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Tailoring a Nondisclosure Agreement for the Sale of Your Business

A nondisclosure or confidentiality agreement (or NDA) should be the first agreement signed in connection with discussions regarding selling your business. The purpose of the agreement is to protect the confidentiality of your confidential information that you may disclose to a potential purchaser and, depending upon the structure of the transaction, may protect the confidentiality of the purchaser's information as well. Unfortunately, all too often a seller may neglect to require a potential purchaser to sign an NDA or may accept the form of NDA provided by the purchaser or a broker, without regard to whether the NDA protects the seller's interests.

A seller should carefully consider what information it will disclose in connection with initial discussions, after a letter of intent has been signed and after the deal closes. However, an NDA should be signed by the potential purchaser **before** the seller discloses **any** confidential information to the potential purchaser. Obviously, this avoids the risk that confidential information has been disclosed, but the potential purchaser refuses to sign the NDA or the parties cannot agree upon its terms. In addition, this permits the seller to tailor its disclosure of information to the terms of the NDA. For example, if the definition of "confidential information" is narrowly drafted, the seller should not disclose confidential information beyond the scope of the definition. Also, if the definition of "confidential information" includes only those items that are marked "confidential," the seller should make sure that all information that it considers confidential is marked "confidential."

The following are some things you should focus on in reviewing the NDA that you're considering using:

- Does the NDA contemplate an acquisition or is it a form that is typically used by suppliers and vendors?
- Does the definition of "confidential information" include all items that you consider confidential? For example, if you will be disclosing confidential financial performance information, is it within the scope of the definition? If the potential purchaser is an actual or potential competitor of the seller, the definition of "confidential information" should be carefully tailored. In addition, the information disclosed should exclude pricing and other competitively-sensitive information and applicable antitrust laws should be considered.

- Does the definition of “confidential information” include derivative materials, such as the potential purchaser’s notes or analyses based upon or including confidential information?
- Is the NDA mutual or one-sided? If the potential purchaser is paying a 100% cash purchase price, it will typically not be disclosing confidential information to the seller. Therefore, the NDA would typically not be mutual.
- Does the NDA restrict both disclosure and use of confidential information?
- Does the NDA limit access to the confidential information to need-to-know personnel and hold the potential purchaser liable for its personnel’s actions?
- Does the NDA require the potential purchaser to maintain the confidentiality of the fact that the seller is seeking a suitor?
- Does the NDA require the potential purchaser to return or destroy all confidential information (and electronic and other copies thereof)? If the potential purchaser retains the right to retain a copy for archival/evidentiary purposes, that copy should be retained by outside counsel.
- Does the NDA prohibit the potential purchaser from hiring the seller’s employees?
- Does the confidentiality agreement contain a “no shop” clause? If so, the seller should have it deleted, as it is premature until a letter of intent has been signed.
- Are you engaged in an industry or area that would require the inclusion of additional provisions unique to that industry or area? For example, sellers whose businesses have access to patients’ medical records may need to include provisions that comply with HIPAA confidentiality requirements and sellers engaged in international trade may need to include provisions that comply with applicable export laws.

If the NDA is not tailored to the facts and circumstances of your deal, you should have it revised to adequately protect your interests before disclosing any confidential information to a prospective purchaser. If the value of your business is derived from your confidential information, you would be wise to ensure that it’s protected in connection with a potential sale of your business.



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