

M&A Confidentiality Agreements: Getting the Deal Started (or Not)

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Overview

- ❑ **Confidentiality Agreements:**
 - Arise in various contexts, including M&A, employment, sharing of intellectual property, joint ventures and other business relationships
 - Protect sensitive information and transaction details from disclosure
 - Prevent improper use of Information
 - May give Seller control over process
- ❑ **Significance:**
 - Often viewed as “standard” or “boilerplate” but may have unintended consequences, restricting Buyer’s activities in the industry and Buyer’s options as the negotiations progress, even if a transaction never materializes
 - Terms may prove very consequential in the event of a subsequent dispute between the parties
- ❑ **Mutuality: One-Way or Two-Way?**
 - Sellers often “hold the pen” on the CA, resulting in Buyers receiving proposed CAs that are “one-way,” serving only to restrict Buyer’s activity.
 - Buyers often modify the CA to restrict Seller if Buyer will be disclosing information to the Seller.
 - Other provisions often made “symmetrical” include: restrictions on disclosing deal info and identities of parties, forum selection, “No Deal Until There’s a Deal” provisions, and remedies.

Definition of Confidential Information

“Confidential Information” is usually defined broadly to include:

“any information concerning the Seller (whether prepared by the Seller, its Representatives or otherwise and irrespective of the form, manner or nature of communication) which is furnished to Buyer [before the date hereof,] now or in the future [by or on behalf of the Seller] ... and any notes, analyses, compilations, studies, interpretations or other documents prepared by Buyer **to the extent** that they contain, reflect or are based upon, in whole or in part, the information furnished to Buyer pursuant hereto.”

- ❑ Buyers often include “to the extent” language for derivative materials to prevent entire documents from being tainted by a single piece of Confidential Information. Buyers may also add that information is included to the extent connected to the proposed transaction.
- ❑ Certain kinds of information may be particularly sensitive (*e.g.*, privileged information; trade secrets). Disclosures to competitors may implicate antitrust or other laws.
- ❑ Broad definition of Confidential Information makes it important to focus on exclusions to the definition.

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Exclusions from Confidential Information

Buyers also seek to add the following common exclusions to the definition of “Confidential Information”:

“**Confidential Information shall not include:**

- information that is or becomes **generally** available to the public [**other than through the fault of the receiving party**] [**other than through a breach of this Agreement**];
- information that was within Buyer’s possession prior to its being furnished to Buyer by or on behalf of the Seller pursuant hereto or becomes available to Buyer from a source that was not [**known by Buyer** [after due inquiry] **to be**] **bound by** an obligation of confidentiality [prohibiting disclosure of such information to Buyer] [with respect to such information]; or
- information that is **independently developed by Buyer** or its Representatives without the use of any Confidential Information.”

- ❑ Sometimes question of evidentiary burden of demonstrating this.
- ❑ Some Buyers worry about co-mingling of information and ask for a “residuals clause”

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Representatives

The definition of “Representatives” determines with whom the Buyer may share Confidential Information:

“Representatives shall include the directors, officers, partners, employees, agents, **affiliates** (as such term is defined under the Securities Exchange Act of 1934, as amended), **financing sources**, or advisors of such party **and those of its subsidiaries, affiliates and/or divisions** (including, without limitation, attorneys, accountants, consultants, bankers and financial advisors).”

- ❑ Buyers often prefer an expansive definition (this could be a double-edged sword as Buyer is often responsible for breaches by Representatives)
- ❑ Buyers most often responsible for breaches by Representatives
- ❑ “Affiliates” is usually defined by reference to the U.S. securities laws.
- ❑ Should Representatives include financing sources?.

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Financing Sources

Sellers may impose restrictions regarding financing sources in order to better manage the auction process:

“Buyer shall not disclose any Confidential Information to any actual or potential financing source (debt, equity or otherwise) or coventurer without the prior written consent of the Seller [such consent not to be unreasonably withheld, conditioned or delayed].”

“Buyer agrees that, without the prior written consent of the Seller, Buyer will not restrict the ability of any of its potential financing sources to provide financing to any other party with respect to a transaction.”

- ❑ The size of the transaction and likelihood of needing to partner with others will influence the importance of these provisions.
- ❑ When these types of restrictions are imposed (and cannot be deleted), Buyers often seek to:
 - Provide Seller with notice, rather than consent, rights;
 - Limit discretion of Seller in refusing to give consent;
 - Where appropriate, bifurcate treatment of debt and equity financing sources;
 - Resist restrictions on exclusivity arrangements with financing sources.

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