Index

A
add-back adjustments, 100, 103–4
add-back calculations, 104
add-in adjustments, 102
all-cash acquirers, 3
Antitrust Division of Justice Department, 232
auction
broad, 20, 144, 145t8.1, 151–55
limited, 144, 145t8.1, 150–53, 155
marketing process, two-step, 161
participation in, 154
process deviation, 147

B
backup buyers, 65, 238–39
bankruptcy
of an ESOP company, 136
bar, 250
court, 257–67
court order mandated sale, 160
creditors’ rights and, 250
filing to protect interests, 257–58
judge, 136
laws, regulations, and procedures, 250
other court proceedings and, 160
process and unsecured creditors, 257
sale, 110
United States Bankruptcy Code, Section 363(b), 251
book value, 34–36, 47–48, 218, 222
broad auction, 20, 144, 145t8.1, 151–55
Buridan, Jean, 1
business
information on company, 90–97, 186
owners, 3, 5, 14–15, 33
for sale, 2, 14, 23, 38, 64, 69, 89, 270, 299
temperament, 22–23
valuation, 33–34
buyers, backup, 65, 238–39
buyers, prospective
competitors and, 159
confidentiality, 158–65
confidentiality agreement, 174–79
credit providers and, 159
customers and, 158
employees and, 158–59
indication of interest, 168–73, 181–82, 230
key manager/shareholder, death of, 160
nondisclosure agreements, 162
buyers, prospective (cont’d)
  offering memorandum, 165–68
  process letter, sample, 179–80
  publicly traded companies, sales of, 159–60
  suppliers and confidentiality, 158

C
  carried interest, 8, 127
  cash flow
    bankruptcy case and, 257
    of the investment banker, 27
    multiple of measure of, 36–38
    prior signing date of LOI, 216
  closing bonus, 77–78
  closing-out of investment fund, 2
  closing process, 234–37
  closing the deal, 17, 87
  company stock, 4
    ESOP owns, 134
    purchasing the, 90
    sale of, 59–61
    warrants, options to purchase, 287
  confidentiality agreement
    buyers, prospective, 174–79
    offering memorandum, 106, 109–12,
      116–17, 129, 133, 144–45, 149, 152,
      157, 161, 163
    prospective buyers, 158–65
    risk and, 114
    strategic buyers and violation of, 94
  contact information, 107, 180
  contacts
    attorney’s, 30
    investment banker, 258
    of investment banker, 20–22
    with screened list of buyers, 145
  contingency payments, 57–59
  co-owners, differences between, 2, 5–6
  corporate divestitures, 2
  cosmetic issues, 68
  costs for parts of company not sold, 102
  created value, 43–46
  customer(s)
    company’s, 39, 48–49, 93
    company sale, knowledge of, 80
    listing, sample, 95
    listing, sample disguised, 95
    lists of key, 75
    marketing efforts for, 94
    prospective, 105, 119
    video to promote company to, 104, 116
  data processing systems, 96
  data room, 193–94
    about, 112–16, 144, 154, 161–62, 173,
      185, 190, 193
    “data box” for each buyer, 114
    definitive purchase agreement, 90
    online, 32, 114–15, 144, 161, 168, 173,
      185, 190
    seller’s online, 230
  decision to act, painful, 250–51
  definitive purchase agreement
    about, 116
    clarifying, 213
    data room supports, 90
    drafting and distributing, 197, 199
    economic value, 208
    exhibits, 116, 229, 243–46, 277
    final edits and schedules to, 225
    lawyers and, 17
    length of, 229
    marketing vehicles and, 90
    markup of, 215
    sample, 240–46
    seller negotiating, 215
    different forms of consideration, 209–13
    diversification parties, 132–33
    due diligence
      after the LOI is signed, 225–27
      asset-based lender, 219
buyer’s, 67, 230–32, 237
buyer’s follow-up, 277
final, 115, 232
final purchase price, 200
financial sponsor, 130, 147
fiscal year and, 73
information, 16, 230, 232
interim goals, 238
investigation, 207
issues, 202
letter of intent, 198, 219–20, 222
management team and, 75–76
offering memorandum, 90
problems uncovered in, 216
process, 200, 203, 207, 216
seller’s response to buyer’s, 234–36
strategic buyers and, 141

E
earning fluctuations, 40–41
earning power
future earnings, 35–36, 41
measure of, multiple of, 36–38, 47
past earnings, multiple of, 41
earnings before interest, taxes, depreciation, and amortization (EBITDA)
adjusting for valuation purposes, 100–101, 103–4, 107–8, 182
cash flow or earning power, 36
company’s, 38, 46, 253
company’s loan, 253
earnings fluctuations, 40
historical, 45, 100, 188
historical vs. projected, 45
in letter of intent, 217–23
of manufacturer of specialty fasteners, 78–79
multiple, 37–38, 45
negative, 48
“negative compensation addback,” 103
president-owner’s income, 101
of privately held companies, 72
revenue of company, 37
value of the company, 40
worth of the company, 41
earnout
ability to pay, 212
arrangement, lucrative, 201
duration of, 212
five-year lucrative incentive, 6
future litigation and, 57
guidelines for a successful, 57–58
payment, contingent, 38, 52, 57
for selling managers, 58
for selling shareholders, 58–59
splitting the future value, 57
tax implications of, 59
EBITDA. See earnings before interest, taxes, depreciation, and amortization (EBITDA)
Employee Retirement Income Security Act (ERISA), 133, 219, 246
employees, 80–81, 98–99
Employee Stock Ownership Plan (ESOP), 133–36, 283
engagement agreement, 27
environmental issues, 49, 64–66, 87, 99, 113, 219
environmental situation, 99
ERISA. See Employee Retirement Income Security Act (ERISA)
escrow, 198
about, 201, 208, 210, 219–20, 223, 227, 290
account, 222, 297
agreement, 138, 219–20, 223, 243
amount, 17
funds, 270
ESOP. See Employee Stock Ownership Plan (ESOP)
exclusivity
bidder, 198
buyer, 226–27
exclusivity (cont’d)
company and other buyers, 198
judges grant extensions of, 260
in marital context, 198
provision, 200, 204
provision, all-critical, 199
provision, seller and the, 200
provision and letter of intent, 203, 205, 220–21, 226–27
purchase price, negotiating the, 220–21, 226–27
executive summary, 91–92, 106–10
exhibits
about, 103–6
customer listing, sample, 95
definitive purchase agreement, 116, 229, 243–46, 277
executive summary, sample, 108
financial sheet with add-back adjustments, 100, 103–4
offering memorandum, 152
process alternatives, 145
stand-alone, 149
supplier listing, sample, 97
expense reimbursement, 27, 105, 283

F
facility tours, 190–93
family
members, 3, 7, 67, 101, 104, 139–41, 160, 219, 303
owned businesses, 7, 140, 142
Federal Trade Commission (FTC), 232
fees
flat, 23
flat percentage, 23–24
investment banker, 23–29
Lehman, 24–25
monthly, daily or hourly, 26
reverse Lehman, 25–26
situation-based incentive, 26
“fiduciary out,” 160
Filippell, Mark, 249, 307
final offers
about, 162, 167, 173
buyer asked to make, 173
buyer due diligence, 230
buyer’s, 202
closing, 89
date for submission of, 194
draft purchase agreement, 273, 275
evaluation of, 276
final purchase price, negotiating, 200–201
management presentations for finalists, 167
markup of the purchase agreements, 200
orchestrating, 17
by second date, 162
seller’s response to, 199–200
financial pressures, 2, 9
financial results, 71, 73
financial review, 100–103
financial sponsors
about, 125–32
auction participation, 154
auction process deviation, 147
business brokers authorized by, 10
buying and selling companies for a living, 153
finder firms and targeted industries, 150
investment banking skills, 18
liquidity events and, 8–9
networks of finders, 142
as potential buyers, 92, 121, 125–32
profit from carried interest, 8
prospective buyers, 15
run by professional investors, 4
specialized, 132
strategic buyers vs., 124
top price offering, 149
valuation of portfolio, 41
financial statements
  add-back adjustment to, 100
  adjustments to, 92
  annual audited, 218
  bankruptcy and, 257
  cost of resolving lawsuits on, 99
  pretransaction checklist, seller’s
    attorney, 281
  raw, 36
  tidying up, 67
  year-end, 223
financial summary, 107
fiscal year, 41, 73, 182, 284

G
  gross negligence, 27–28

H
  Hart-Scott-Rodino filing, 232–33
  Herbert, George, 117
  history of company, 30, 92–93, 104–5
  honesty as the best policy, 2–4

I
  illness or death, 2, 6–7, 160
  indemnification, 27–28, 138, 242, 283
  indication of interest, 168–73, 181–82, 230
  industry description, 92–93
  intangibles, 38–39
  Interim Net Book Value, 222
  internal company changes, 73
  internal rate of return, 8
international
  access, investment banker’s, 21
  alliances, membership in, 21
  buyers, 20–21
  experience, 21
  offices, 21
investment bankers
  choosing the right, 29–32
  collaborating with, 274–75
  criteria for selecting, 19–23
  fees, 23–29
  presentations, competing, 30
  questions asked of owners, 4
  two mistakes when selecting, 31
  what they do, 14–19
investment considerations, 92, 106–8

K
  Khashoggi, Adnan, 13

L
  lawsuits
    about, 66–67
    antitrust laws, violation of, 232
    breach of confidentiality, 94
    buyer, 90, 200
    cost of resolving, 99
    current of pending, 113, 246
    indemnification for past, 138
    post-closing, 90
    potential, 35, 58
    regulatory entanglement and, 115
    risk of, 66
    seller’s rights in, 99
    seller’s violation of the LOI, 227
    settlement costs, 104
    violation and attempt to avoid, 165
  lawyers, effective vs. ineffective,
    278–80
  leaks, dealing with, 82–86
legal
  checkup, 274
  claims, 271
  counsel, 250
  deliberations, 259
  dispute, 18, 102
  documents, 269
  exposure, 99
  fees, 261
  fine points, 260
  hassle of bankruptcy, 257
  process, 252
letter of intent (LOI)
  about, 198–201, 302
  bankruptcy counsel files, 258
  best price and most reasonable terms, 258
  charitable trust and, 302
  closing and, performance between, 227–29
  date for submission, 180, 182
  exclusivity provision, 200, 204
  final offer price, 200
  indication of interest, 181
  key legal issues and, 209
  negotiations and, 215–16
  samples, 217–23
  signature, meaning of a, 203, 216
  signed, 65
limited auction, 144, 145t8.1, 150–53, 155
limited partnerships, 4, 8, 60, 125, 142
liquidity events, 8
LOI. See letter of intent (LOI)
long-term timing deals, 71–73
“low-ball” offers, 7

M
M&A. See mergers and acquisitions (M&A)
M&A International Inc., 21
major contracts, 73–74
management
  buyers, 136, 138
  buyers rely on, to run business, 96
  changes, 68–71
  incentive, 219
  reports, 96
management presentations
  about, 185–86, 189–94
  blocking and tackling, 186–88
  buyer meets, 98, 161–62, 173
  data room, 112–16
  definitive purchase agreement, 116
  document preparation, 89–90, 98,
    110–12
  for the finalists, 167
  indications of interest, 87, 154, 161, 163,
    167–70
  letter of intent and, 228, 230
  management team and, 171–72, 185–89
  negotiating purchase price and, 197,
    204, 207, 215
  offering materials, preparation of, 139,
    144
  pitfalls, 189–90
  practice makes perfect, 189
  preparing for and delivering, 189
  purchasing agreement and, 275
  sellers prepare customized, 111
management team
  about, 1, 5, 136–39
  after sales closing, 293
  as buyers, 136–38
  company sale process, 229
  internal company changes, 73
  investment banker and, 274
  involving the, 75–80
  management incentive, 219
  management presentations, 171–72,
    185–89
  new owner and, 291
  offering memorandum, 75, 79, 90, 98
  poaching by buyers, 96, 98
  prospective buyers and, 16, 110–11, 136,
    170–72, 227
  seller’s, 229, 236
  upgrading, 71
  workforce, informing the, 81–82
market consolidation, 8
marketing philosophy, 20
marketing strategy, 14–15, 122
markup
  of different forms of consideration,
    207–9, 212
  of purchase agreement, 198–200,
    202–19, 276
merger & acquisition lawyer, 272–74, 280
mergers and acquisitions (M&A)
  advisor, 20
  assignment and Lehman fee, 25
  auction process, 162
  business valuation, 34
  experience, 18–20
  experience and skills, 273
  firms in foreign countries, 21
  firms with international connections, 21
  Hart-Scott-Rodino Antitrust filing, 232–33
  intermediary, 13, 32
  lawyer, 272–75, 278–80
  legal force behind the engagement, 198
  marketing process, 30
  mediums of exchange in, 52–59
  playbook, 144
  process, 86
  professional billing rate, 26
  tacticians, 40
  transactions, cross-border, 20
  transactions, middle-market, 232
  version of antitrust, 232
  visitation, tactical “blocking and tackling” of, 170

N
  “negative compensation addback,” 103
  negotiated sale, 144–50, 145t8.1, 153, 155
  negotiating dynamics, reversed, 226–32
  negotiating strategies, 213–15
  case-specific, 201–15
  four comparable offers, 204–5
  higher price with tough terms vs. lower price and reasonable terms, 206–7
  letter of intent, sample, 217–23
  negotiating dynamics, 215–16
  one clearly superior offer, 202–4
  one high price offer with tough terms, 208–9
  six offers with different forms of consideration, 209–13
  three offers with high prices and tough terms, 207–8
  New York Stock Exchange, 6, 118
  nonrecurring events, 102
  notes in lieu of cash, 52–53

O
  offering memorandum
    about, 90–106
    annual financial statement, 100, 103
    auction marketing process, two-step, 161
    broad auction, 145
    buyers, prospective, 165–68
    buyer’s indications of interest, 103
    confidentiality agreement and, 108–10, 114, 129, 131, 133, 146, 149, 154, 161–63, 174–78
    cosmetic changes to, 239
    definitive purchase agreement, 116
    destruction of, 163–64
    digital vs. physical version of, 166–67
    distributing to buyers, 165–68, 197, 230, 234
    due diligence, 90
    executive summary (teaser), 105–6, 108–9
    indications of interest, 168
    investment banker, 161
    limited auction, 145
    management presentation, 89, 110–12, 116, 139, 144, 154, 161–62
    management team, 75, 79, 90, 98
    photographs of plant and people, 104
    preparation of company for sale, 144
    preparation time, 252
    preparing, 15–16, 86, 89–90, 157, 197
    as a presentation guide, 110
    prospective buyer, 89, 149, 197
    questions, responding to, 16
offering memorandum (cont’d)
  risk of, 90–91
  unions and labor union agreements, 98–99
offices and other facilities, 96
online data room, 32, 114–15, 144, 161, 168, 173, 185, 190
ordinary negligence, 27–28
out-of-pocket expenses, 27
owner compensation, excess, 100
owner expenses, excess, 101–2

P
post-closing
  financial matters, 298–305
  hubris, 296–97
  immediate cooperation, 290–95
  legal matters, 297–98
  subsequent matters, 295–98
post-sale closure
  charitable giving, 300–303
  closing month following, 293
  investments, 303–4
  new horizons, 304–5
  notification, customer, 291–92
  notification, employee, 290–91
  notification, general public, 292–93
  notification, supplier, 292
  notification methodology, alternative, 293–95
  playing field, leveling the, 305
post-transaction litigation, 27
preparation for sale, 64–71
pretransaction checklist, seller’s attorney, 281–88
products and development, 93
professional investors, 4
prospective buyers
  bidding war, 37
  broad auction and, 144
  broad auction process, 153
  client approach by, 148
  company management, reliance on, 96
  confidentiality agreement, 161–63, 174–79, 197
  confidentiality efforts, undermining, 74
  confidentiality issues, 155
  confirming interest of, 109
  contacting, 15–16, 109
  data room documents, 113
  dreaded call from, 153
  executive summary teaser, 106–7
  face-to-face meetings with, 16–17
  “fiduciary out,” 160
  identification and cultivation of, 153
  identifying and vetting, 141
  identity of selling firm, 161
  information requirements of, 93
  intentions and confidentiality, 74
  investment banker and, 20, 29–30, 110
  key managers, retain, 77
  lawsuit risk, 66
  letter of intent, 198–99, 227
  management buyers and, 138
  management team and, 172
  negotiated sale and, 144
  offering memorandum, 89–90, 149, 197
  purchase-agreement markup, 205
  researching, 15
  revised bids, 205
  select group of managers and, 80
  seller questions the integrity of, 162
  seller’s Web site, 68
  synergies between client and, 111
  trade show cocktail party, 155
  valuing companies and, 49–50
  walk-through of client’s business, 68
publicly traded
  companies, sales of, 159–60
  strategic buyers, 128
public offerings, 4, 8, 125, 211
purchase agreement
  drafting and negotiating the, 275–78
  markup, 200, 278
negotiating, 17
negotiating out of, 229–230
negotiations, 200

R
recapitalization, 4
Redford, Robert, 289
retainers, up-front, 27
retention bonus, 77
retirement, 2, 5, 11, 57, 71, 128, 133–34, 212
risk
in auction process, 149
benefits vs., 298
buyer’s, 69
of buyers learning of each other, 152
buyer willingly assumes, 59
catastrophic, reducing, 74
collateral, protecting the downside, 255
of company’s appraisal, 138
confidentiality agreement and, 114
doing disclosures, 85–86 138
environmental, 99
of ESOP, 136
of exposing confidential sale, 131
factors in offering memorandum, 90–91
of Federal Trade Commission (FTC), 232
financial sponsors and, 125–28, 131, 133
of hurting the company, 155
investment, 90
of lawsuit, 66, 115
lawyers and minimizing of, 270–71
of leaking marketing materials, 163
of limited auction, 150–51
of losing the deal, 203
of making offers, 169
post-transaction, 270
of projected performance, 36–37
of prospective buyer, 66
publicity, 137
of rumors, 83
sale put at, 270
for seller, 237, 277
structure a trust to cover, 279
of synergies from business combination, 40
tolerance for, 5
trade show/convention, 74
volatility and, 36
ways to mitigate, 96
S
sale decision, 3, 8, 10–11, 205
sales organization, 93, 119
sales transaction, tails covering, 28–29
secured party sales, 256–57
seller’s
attorney pretransaction checklist, 281–88
exposure if buyer does not close, 237
management team, 5, 186–89, 229
stock price, 16
time, freeing up the, 17–18
“unfair advantages,” 14
Web site, 68
senior lender dynamics, 252–56
shareholder objectives, 107
short-term timing deals, 73–75
spray-and-pray letter, 9
stock, 54–56
stock options, 52, 56–57, 113, 220, 222, 283, 285
strategic buyers
about, 118–25
corporate, 123, 126
dealing with, 149
as diversification parties, 132–33
due diligence, 141
feedback from, 39
high bids from, 86
strategic buyers (cont’d)
  internal review process, 226
  negotiation by, 98
  preemptive bid, 18, 140, 146, 149, 155
  publicly traded, 128
  purchase agreement, revisions to, 275
  showing the business to, 46
  synergies and, 93, 148, 154
  in tank business, 45
  unlocked value by, 47–50
  well financed, 15
strategic position, change in, 7–8
suppliers, 35, 80, 94, 96–97, 105, 154, 157–60
synergy (synergies)
  deriving profits from, 127
  marketing, 119
  operations, 119
  owners, direct contact with, 148–59
  product, 120
  prospective buyers and client, 111
  provided by buyer, 39–42
  research and development, 120
  risk of, 40
  speculative, 120–21
  strategic buyers and, 93, 148, 154
T
  taxes, 299–300
  third-party sale, 5
  timing, 71–75
trade show cocktail party, 155
trade shows, 39, 44, 74, 83, 85, 105, 155, 163, 235
transaction value, 23, 53
U
United States Bankruptcy Code, Section 363(b), 251
unsolicited offer, 2, 9–10, 45
V
valuation methodologies, 34–42
valuation theory in real-world, 42–43
value fluctuations, 41
value vs. currency, 51
video about company, 104–5
W
website upgrades, 68
West, Mae, 7
Western Reserve Partners, 16, 22, 49, 80, 108, 112, 123, 149, 179, 182, 238, 274, 295
“what’s in it for me?”, 4
workforce
  in executive summary, 108
  informing the, 80–83
  working capital, 17, 179, 183, 244
Y
Young Presidents’ Organization, 3