

Strictly confidential

Protecting private information during a merger

A confidentiality agreement typically is the first thing prospective buyers and sellers sign when they enter M&A deal talks. These legal documents may seem like a formality, but they provide the foundation for a transaction's successful execution and shouldn't be ignored.

A SAFE SPACE

Confidentiality, or nondisclosure, agreements (NDAs) are designed to keep information that parties exchange during the due diligence and negotiation stages private. Typically, review processes involve documentation about research and development, product rollouts, hiring and expansion plans, and long-term strategies. If such information were to be released prematurely — or at all — it could be disastrous for a company.

NDAs are legally binding agreements M&A participants use to enable candid and detailed discussions during deal negotiations. They're particularly important for sellers, who need to feel comfortable enough to disclose competitive information to a serious buyer — particularly when that buyer is also a competitor.

NDA PROVISIONS

You can draft an NDA in a variety of ways with terms specific to your deal. Most agreements, however, contain:

- Information that's to be considered confidential,
- Information that's excluded from the agreement,
- The timespan during which information must be kept confidential, and
- Specific scenarios in which a party could disclose confidential information — for example, when subpoenaed by a court or ordered by a federal regulator.

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Buyers and sellers frequently have different objectives and prerogatives when it comes to the NDA. So be prepared to compromise some

document security if necessary. Establishing a good working relationship early in the transaction can reap benefits later at the final negotiation table.

A NOTE FOR SELLERS

Sellers almost always produce more information for review during due diligence than buyers. So naturally, sellers are going to be the most interested party when it comes to securing sensitive data related to sales, earnings and intellectual property.

But if you're selling, be careful not to come across as inflexible. If you demand overly strict barriers on information access or force the buyer to negotiate with you on the release of every document, it will slow down the deal process. Your buyer may even become so frustrated that it loses interest in completing the transaction.

Also, keep in mind that some leaked information can actually help you. For example, if the sale of your company and name of your prospective suitor become public, it could spur interest from competing buyers.

CHOOSING YOUR BATTLES

Although NDAs are standard in the M&A process, don't neglect to carefully consider the contents of yours. Make your priorities known to your advisors and they can help you decide which information needs to be protected and which likely poses little risk should it become public.