

## NON-DISCLOSURE AGREEMENTS IN THE M&A CONTEXT

Presented by:

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**PRACTICE AREAS:**

[Business Counseling](#)

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[Mergers & Acquisitions](#)

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Ohio

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**EDUCATION:**

J.D., cum laude, Case Western Reserve University School of Law, 2012

B.A., magna cum laude, University of Pittsburgh, 2009; Phi Beta Kappa

## Daniel J. Smith

**MEMBER****VICE-CHAIR, BUSINESS COUNSELING, FINANCIAL TRANSACTIONS AND MERGERS AND ACQUISITIONS**

Daniel Smith primarily focuses his practice in the areas of mergers and acquisitions and general corporate counseling. He assists clients with all aspects of mergers and acquisitions across a number of industries, including international companies, private equity funds, and others. He also drafts supply, distribution, and other complex commercial agreements for major corporations and advises clients on sophisticated corporate formation and governance matters.

### REPRESENTATIVE MATTERS

- Represented a home improvement retailer in its \$265 million acquisition of an equipment rental company.
- Represented a power management company in its \$270 million sale of its aerospace division.
- Represented a large conglomerate in its \$120 million acquisition of a major franchisor in the automobile service sector.
- Represented a private equity fund in the \$150 million sale of a coatings company to a public company.
- Represented a home goods manufacturer in its \$90 million acquisition of a plumbing products company.
- Represented a publicly traded manufacturer of sterilization products in numerous strategic acquisitions and divestitures.
- Represented private equity funds in numerous add-on acquisitions and exits.
- Represented a franchisee in the sale of over 40 restaurants.
- Represented a logistics company in its \$60 million sale to a public company buyer.
- Represented a publicly traded renewable energy company in several acquisitions.
- Represented a construction materials company in its \$65 million sale to a private equity fund.
- Represented cannabis companies in transactional matters.
- Represented a family office in its \$50 million acquisition of a snack foods company.

- Represented numerous sponsors, capital partners and other stakeholders in mixed-use real estate joint ventures relating to projects involving investments of up to (and exceeding) \$100 million.

## COMMUNITY INVOLVEMENT

- Recovery Resources, Associate Board Member (2015-2018)

## AWARDS AND RECOGNITION

- Received a Best Lawyers: Ones To Watch recognition for Corporate Law (2021-2023)
- CALI Excellence for the Future Award for excellent achievement in the study of Appellate Practice, 2011
- CALI Excellence for the Future Award for excellent achievement in the study of Contracts, 2010

## NEWS AND INSIGHTS

### PUBLICATIONS

- ["Delaware Chancery Court Holds for First Time That Corporate Officers Owe Duty of Oversight to Corporation,"](#) Eckert Seamans' Business Counseling Update, June 2023.
- "More Money, More Problems: The Bitcoin Virtual Currency and the Legal Problems that Face It," Case Western Reserve Journal of Law, Technology & the Internet, 2012.
- "When Everyone is the Judge's Pal: Facebook Friendship and the Appearance of Impropriety Standard," Case Western Reserve Journal of Law, Technology & the Internet, 2012.

# Non-Disclosure Agreements in the M&A Context

Daniel J. Smith  
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## Non-Disclosure Agreement Basics

- Confidential information (“CI”) is a valuable business asset and protecting a company’s CI is a business priority.
- Companies share and receive CI with customers, suppliers, and third parties in the ordinary course of business for a variety of commercial matters.
- “Non-disclosure agreements” or “confidentiality agreements” (“NDAs”) create confidentiality obligations and use restrictions that protect a disclosing party’s CI from disclosure or use by the receiving party.
- Specialized types of NDAs are often used for mergers and acquisitions, finance transactions, and joint ventures.

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## Types of NDAs

- Unilateral NDA: One party is the disclosing party and the other party is the receiving party.
- Mutual NDA: Both parties mutually exchange CI.
- Hybrid: Some reciprocal exchange of information but include other asymmetric terms particular to the circumstances.

## Typical Terms and Provisions in NDAs

- Parties
- Definition of CI
- Exclusions from definition of CI
- Permitted recipients of CI
- Permitted uses of CI and restrictions on use
- Term of NDA and survival of obligations
- Return or destruction of CI
- Non-solicitation
- Remedies

## What is Confidential Information?

- CI takes various forms in different businesses and industries.
- Defining what information and data is confidential is central to any NDA.
- Generally, disclosing parties wish to define CI as broadly as possible, while receiving parties attempt to more narrowly define CI.

## What is Confidential Information Cont.

- Common types of CI include:
  - Business and marketing plans and strategies
  - Financial documents, including budgets, projections and results
  - Customer and supplier lists
  - Business methods
  - Blueprints and designs
  - Trade secrets
  - Proprietary software development
  - Pricing and sales data
  - Terms of commercial contracts
  - Information derived from a disclosing party's confidential information
  - Discussions of potential transaction or strategic relationship
  - The existence of the NDA

## Common Exclusions from Definition of Confidential Information

- Receiving parties typically negotiate that certain information be excluded from the definition of CI.
- Common exclusions include:
  - CI that becomes public without a breach of the NDA by the receiving party
  - CI that was in the receiving party's possession or available to it before disclosure
  - CI received from a third party not bound by confidentiality obligations to the disclosing party
  - Information independently developed by the receiving party without use of the CI

## NDA's in the M&A Context

- Crucial first step in any sale process or other strategic transaction.
- Often structured as unilateral NDAs, where the seller is the only party disclosing CI.
- Should be a prerequisite to providing any Confidential Information Memoranda (CIMs) or any due diligence materials.
- Sales processes will often entail NDAs with numerous potential counterparties.
- Process often coordinated through investment banking firm or other broker.

## Practical Considerations

- As seller, consider:
  - The type of CI that will be disclosed and whether any practical steps can be taken to limit risk.
  - Profile of your counterparty(ies) (i.e., competitor vs. financial buyer).
- As buyer, consider:
  - Who will need access to the CI to assess the opportunity.
  - What are “must haves,” particularly if process is competitive and moving quickly.

## Key Terms – Parties and Representatives

- Who is the recipient party and to whom is disclosure permitted?
- Representatives: Affiliates, directors, officers, employees, consultants and advisors.
- Disclosing party’s perspective: Should be limited to those with a “need to know.”
- Negotiated point: Financing sources and/or co-bidders.
- See later slide for other technical issues regarding certain affiliates/portfolio companies.



## Key Terms – Parties and Representatives Cont.

- How is the NDA enforced against recipient's non-party representatives?
  - Ideal disclosing party position: Recipient is responsible and representatives sign joinder to the NDA
  - Practical reality: Typically recipient agrees to be responsible for representatives' conduct

## Key Terms – Scope of Use Restrictions

- Use of CI is limited to “Purpose.”
- Purpose is generally described as the evaluation, negotiation, and consummation of the particular transaction under consideration.
- Scope of purpose is important given that recipients may be competitors or financial sponsors assessing other competitive opportunities/targets.

## Key Terms – Term and Survival

- Recipient parties should require a finite term.
- Often 1-3 years with survival for trade secret protection and prior breaches.
- Disclosing party's protection is mandatory return or destruction of CI at its request or upon termination.
- Destruction should be certified.
- Recipient may request exceptions to obligation to return/destroy, but confidentiality obligations should survive with respect to retained CI.

## Key Terms – Non-Solicitation

- Very common requirement in M&A NDAs, given that employee information will typically be provided.
- Typically survives termination of NDA for 1-2 years.
- Typical recipient carve-outs: former/terminated employees, only employees introduced through M&A process, general solicitation, etc.
- State law issues and evolving federal landscape must be considered.

## Additional Negotiated Terms

- Scope of CI or “evaluation material” definitions.
- Procedures around any required disclosures to governmental authorities, regulators, etc.
- Limitations on contact with employees, customers, suppliers, etc.
- Specific performance.
- No obligation to proceed with transaction.
- No representations as to accuracy of CI.
- Governing law, jurisdiction and venue.

## Advanced Topics – Portfolio Companies and Affiliates

- Recipient may be a fund or other financial buyer with numerous portfolio companies in the same or adjacent industries.
- Such recipients will seek to carve those portfolio companies out of the NDA notwithstanding that they are affiliates and may share common directors.
- Recipient’s concern is that NDA could be used as a tool to limit unrelated portfolio company’s ability to compete by virtue of its affiliation.
- Disclosing party should clarify that such exclusions do not apply if any CI was actually received by the portfolio company.

## Advanced Topics – “Residuals” Clauses

- Designed to allow the recipient to disclose or use intangible CI that is retained in “unaided memory.”
- Recipient’s argument is that it cannot be restricted in using information that its representatives simply remember vs. tangible materials that can be destroyed/returned.
- Typical disclosing party response in the M&A context is to resist any such language very strongly.

## Advanced Topics – Data Room Terms

- Use of virtual “data rooms” are increasingly standard in M&A.
- These data rooms will often include standard “click-through” confidentiality terms that may conflict with the negotiated NDA.
- Recipients should include language making it clear that the NDA controls.

## Other Advanced Issues

- Public company parties and “standstill” agreements.
- Securities law compliance.
- Competitively sensitive information and the use of “clean team” agreements.

## Questions?

- Feel free to contact me at [dsmith@eckertseamans.com](mailto:dsmith@eckertseamans.com)