term, interest rate and other conditions as negotiated in a seller note. That's a lot of variables and can be a deal-breaker.

Customer confirmation. Buyers usually want to have some interaction with a company's customers pre-closing to help ensure that relationships will continue. The nature and timing of these interactions are always subject to negotiation - often complicated by confidentiality concerns - which can create potential breakdowns in the sale process.

Working capital adjustment. Working capital - the difference between current assets and current liabilities - moves up or down between the date the LOI is signed and the date of closing. The degree of allowable change and the mechanics of

adjusting for this change are always negotiable. Moreover, the mechanics can be hard for the seller to grasp, particularly given the prospect of having to write a post-closing check in the event of a negative adjustment.

Third parties. Lawyers may get a bum rap here because of the cliché that lawyers are deal killers. In reality, any third party to the deal who does not have the expertise to play a helpful role in the transaction can gum up the works, and that might be an accountant, financial adviser, relative or, on occasion, a lawyer.

In the M&A world it is often said that “there are no easy deals.” In my experience, this is mainly true, but I have also found that when the buyer and seller are truly committed to consummating a deal, the process isn’t always pretty, but the deal gets done – especially when at least one of the parties is intent on building trust.

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