

Introduction

In most cases, NDAs act as first step towards subsequent business agreements and contracts, which include additional provisions to cover complexities of business transactions between the parties. While drafting a confidentiality (non-disclosure) agreement, it is crucial to **ensure interests of both the parties is adequately secured** by including the required provisions in a well-defined manner and excluding provisions that are not required

http://www.axial.net/wp-content/uploads/2014/03/Axial_9-Clauses-to-Include-in-Every-NDA.pdf

Types of NDA

One-way NDA, also known as a unilateral NDA: only one party is disclosing information and the receiving party of the confidential information is bound to protect that information.

Mutual NDAs, also known as bilateral NDAs: both parties disclose confidential information and both are held accountable for that confidential information. These types of agreements are more appropriate for joint ventures or strategic investments

Definition of Confidential Information

Definition of 'confidential information' can and should vary based on the specific transaction. As such, it is critical for every NDA to first and foremost clearly define the materials that should (and should not) be considered confidential. Materials include, but are not limited to, oral conversations, written notes, analysis, and documents produced with the use of the confidential information. Special mention should be made for any materials that are considered to include 'trade secrets'..

2) Term of Confidentiality

All NDAs should also clearly define a time limit for the agreement. The term can be one year, two years, five years, or for an indefinite term. Whatever the choice term, it is critical to clearly define it.

3) Disclosure / Representatives

In this clause, the NDA should define with whom the confidential information may be disclosed.

4) Use of Confidential Information

One of the trickiest clauses in the NDA. This section is meant to provide clarity around the intended use of the confidential information. For most standard M&A NDAs, the confidential information is limited only for evaluation and negotiation of the potential transaction.

5) Compelled/Legal Obligation to Disclosure

6) Return/ Destruction of Confidential Info

It is important to include a clause that defines how all of the disclosed confidential information should be handled. Traditionally, the return/destruction of the material must occur at the end of the negotiations or within a certain time frame.

The strategy and timeframe of handling the confidential information largely depends on the nature of the shared information, but usually matches the duration of the NDA

7) Remedies

In the event of a breach of the NDA, the disclosing party is entitled to either monetary damage or injunctive relief. While monetary damage is first considered, the presence of a Remedies clause represents mutual agreement between both parties that the cost of a breach is difficult to assess or prove -- or the monetary damage is viewed insufficient -- and the discloser is allowed to pursue an injunction as an alternative remedy for the breach.

8) Interaction with Employees

In the early stages of a deal, many business owners are concerned that news of the transaction will spill to employees and third parties. To prevent such information leaks, many disclosers require the NDA to limit interaction with employees, especially in regards to solicitation or hiring.

9) No Binding Agreement for Transaction

NDAs should also include a clause that clearly states that neither party is under legal obligation to continue negotiations. The NDA does not indicate any formal relationship or partnership and either party can terminate discussions at any point.

Inclusion of Related Clauses in NDA

While an NDA is signed to prevent the disclosure of confidential information to third parties, such an event is occasionally unavoidable. Necessary exceptions to the NDA must apply when disclosure is mandated by administrative or legal proceedings. For example, if a financial sponsor is being investigated by the SEC, it may have no choice but to share the confidential documents.

It is a common practice to include various other related clauses in a NDA. However, in some cases, inclusion of such clauses may lead to issues as described below:

Non-Compete Clause: including a non-compete clause in a NDA is not advisable as it can become problematic for both the parties. If the parties intend to include a non-compete provision, it should be a part of separate business agreement between both the parties.

Assignment of Intellectual Property Rights (IPR): it is strongly advisable to specifically define IP assignment or non-assignment if such clause is included. In case it is decided to include IP assignment clause, appropriate care must be taken to ensure that the clause is not generic (broad) and its full scope and intent should be defined. A disclosing Party should specifically disclaim grant of any kind of IP rights.

No Warranties: it is always advisable to state in NDA that confidential information is shared "As is" without any warranties.

Non-solicitation: a non-solicitation clause can be included in the agreement with proper definition of scope, intent and duration, all of which can be practically enforced and justified. For example, such non-solicitation clauses can prevent each party from hiring and soliciting employees from other party for a certain period of time. In certain cases, non-solicitation clauses can be replaced by no-hire clauses as well.



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