

MERGERS & ACQUISITIONS

Non-disclosure Agreements (NDAs)

Understanding the Basics of NDAs

An NDA, also known as a confidentiality agreement, is a **legally binding contract that creates a confidential relationship between parties.**

The main objective is to protect any non-public business information shared during M&A discussions with the buyer and seller.

Importance of Confidentiality in M&A Transactions

Confidentiality is crucial in M&A deals to **protect sensitive business information from being leaked** to competitors or the public.

Breaches of confidentiality can lead to **severe consequences**, including financial loss, reputational damage and legal ramifications.

Key Elements of an NDA

01

Definition of Confidential Information: Clearly outline what constitutes confidential information.

02

Obligations of the Receiving Party: Specify how the receiving party should handle the information.

03

Exclusions from Confidentiality: Identify information that is not covered by the NDA.

04

Term and Termination: Define the duration of the confidentiality obligations and conditions for termination.

05

Remedies for Breach: Detail the consequences and remedies if a party breaches the agreement.

How do NDAs safeguard confidential information?

DEFINE CONFIDENTIAL INFO

Typically includes **trade secrets, financial data, business strategies, customer lists and other proprietary information.**

Clearly defining what data is protected is essential for the NDA's enforceability.

PARTY OBLIGATIONS

The **disclosing party** must ensure that the information shared is accurate and necessary for the transaction. The **receiving party** is obligated to use the information solely for the purposes outlined in the NDA and to protect it from unauthorized access or disclosure.

HANDLING DISCLOSURE OF SENSITIVE INFORMATION

When sensitive information is disclosed, it's important to:

- Ensure buyer and seller **agree on confidentiality terms.**
- **Limit access** to only those individuals who need to know.
- Use **secure methods for sharing information**, such as encrypted emails or secure virtual data rooms (VDRs).
- **Monitor and track** who accesses the data and when.

Common Pitfalls in Drafting NDAs

Negotiation Process and Key Terms

- **Scope of the NDA:** Neither too broad nor too narrow, which could otherwise disadvantage the buyer.
- **Agreement Duration:** Set a realistic timeframe for the confidentiality obligations.
- **Jurisdiction:** Decide on the governing law and jurisdiction for resolving disputes.

Preventing Breaches of Confidentiality

- **Mandate the return or destruction** of certain information if the deal falls through.
- **Specify security measures** for receiving party to take.
- **Prohibit the sharing of confidential information** with third parties without prior consent.
- **Require immediate notification** if a breach occurs, the buyer must return or destroy certain information.

Ensuring Return or Destruction of Confidential Information

Include clauses that mandate the return or destruction of confidential information upon request or at the end of the NDA term. This **ensures that sensitive data does not remain in unauthorized hands**, particularly during due diligence with a potential buyer in a potential transaction.

How to Address Confidentiality Restrictions in NDAs

STANDSTILL PROVISION

A standstill provision **prevents the potential buyer from making a takeover bid without the disclosing party's consent**, protecting against unsolicited acquisition attempts during negotiations.

INTELLECTUAL PROPERTY

NDAs should **clearly define what constitutes intellectual property** (IP). They should include provisions to protect existing IP rights and address handling of jointly developed IP, ensuring protections for both buyer and seller.

THIRD PARTY ACCESS TO CONFIDENTIAL INFORMATION

Sometimes, third parties, such as **advisors or consultants**, **need access to confidential information** for a potential transaction. NDAs should:

- Require third parties to sign separate agreements.
- Ensure third parties comply with the same obligations.
- Include indemnity clauses to protect against breaches.

To Wrap up...

Non-Disclosure Agreements are indispensable in mergers and acquisitions, providing a **legal framework to protect sensitive information** and foster trust between parties.

By understanding the basics of NDAs, the role they play in safeguarding confidential information, and the common pitfalls in drafting them, businesses can navigate M&A transactions more effectively.

Addressing **confidentiality restrictions** and ensuring the **protection of intellectual property** further solidifies the foundation for a successful transaction, especially in a potential transaction.

In the ever-evolving landscape of M&A, a well-crafted NDA is not just a legal necessity but a **strategic tool that can determine the success of the deal**. For businesses starting out, putting in the effort to create solid NDAs, like a mutual NDA, will definitely pay off down the line.



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