Wait, Why Am I Signing this NDA Again? The Basics of Confidentiality Agreements

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NDAs are everywhere in M&A and other commercial transactions, but disclosing parties occasionally forget the original reasons for signing an NDA and, as a result, key clauses may be dropped. An occasional refresher on NDA basics can help ensure your NDA forms work as intended.

The ABCs of an NDA

Confidentiality Agreements, also called Non-Disclosure Agreements or "NDAs", are ubiquitous in commercial transactions. Some firms require an NDA be signed before they begin any negotiations with a vendor, customer, or other counterparty, and it's often critical that a seller or target (and, occasionally, a buyer) in an M&A process require all interested counterparties to sign an NDA before disclosing any information.

I have seen thousands of NDAs over the years, and occasionally I come across a form that is missing the basics of an NDA – non-disclosure, non-use, and confidentiality. As with many things, a refresher on why NDAs are used in the first place can help ensure that NDAs actually achieve the desired result.

This article describes a few key components of an NDA from the perspective of a party disclosing confidential information (the "disclosing party"). As always, it's strongly recommended that a party engage legal counsel to advise on drafting and negotiating an NDA.

Non-Disclosure

First, an NDA should contain a "non-disclosure" restriction that prohibits the "receiving party" from disclosing to any other person any confidential information of the disclosing party. This restriction is often subject to narrow exceptions allowing disclosure (a) to the receiving party's "representatives", such as its employees, attorneys, and other advisors, who need the information to assist with the NDA's "purpose" and are required to keep the information confidential, and (b) subject to certain conditions, if the receiving party is legally required to disclose the information.

Non-Use

Another critical aspect is the "non-use" restriction, which prohibits the receiving party from using the confidential information for any purpose other than the NDA's stated narrow purpose. Even if the receiving party never discloses the information, it could still harm the disclosing party by using the information for unintended purposes such as creating competing products. Therefore, a disclosing party should include a non-use restriction in every NDA.

Confidentiality

"Confidentiality" covenants are occasionally conflated with non-disclosure or non-use, but often are different. Non-disclosure and non-use restrictions generally aim to prohibit the receiving party from affirmatively disclosing or using for a prohibited purpose the information. "Confidentiality" covenants require the receiving party to use certain efforts or measures to guard against an unintentional disclosure of information. For example, if a receiving party leaves confidential materials in a public place or downloads them to a public computer, someone could easily access and use those materials for harmful purposes. A confidentiality covenant may require the receiving party to protect the information using the same measures used to protect its own confidential information, subject to a floor of "reasonable care"

or “industry-standard safeguards”.

Remedies and Other Protective Measures

Other terms that the disclosing party should consider include the following.

1. Requiring the receiving party to return or destroy all confidential information upon request.
2. Allowing the receiving party to obtain an injunction to stop an actual or threatened breach without any requirement to prove irreparable harm or inadequacy of monetary damages or post any bond.
3. Ensuring that “confidential information” is not defined too narrowly and that the exceptions to the definition are not too broad.
4. Providing that the NDA restrictions continue for a healthy term (which may vary based on industry), with protection for trade secrets remaining in place at least until the date when the information ceases to be a trade secret under applicable law.

Takeaways

Of course, the above are just a few of the terms that a disclosing party should consider, and well-drafted NDAs often include additional terms, particularly in the M&A context (when parties may consider non-solicitation restrictions, whether equity owners or financing sources count as “representatives”, and anti-clubbing provisions). By getting input from experienced counsel on an NDA, companies may be able to avoid the substantial losses and headache that may result when confidential information is disclosed without adequate protection.

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