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# MERGERS & ACQUISITIONS

## Non-disclosure Agreements (NDAs)

Swipe 

## 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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