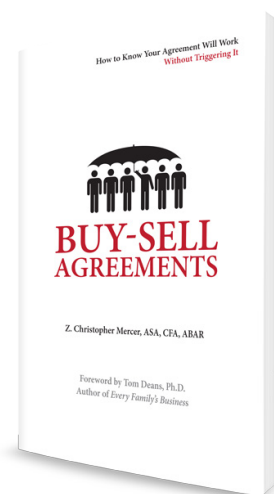


The **BUY-SELL AGREEMENT REVIEW CHECKLIST**

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The Buy-Sell Agreement Review Checklist is a companion piece to the book *Buy-Sell Agreements for Closely Held and Family Business Owners*.

THE BUY-SELL AGREEMENT REVIEW CHECKLIST

Introduction

The Buy-Sell Agreement Review Checklist can be used in two basic ways:

- » Use as a tool to review an existing buy-sell agreement; or
- » Use as a tool for owners and advisers to discuss the important business and valuation components when a buy-sell agreement is being created or revised

The Buy-Sell Agreement Review Checklist is based on my book, *Buy-Sell Agreements for Closely Held and Family Business Owners*. If you have the checklist and not the book, I highly recommend that you purchase copies of the book for key owners and advisers to review.

Consulting Services

You should review your buy-sell agreement and other important corporate documents and agreements every other year or so. I read and review buy-sell agreements from business and valuation perspectives for clients. My main focus is on the valuation mechanism, but I will share my thoughts about the entire document.

My review can help assure that the agreement will work to provide a reasonable valuation when triggered. I also focus on what happens with trigger events and any interaction between trigger events and the valuation mechanism.

I will read/review your buy-sell agreement (or the relevant portion of your operating agreement or partnership agreement) and provide short memorandum outlining my comments, observations and recommendations for your consideration. I will also have a conference call with you, your other owners, or advisers for up to an hour to talk about your buy-sell agreement situation. If you are interested in this service, contact me at 901.685.2120 or mercerc@mercercapital.com.

Other Resources

Below are other buy-sell agreement resources including: the book *Buy-Sell Agreements for Closely Held and Family Business Owners*, the kindle e-book *Buy-Sell Agreements for Baby Boomer Business Owners*, the complimentary PDF Buy-Sell Agreement Checklist for Shareholder Promissory Notes, and the newest book *Unlocking Private Company Wealth*. Learn more about these resources at ChrisMercer.net.



THE BUY-SELL AGREEMENT REVIEW CHECKLIST

Overview of Agreement

Company Name: _____

			NOTES
1 Agreement Status			
Date Signed: _____			
Date(s) of any Amendments: _____			
Date(s) of any Amendments: _____			
2 Type of Agreement			
Fixed Price	Price per agreement	\$ _____	
	Date of price	/ /	
	Alternative(s) if price is out-of-date? (i.e., is there a valuation process in the event that the fixed price is dated?) Then, it is also a process agreement and must be evaluated as such.	Yes / No	
Formula	Does agreement specify who to calculate?	Yes / No	
	If so, who?	Notes	
	Date of last calculation?	/ /	
	Price per last calculation	\$ _____	
Valuation Process Multiple Appraisers	Type of process*		
	Appraiser(s) named in agreement?	Yes / No	
	If so, who?	Notes	
	Has the process ever been triggered?	Yes / No	
	If yes, when?	/ /	
Valuation Process Single Appraiser	Type of process**		
	Is the appraiser named in agreement?	Yes / No	
	If so, who?	Notes	
	Has appraiser provided opinion?	Yes / No	
	Date of last price by appraiser?	/ /	
	Amount of last price?	\$ _____	

* Either Third Appraiser as Reconciler, Judge or Determiner per Chapter 16

** Select Now and Value Now, or Select Now and Value at Trigger Event, Select and Value at Trigger Event, or Select Now and Value Now (preferred in most cases) per Chapter 17

THE BUY-SELL AGREEMENT REVIEW CHECKLIST

Overview of Agreement

			NOTES	
3 Parties to Agreement				
	Are all shareholders who should be party to the agreement actually party to the agreement?	Yes / No		
	Are future shareholders automatically made party to the agreement?	Yes / No		
4 Right of First Refusal (ROFR)				
Is there a ROFR in agreement?		Yes / No		
Outline its terms in the Note Section		Notes		
5 Life Insurance?				
	Amount(s)	Corporate / Individual Owners		
\$				
\$				
\$				
\$				
6 Binding or Not?				
Based on reading the agreement from business and valuation perspectives...				
Is the agreement binding on shareholders to sell following trigger events?		Yes / No		
Is the agreement binding on the Company to buy following trigger events?		Yes / No		
Comment re conditions if not binding		Notes		
7 Stock Status After Trigger Event				
Does the agreement specify the status of stock or partnership units or member interests during the period between trigger events and eventual purchase?		Yes / No		
a) Dividends for C Corporations		Yes / No		
b) Distributions for tax purposes (for tax pass-through entities)		Yes / No		
c) Economic distributions (for pass-through entities)		Yes / No		
d) Vote (if any)		Yes / No		

THE BUY-SELL AGREEMENT REVIEW CHECKLIST

Trigger Event Review

Buy-Sell Agreement Trigger Events	Present (Y/N)	Comments
Quits		
Is Fired		
Retires		
Becomes Disabled		
Dies		
Becomes Divorced		
Default (bankruptcy)		
Disqualification		
Disagreement		
Disclosure		
Dispute resolution		
Dilution		
Dividends		
Distribution		
Drag-along rights		
Double entities		
Differential pricing		
Don't compete agreements		
Donate		
Distributions after a trigger event		

Other situations that may warrant consideration	Present (Y/N)	Comments
Rights of first refusal to other owners		
Secondary right of refusal to company		
Optional purchase/sale		
Mandatory purchase		
Life insurance		
Maintenance of S corporation status		
Who owns / votes the stock after a trigger event?		
Control maintenance		
Vote restrictions or agreements		
Personal guarantees		

THE BUY-SELL AGREEMENT REVIEW CHECKLIST

Fixed Price Agreement Worksheet

Company Name: _____

Fixed Price Agreement			NOTES
	Price per agreement	\$	
	Date of price	/ /	
	Alternative(s) if price is out-of-date? (i.e., is there a valuation process in the event that the fixed price is dated?) Then, it is also a process agreement and must be evaluated as such.	Yes / No	
Questions to Address			
1	How is the price to be set? <i>(usually by unanimous agreement of the owners)</i>	Notes	
2	How is the price to be updated? <i>(agreements usually specified annual repricing by the owners)</i>	Notes	
3	What happens if the agreement is not updated for one or more years and a trigger event occurs?		
	Is there a provision for repricing if the most recent price is stale?	Yes / No	
	Is there a requirement that the owners agree on a then-current price?	Yes / No	
	What happens if the parties cannot reach agreement?	Notes	
	Is the agreement silent in this event?	Yes / No	
4	Is there a provision in the agreement calling for a valuation process in the event that the parties cannot reach agreement on the price if the existing price is stale at the time of the trigger event?	Yes / No	
5	If the agreement has a valuation process to resolve dated fixed prices, then the review should include analysis on the appropriate Valuation Process Worksheet	Yes / No	
6	If there is life insurance associated with the buy-sell agreement, is the use of the proceeds clearly specified?	Yes / No	
	Is there potential for misunderstanding about who is required to purchase stock of a deceased owner? <i>(Comment in Notes, as appropriate)</i>	Yes / No	
7	Based on what you know about the Company and its current value, is the recent fixed price in the agreement overstated or understated relative to your best estimate of current market value? <i>(Comment in Notes, as appropriate)</i>	Over / Under	
8	If the fixed price has not been reset in two years or more, have the owners attempted to agree on a new price and not reached an agreement?	Yes / No	
	If no, what are the key stumbling blocks?	Notes	

THE BUY-SELL AGREEMENT REVIEW CHECKLIST

Formula Price Agreement Worksheet

Company Name: _____

Formula Price Agreement			NOTES
	Does agreement specify who to calculate?	Yes / No	
	Who?		
	Date of last calculation?	Yes / No	
	Price per last calculation	\$	
Questions to Address			
1	Is a formula specified in the agreement?	Yes / No	
2	Are definitions of terms clear? <i>Attempt to replicate the formula's math in a separate worksheet</i>	Yes / No	
3	Is there an example calculation attached to the agreement? <i>If so, show a replication of the calculation</i>	Yes / No	
4	Is there any discussion in the formula re potential adjustments to the calculations?	Yes / No	
5	Is the formula routinely recalculated by the Company?	Yes / No	
6	Who performed the last calculation?		
7	Using current information, if available, calculate the now-current formula price in accordance with the agreement	Notes	
8	Based on what you know as an appraiser or think as a business owner, would valuation adjustments be appropriate in a current valuation that would cause an appraised value to be different from the formula calculation?	Over / Under	
9	What are those adjustments?	Notes	
10	Might they be material? <i>(If yes, comment separately or in Notes)</i>	Yes / No	
11	Does the agreement specify an alternative pricing resolution in the event there are disputes over the calculated formula price? <i>(If so, describe the alternative resolution process in the Notes or separately)</i>	Yes / No	
12	If there is life insurance associated with the agreement, is the use of proceeds clearly specified?	Yes / No	
	Is there potential for misunderstanding about who is required to purchase stock of a deceased owner?	Yes / No	
	Are life insurance proceeds included in the formula to determine price?	Notes	
13	Other comments or observations?	Notes	

THE BUY-SELL AGREEMENT REVIEW CHECKLIST

Multiple Appraiser Process Agreement Worksheet

Company Name: _____

			NOTES
Multiple Appraisers	Type of process*		
	Appraiser(s) named in agreement?	Yes / No	
	If so, who?	Notes	
	Has the process ever been triggered?	Yes / No	
	If so, when?	/ /	
Process Overview			
Most multiple appraiser valuation processes can be categorized as one of three types:			
Third Appraiser as Reconciler: The third appraiser's conclusion is averaged in some way with the conclusions of the first two (<i>see following pages</i>)		Reconciler	
Third Appraiser as Determiner: The third appraiser provides the sole appraisal per the agreement and that conclusion determines price (<i>see following pages</i>)		Determiner	
Third Appraiser as Judge: The third appraiser does not prepare an appraisal but must decide which of the two initial appraisals is the most appropriate. The decision of the third appraiser (the Judge) is determinative of price (<i>see following pages</i>)		Judge	
Outline of the Process			
Pick the appropriate chart from the attached and outline the process from the agreement as clearly as possible on the chart. This will provide a visual picture of the process to facilitate discussions with clients and advisers. If the process differs from the three most typical roles for the third appraiser, then adapt the chart that best fits		Attach chart	
Based on the outline of the process in the chart, comment as appropriate regarding time frames, selection criteria for appraisers, etc. (Notes or separately)		Notes or separately	

* Either Third Appraiser as Reconciler, Judge or Determiner per Chapter 16

THE BUY-SELL AGREEMENT REVIEW CHECKLIST

Single Appraiser Process Agreement Worksheet

Company Name: _____

			NOTES
Single Appraisers	Single appraiser, select now and value at trigger event?	Yes / No	
	Single appraiser, select now and value regularly thereafter?	Yes / No	
	Appraiser(s) named in agreement?	Yes / No	
	If so, who?	Notes	
	Has the process ever been triggered?	Yes / No	
	If so, when?	/ /	
Outline of the Process			
Select the chart from the attached that most closely follows the procedure in the agreement. This will provide a visual of the process to facilitate discussions with business owners and advisers		Attach chart	
Based on the outline of the process in the chart, comment as appropriate regarding time frames and other aspects of the process (Notes or separately)		Notes or separately	

THE BUY-SELL AGREEMENT REVIEW CHECKLIST

Valuation Process Agreement Worksheet

Defining Elements of the Appraisal

Standard of Value		NOTES
Possible standards of value you might see	(per agreement)	
Fair Market Value	Yes / No	
Fair Value	Yes / No	
Going Concern Value	Yes / No	
Market Value	Yes / No	
Other	Notes	
Level of Value		
<p>Appraisers tend to place values into conceptual buckets along a "levels of value" chart. There is often confusion re whether the price to be determined is, e.g., the fair market value of the enterprise or the fair market value of an interest in the enterprise. Language in agreements is often confusing. Copy the language describing the kind of value called for in the agreement. Using the chart below as a reference attempt to specify the value described. If there is confusing language regarding the company or an interest in the company, make note. If there is confusing language regarding valuation premiums or discounts that should be considered, make note. The point is that, regardless of what standard of value is specified, the appraiser(s) will have to convert the language of the document into actionable valuation concepts. If the "words on the page" are confusing to you as a reviewer, say so. This could be your highest contribution to the buy-sell agreement review process.</p>		
<p>What is the level of value specified by the agreement? Circle the appropriate box above if the level is clear. If it is not, it would be good to seek valuation advice for appropriate language.</p>		

THE BUY-SELL AGREEMENT REVIEW CHECKLIST

Valuation Process Agreement Worksheet

Defining Elements of the Appraisal

The "As Of" Date			NOTES
<p>The "as of" date for purposes of pricing a buy-sell agreement should not be difficult; however, confusing language leads to confusing results. While reviewing the discussions of specific trigger events for the buy-sell agreement under examination, be sure to note that the appropriate "as of" or valuation date or pricing date is specified. The following provides some guidance for assuring that this date is set in the agreement.</p>			
Possible trigger events include:		Clear?	
Quits	Pricing date may be date of departure or a date specified in resignation letter	Yes / No	
Fired (Terminated by Co.)	Pricing date may be date of termination or date of end of benefits or...	Yes / No	
Death of Owner	Usually pricing date is the date of death	Yes / No	
Retirement	Pricing date may be date of retirement or date of end of benefits or...	Yes / No	
Disability	Pricing date may be date that disability is determined (Side issue: be sure that the agreement has a clear definition of disability)	Yes / No	
Divorce	Filing date for divorce or date of actual granting of divorce are possibilities	Yes / No	
Bankruptcy	Date of granting of bankruptcy or filing date are possibilities	Yes / No	
Other	Be sure to look at all trigger events in the agreement and show on worksheet	Yes / No	
Qualifications of Appraisers			
<p>Quite often, minimal or no qualifications are indicated in agreements. You may find that the agreement calls for the selection of "an appraiser," or "an investment banker," or "a certified public accountant," or a "qualified appraiser," or any of numerous other non-specific descriptions of appraisers. Quote the stated qualifications below and comment as appropriate.</p>			
Qualifications of Firms (Size, Longevity)			
Qualifications of Appraisers			
Education			
Credentials			
Experience in Appraisal			
Relevant Industry Experience			
Publications			
Other			

THE BUY-SELL AGREEMENT REVIEW CHECKLIST

Valuation Process Agreement Worksheet

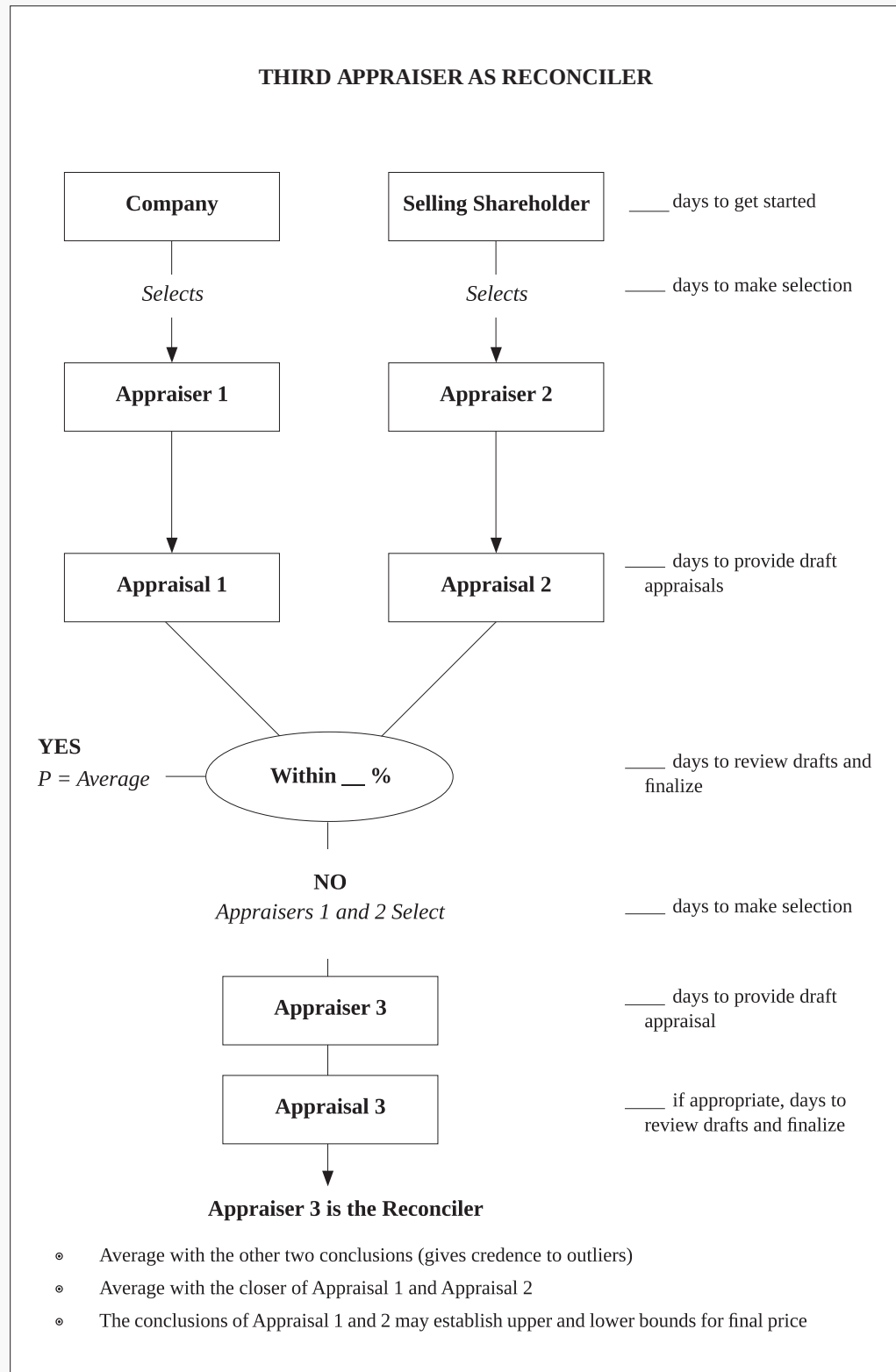
Defining Elements of the Appraisal

		NOTES
Appraisal Standards		
<p>There are several sets of business appraisal standards in the marketplace today. It is important for an orderly valuation process that all appraisers follow a common set(s) of appraisal standards. Each of the major appraisal societies has its own set of standards. If the agreement specifies that appraisers must hold the ASA designation, then the parties to the agreement know that appraisals must be rendered in compliance with the <i>Uniform Standards of Professional Appraisal Practice</i> and the <i>ASA Business Valuation Standards</i> of the American Society of Appraisers. Similarly, if the agreement specifies that the appraisers must hold the CPA/ABV designation, then the parties know that reports will be rendered compliant with Statement on Standards for Valuation Services (SSVS-1 of AICPA). Quote the language re specification of appraisal standards in the notes (there may be no language).</p>		
Uniform Standards of Professional Appraisal Practice		Yes / No
ASA Business Valuation Standards		Yes / No
Statement on Standards for Valuation Services (SSVS-1 of AICPA)		Yes / No
NACVA Professional Standards		Yes / No
IBA Business Valuation Standards and Rules of Professional Conduct		Yes / No
CICBV Practice Standards		Yes / No
Funding Mechanism		
<p>When life insurance is associated with buy-sell agreements with pricing according to a valuation process, it is critical that the agreements specify the precise treatment of life insurance proceeds for purposes of valuation. Quote all language re treatment of proceeds in agreement (noting sections) below:</p>		
Is life insurance a funding vehicle such that proceeds are not added to value and are used to repurchase subject interests?		Yes / No
Is life insurance a corporate asset such that the proceeds are added to value in the determination of price?		Yes / No
Is the agreement unclear or silent on the treatment of life insurance proceeds? (If yes, flag this issue for immediate attention!)		Yes / No
Notes and Funding Considerations		
<p>Most notes in buy-sell agreements are not well specified. They are generally defined so as to provide maximum flexibility to companies and with little thought re the security (or value) implications of unsecured or poorly secured or protected notes issued to purchase stock. At a minimum, there should be no confusion on at least the following points:</p>		
Down Payment at Closing of Purchase	Specified?	Yes / No
Interest Rate on Note	Fixed, floating, clearly specified?	Yes / No
Amortization Schedule	Payments are annual, quarterly, or monthly?	Yes / No
Amortization Schedule for Remaining Principal	<p>Equal payments of principal for remaining amortization?</p> <p>Even payments of P&I over remaining term?</p> <p>Need to recalibrate amortization schedule if rate changes?</p>	Yes / No
Security for Note	Should be specified, if any	Yes / No
Priority in Company's Capital Structure		Yes / No

See the table at pp.125-128 of *Buy-Sell Agreements for Closely Held and Family Business Owners* for further guidance re treatment of notes.

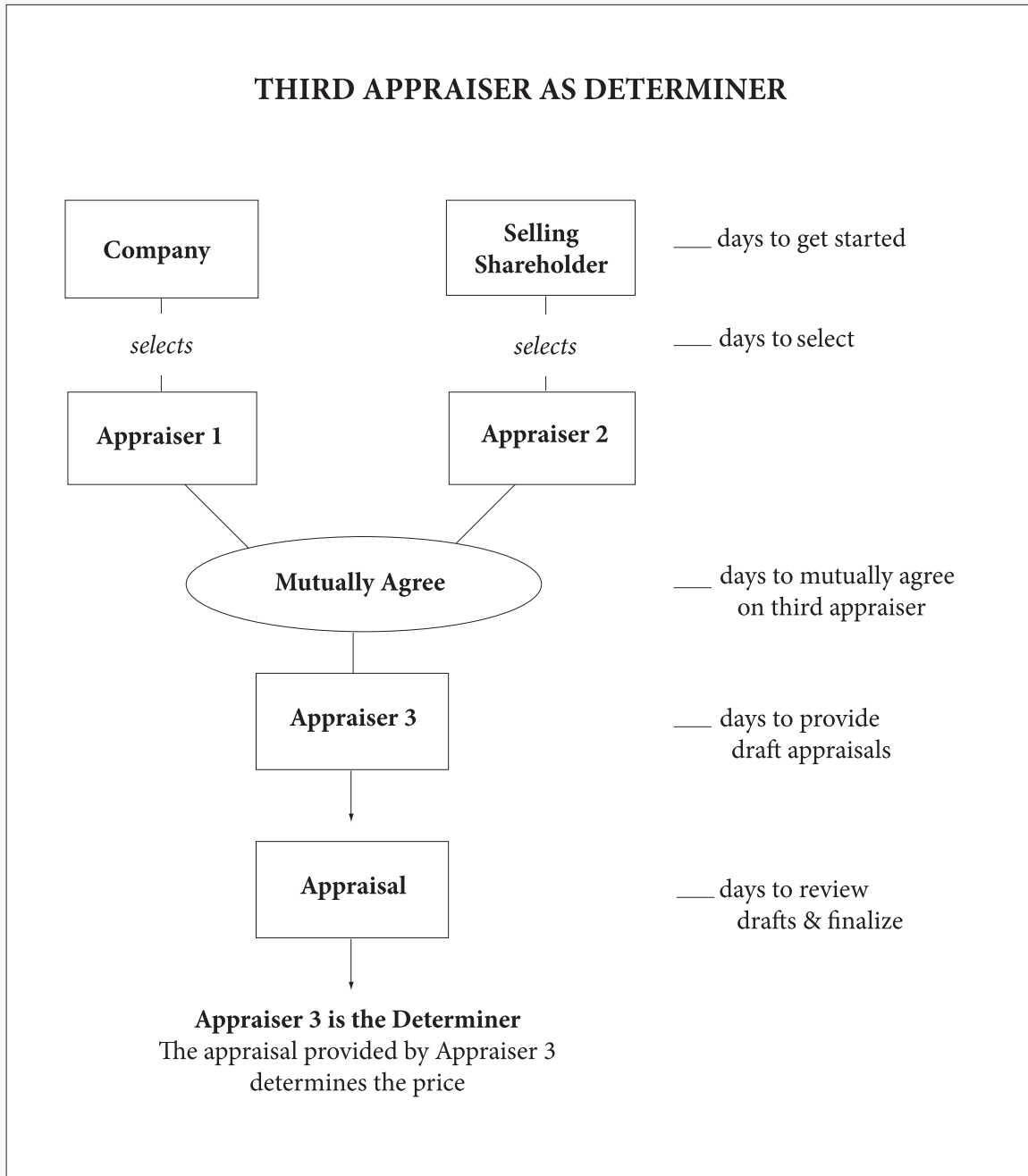
THE BUY-SELL AGREEMENT REVIEW CHECKLIST

Multiple Appraiser Agreement Worksheet



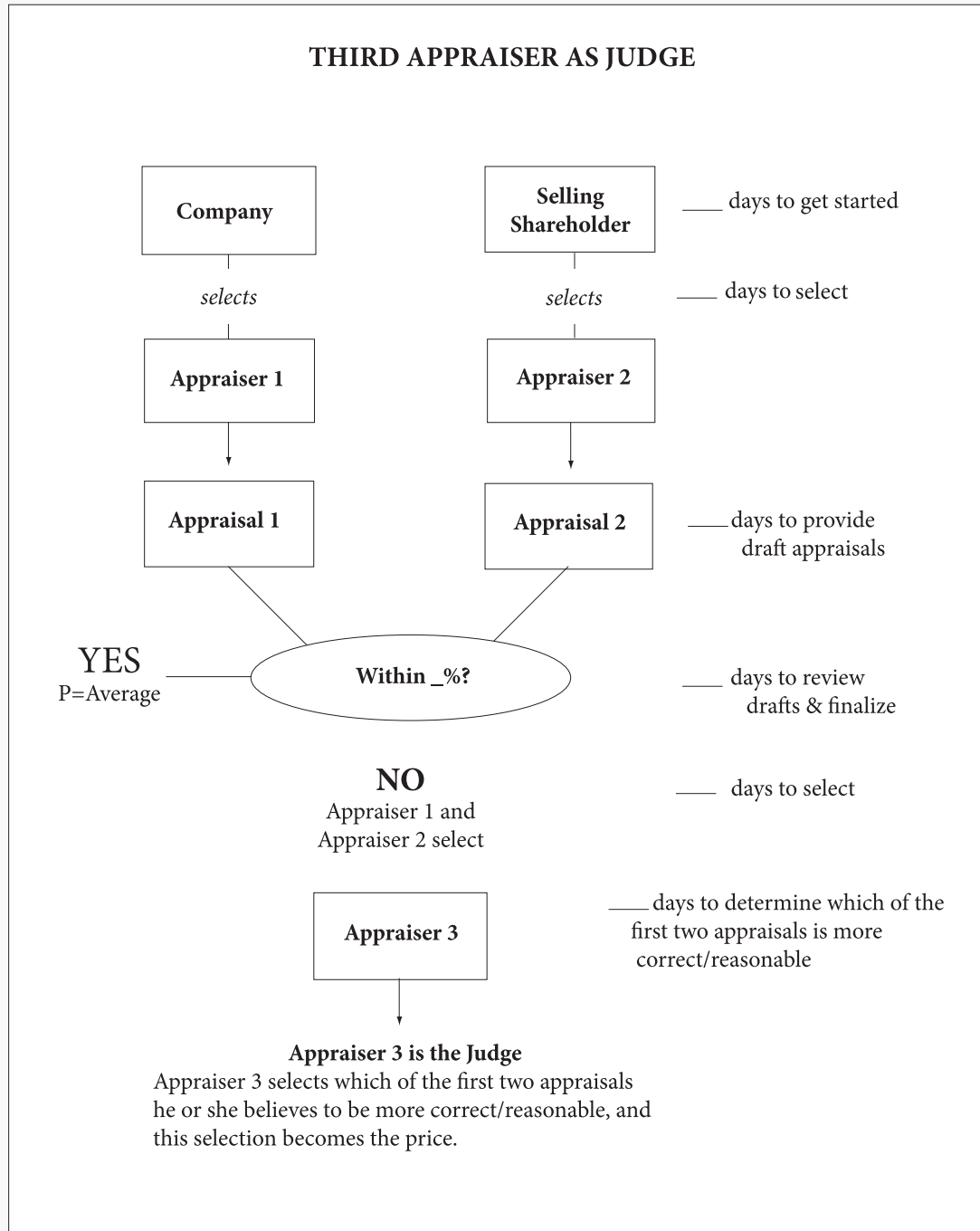
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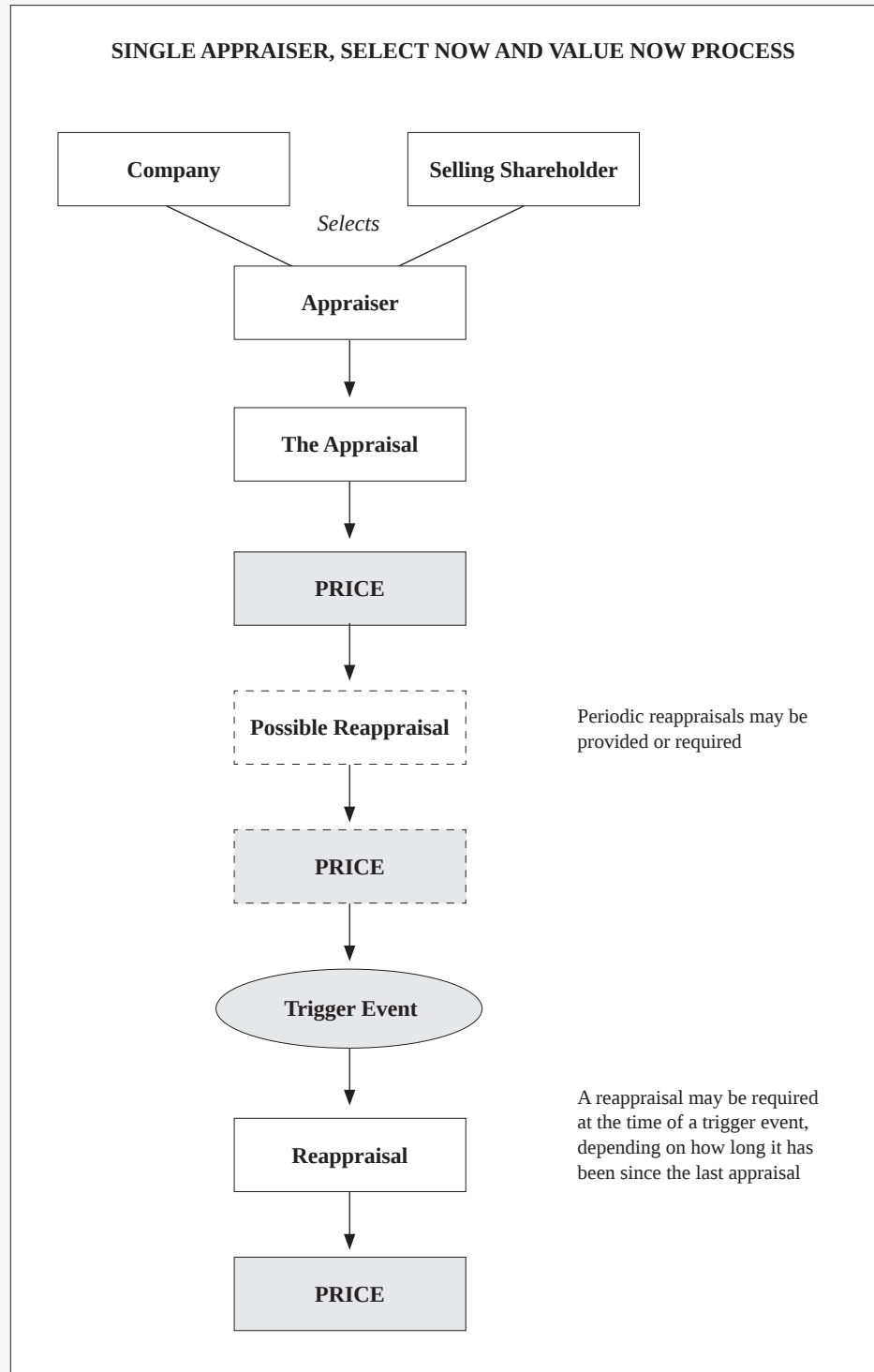
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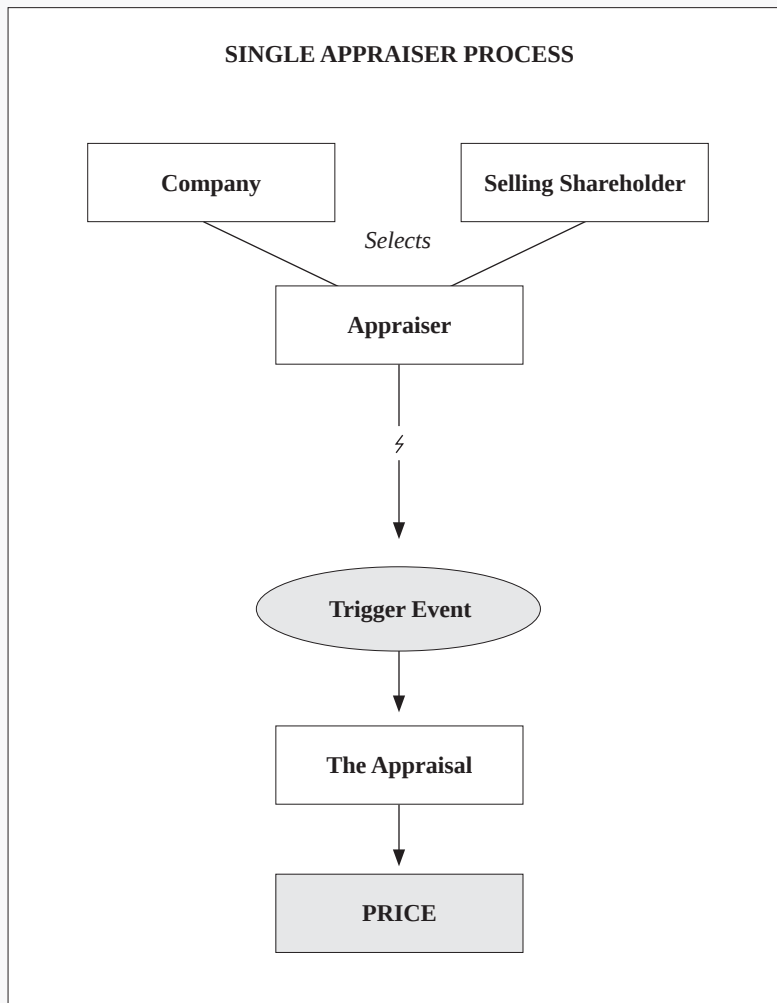
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Single Appraiser Agreement Worksheet



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Single Appraiser Agreement Worksheet



THE BUY-SELL AGREEMENT REVIEW CHECKLIST

Valuation & Consulting Services

The Buy-Sell Agreement Review Checklist is based on my book, *Buy-Sell Agreements for Closely Held and Family Business Owners*. If you have the checklist and not the book, I highly recommend that you purchase copies of the book for key owners and advisers to review.

Buy-sell agreement valuation services are provided in four basic areas:

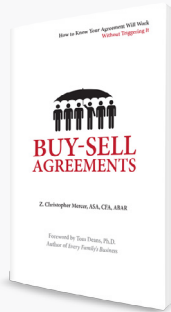
- » **Buy-sell agreement reviews.** I will review your or your client's buy-sell agreement from business and valuation perspectives and make appropriate suggestions. This type of review is helpful to owners and their attorneys when creating or amending buy-sell agreements.
- » **Annual/recurring business valuations.** I or other professionals at Mercer Capital are the named appraiser in a number of buy-sell agreements. Mercer Capital has been conducting recurring valuations for businesses for many years, and have current clients with more than 20 years of continuing experience with us.
- » **Named appraiser for valuation processes.** Many buy-sell agreements call for a two or three appraiser process to determine value when trigger events occur. I or other Mercer Capital professionals have been the named "first appraiser," the "second appraiser," and the "third appraiser" in many buy-sell agreement valuation processes.
- » **Litigation regarding your or your client's buy-sell agreement.** Unfortunately, too many buy-sell agreements end up in litigation. I have extensive experience in damages and valuation-related litigation support, and specific experience with litigation re buy-sell agreements.

Contact me to discuss your valuation or consulting needs in complete confidence:

Z. Christopher Mercer, ASA, CFA, ABAR

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BUY-SELL AGREEMENTS FOR CLOSELY HELD AND FAMILY BUSINESS OWNERS (Print Book)

Buy-Sell Agreements for Closely Held and Family Business Owners will be your guide for understanding what your agreement says from business and valuation perspectives. The book includes a comprehensive and yet understandable roadmap for business owners and their advisers. It discusses the three major types of buy-sell agreements – fixed price, formula and valuation process agreements.

"This is the business owner's self-defense manual. Reading it could be the most cost-effective hour or two you've ever invested. Don't dare sign a buy-sell agreement until you've read and pondered the questions posed in this book. Your life(s work) may depend on it!" — Stephan R. Leimberg



BUY-SELL AGREEMENTS FOR BABY BOOMER BUSINESS OWNERS (Kindle E-Book)

The first in the Baby Boomer Business Owner Transition Guide Series, this Kindle e-book speaks directly to the situation facing many boomer business owners – planning for transition. A buy-sell agreement is a transition vehicle, and how it operates when triggered can have a substantial financial and personal impact on the next phase of your life.

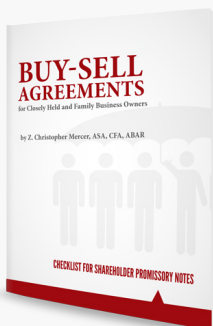
"The unintended consequences of poorly crafted buy-sell agreements are an all-to-frequent source of dispute and litigation. Mercer's presentation of the strengths and weaknesses of alternate pricing mechanisms and comprehensive summary of other essential elements that should be considered and clarified in every buy-sell agreement is very well done. It is a practical resource for both business owners and advisors" — Scott Roehr, CPA, CFA, ASA



UNLOCKING PRIVATE COMPANY WEALTH (Print Book)

Unlocking Private Company Wealth is all about managing the wealth represented by your ownership of a private business. The book calls for business owners to treat their illiquid, private company wealth with the same care and respect as their liquid wealth and retirement funds. *Unlocking Private Company Wealth* will help you turn your business into the liquidity-creating vehicle it needs to be for you to become independent of the business and truly free to sell it, stay with it, or transition it to others of your choice.

"Unlocking Private Company Wealth brings clear perspective and concrete solutions to one of the missing pieces of business ownership – how to turn a lifetime of work into a legacy of wealth." — Barbara Taylor, MBA



BUY-SELL AGREEMENT CHECKLIST FOR SHAREHOLDER PROMISSORY NOTES (Complimentary PDF)

Promissory notes are frequently used as a funding mechanism when buy-sell agreements are triggered. However, most buy-sell agreements reflect very little thought or negotiation researching the promissory notes they contain. This checklist helps you determine if your promissory note is reasonable for all parties under reasonably foreseeable circumstances.

Learn more about these resources at ChrisMercer.net