Question

I am a director considering an MBO of my employer company. Am I right in thinking that the Companies Act 2006 abolishes financial assistance and if so when does the abolition take effect?

Legal opinion

The Companies Act 1985 prohibits a company from giving financial assistance for the purposes of an acquisition of its own shares or those of a private holding company.

Financial assistance is a broad term and can include a series of activities from direct loans to a purchaser by the target company, to the target company reducing or discharging a liability incurred by a purchaser or a subsidiary of the target company guaranteeing funds lent to the purchaser (and a series of similar arrangements).

The 'whitewash' process permits financial assistance otherwise prohibited by the 1985 Act to be given where the auditors report on the solvency of the company giving the assistance and all of the directors of the company sign a statutory declaration confirming that solvency.

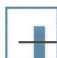
The existence of the financial assistance restriction often results in substantial advisor fees being incurred to identify whether a transaction falls foul of the restriction and complex structures being devised to permit the transaction to proceed.

The 2006 Act financial assistance provisions will take effect on 1 October 2008 and replace in their entirety the 1985 Act provisions. Section 678 of the 2006 Act continues the general prohibition on the giving of financial assistance by a public company.

This restriction does not, however, extend to private limited companies, except where the company is a subsidiary of a public company giving the assistance for the acquisition of that public company or a public company subsidiary giving assistance for the acquisition of its private holding company.

These changes have been broadly welcomed, as it is anticipated that they will remove the requirement for advisors to consider the financial assistance regime in relation to a large number of private company transactions, however, companies and their advisors may still need to consider the financial assistance regime where there is a public company involved in the transaction.

Ian Mitchell



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Question

What wealth management issues should be considered when planning an exit strategy from my business?

Advisor's opinion

You will need advice from your accountant and financial advisor when planning an exit strategy. You should ensure that your professional advisors understand your objectives and communicate with each other in order to formulate the best exit strategy. I will highlight some of the major wealth management issues that you will face.

There may be a capital gains tax liability on the sale of the business and this should be calculated at an early stage. Planning techniques can then be used to minimise the amount of tax that is paid. There are also tax breaks on a number of investment vehicles which can be used to defer or offset the liability.

Your business will be a major source of income and this is likely to cease when it is sold. The sale proceeds can be employed to produce income from an investment portfolio. Consideration should be given to the level of income and the access to capital that will be required. Appropriate investment vehicles can be identified into which the proceeds can be invested. Contributions to some plans are limited, due to tax benefits, and it may take a number of years to build up a significant fund. Planning should therefore start at least 3 years in advance of exiting your business.

Once the investment vehicles have been put in place, you need to consider the underlying investments. I would advocate an approach whereby you assume the lowest risk profile required to meet your objectives. This contrasts with the common approach of selecting your risk profile from a scale of one to five and selecting funds to match it.

Many businesses attract business property relief which means their value is not included in your estate for inheritance tax. Following an exit, you may receive a cash lump sum which will be included in your estate. Your potential inheritance tax liability can dramatically increase overnight and you need to consider the options for mitigating this liability.

There is a close interaction and a number of overlaps between accounting and wealth management issues. It is vitally important that your accountant and financial advisor work together to ensure that they produce the best exit strategy for you, well in advance of the actual sale.

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