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Name, Image, and Likeness: Separating Founder NIL from Enterprise Value

Founders of closely held businesses often build their companies around their own name, image, and likeness (NIL) and personal stories. Through social media, marketing campaigns, public appearances, and direct consumer engagement, a founder may use his or her personal identity to reach broader audiences and connect with consumers—which may result in his or her persona becoming closely associated with the company and its brand. That dynamic can be powerful, but it can also create legal complexity.

When a founder's NIL contributes meaningfully to company and business value, an important question arises: which portion of that value belongs to the company, and which portion remains personal to the founder?

What Is Founder NIL?

“Founder NIL” refers specifically to the founder's name, image and likeness, but encompasses the intangible value derived from the founder's personal goodwill and individual characteristics—credibility, expertise, relationships, visibility, and reputation—all of which are distinct from the company's enterprise goodwill. In contrast, enterprise goodwill reflects value generated by the business itself: its workforce, systems and processes, intellectual property, brand assets, and corporate and operational structure.

When a founder's identity is central to the company's identity, distinguishing between the Founder's NIL and personal goodwill, on the one hand, and the enterprise goodwill, on the other, becomes increasingly important. Clear delineation between the two can protect both the company and the founder.

Why the Distinction Matters

1. Alignment and Control

Establishing Founder NIL as personal goodwill separate from the company's enterprise goodwill allows the founder to retain control over the commercial use of his or her NIL and personal story. It also clarifies (and potentially limits) the company's rights to continue using those attributes beyond the founder's active participation in and ownership of the company.

This distinction may seem less critical when the founder remains a controlling owner and business operator. However, it becomes significantly more important if the founder exits the business, if ownership and operational control of the company change, or if the company is sold. Without prior agreement about this distinction, disputes may arise over whether and how the company can continue to use Founder NIL in branding or marketing the company. Proactively addressing these issues reduces uncertainty at moments when the stakes are highest.

2. Tax Considerations

Characterizing Founder NIL as personal goodwill separate from enterprise goodwill can also affect transaction economics. In certain sale transactions— particularly involving asset sales of corporations or similarly structured transactions— sale proceeds may be subject to two levels of tax: (1) corporate-level tax on the sale of assets, and (2) shareholder-level tax on distribution of the proceeds. If a sale involves Founder NIL that qualifies as personal goodwill, the portion of the purchase price allocated to that goodwill will generally be taxed only once at long-term capital gains rates, provided the founder (and not the company) sells, transfers, or licenses such Founder NIL to the buyer in a separate transaction.

Any such allocation of Founder NIL as personal goodwill must be defensible and supported by facts and valuation analysis. The IRS closely scrutinizes arrangements that appear primarily tax-motivated, particularly where Founder NIL was not clearly established as personal goodwill of the founder prior to the transaction.

How to Establish Founder NIL/Personal Goodwill

No single factor determines whether Founder NIL will constitute personal goodwill as opposed to enterprise goodwill, but several considerations commonly inform the analysis:

1. **Personal Relationships and Reputation:** Is value attributable to the founder's individual expertise, reputation, relationships, and credibility rather than to institutional processes?
2. **Founder Industry Recognition:** Does the founder maintain industry recognition, celebrity status, media presence, or a following that drives customer loyalty?
3. **Contractual Rights:** Employment agreements, noncompete provisions, assignments of rights/ inventions, or similar arrangements may assign or restrict personal goodwill and/or certain uses by the business of a founder's personal attributes. The presence (or absence) of such agreements can materially affect the analysis.
4. **Non-transferability:** Would the business suffer if the founder departed? Are key business relationships personal to the founder?
5. **Independent Valuation:** Engaging a qualified appraiser before a transaction arises in order to distinguish enterprise goodwill from personal goodwill as it relates to the use of Founder NIL strengthens credibility and defensibility.

The greater the factual support, the more sustainable the position will be in negotiations and, if necessary, under regulatory scrutiny (including as it relates to IRS scrutiny as mentioned above).

Addressing Founder NIL in a Sale

In a business sale, transaction documents should expressly distinguish between the sale of business property and assets from the sale or license of Founder NIL as personal goodwill. Any documents for the sale, license, or other transfer of rights relating to Founder NIL should clearly specify (i) the scope of rights conveyed and any limitations on use, (ii) that the rights are exclusive to the buyer, (iii) the duration of the license, and (iv) compensation structure if a license from the founder is involved.

Additionally, a founder's transaction noncompete provisions should be narrow in scope to enable the founder to use his or her NIL and personal story in connection with a future venture. Any limitations that are too restrictive of a founder's ability to control and direct the use of his or her personal attributes will likely be challenged as unenforceable.

Balancing Competing Interests

Both the company and the founder share an interest in maximizing value upon the Company's exit transaction. The founder should both utilize and protect the long-term integrity of his or her NIL, reputation, and personal story. At the same time, an overreliance on Founder NIL as a driver of value may create perceived risk for potential buyers and result in decreased enterprise value. If a company appears inseparable from its founder, purchasers may discount value or require retention arrangements such as earnouts or extended employment commitments post-closing.

Effective planning regarding the role a founder plays in the image of the business and its branding and marketing strategy requires balance. The company should capture the value generated by Founder NIL and personal goodwill while building infrastructure and separate enterprise value that sustain the business independent of its founder.

Considering and addressing these interests at all stages of a business' life cycle can bring greater clarity, stronger negotiating leverage for the selling parties, a more defensible allocation of value, and improved transaction outcomes.

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