

Article

Key Provisions In M&A Confidentiality Agreements

09.23.10

Whether you're a buyer or seller, the first document you sign is most likely a confidentiality or non-disclosure agreement ("NDA").

Generally speaking, buyers and sellers do not have an obligation to keep the other's information confidential unless there's an NDA. And if there's no NDA, recipients are also generally free to use the confidential information they receive, even if that use is harmful to the seller. You'd be surprised at how many times I've seen sellers neglect to get an NDA from buyers before handing over sensitive information.

When I review NDAs, I often pay close attention to the following provisions:

- **Covenant not to use.** An agreement merely not to disclose information typically doesn't go far enough to protect the seller because it doesn't prevent the buyer from improperly using the seller's information. A covenant not to use confidential information typically requires the buyer to use the confidential information only for the purpose of evaluating the proposed transaction. Some covenants not to use go farther and require the buyer not to use information in a manner detrimental to the seller, but buyers often object that this language is vague, subjective, and prone to disagreement. Strategic buyers or private equity buyers with portfolio companies in the same or similar industries will need to pay very close attention to the wording of the covenant not to use in order to reduce the likelihood of future claims.
- **Independently developed information.** A common exclusion from the definition of confidential information is information that is "developed without the aid, application, or use of the confidential information". This exclusion is especially important for buyers with operations in the same or similar industries as the seller. Some versions of the independently developed information exclusion place the burden on the buyer to prove by clear and convincing evidence that it independently developed the information.
- **No raid clause.** A no raid clause prevents the buyer from hiring or soliciting the employment of seller's employees for a specified period of time. This provision provides the seller comfort that the buyer won't terminate discussions and then pick off seller's key employees. No raid clauses come in many flavors, including a covenant merely not to solicit employees and a more restrictive covenant not to hire. Many no raid clauses contain exceptions for general, non-directed solicitations made through print or electronic media.

Finally, in addition to having the right provisions in the NDA, buyers and sellers will often want to manage the timing of the information flow so that the seller furnishes buyer with the more sensitive information later in the process after the buyer is more committed to the transaction.

Primary Contacts



Robert Kibby

Dallas
214.855.7504
rkibby@munsch.com

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