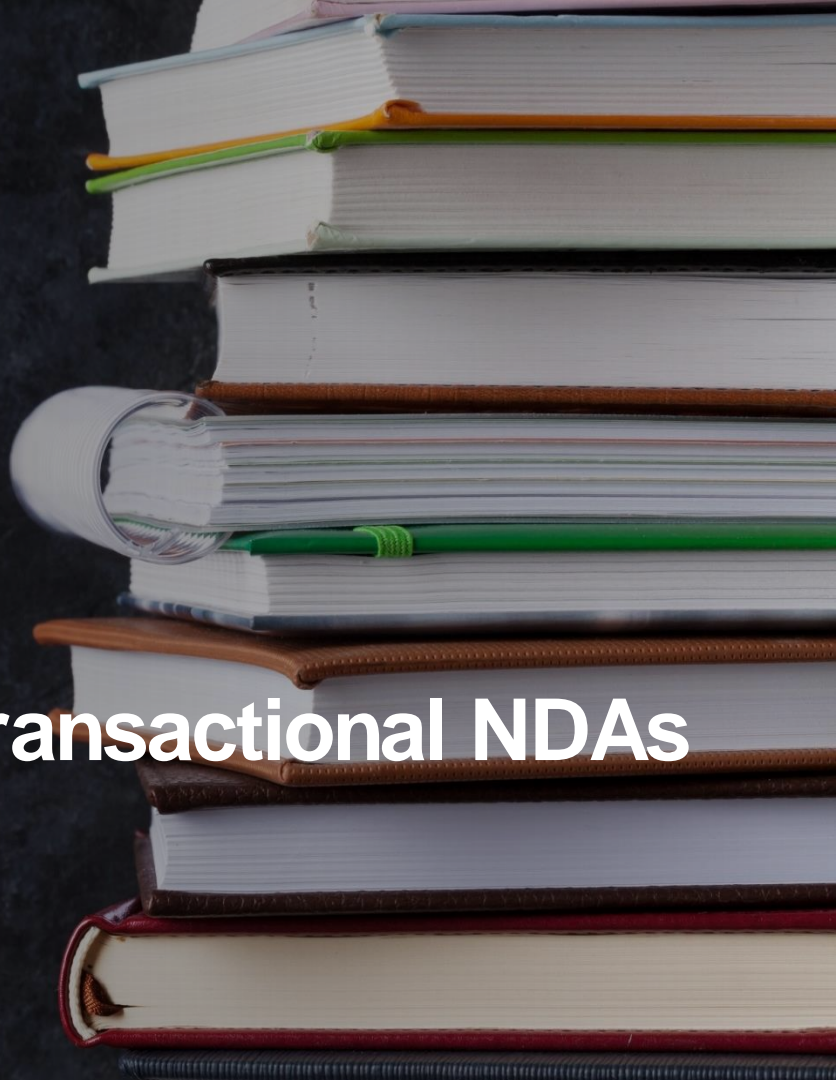


**Baker
McKenzie.**

The Secret Getaway: Drafting and Negotiating Transactional NDAs

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Welcome



Leif King

Partner
Palo Alto

Baker McKenzie



Barry Chang

Associate
Palo Alto

Baker McKenzie



Grace Blackburn

Associate
London

Baker McKenzie



Masha Polyakov

Associate General Counsel

FinancialForce



Agenda

- 1 Background
- 2 Key Terms and Concepts
- 3 Pitfalls and Areas of Contention
- 4 Practical Considerations
- 5 Closing Remarks and Q&A

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Background



Background



An agreement between parties that creates an obligation to keep certain information confidential and thereby ensures that the confidential information disclosed is not misused



Can be unilateral or bilateral, though typically management discussions are two-way streets in terms of information flow, so buyers usually seek to make NDAs mutual obligations



Depending on the transaction context, initial draft can be prepared by buyer (e.g., in a targeted outreach) or seller (e.g., in an auction context), and terms included in NDA can vary significantly based on the deal context



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Key Terms and Concepts



Definition of “Confidential Information”

Sets out what information is not confidential



“**Confidential Information**” shall mean, with respect to Discloser, the **confidential, proprietary or non-public information** furnished by Discloser or its Representatives to Recipient or its Representatives in furtherance or continuance of an established business relationship or the Transaction or for the purpose of enabling the parties to evaluate the feasibility of a business relationship or the Transaction, including, but not limited to, tangible, intangible, visual, electronic, present, or future information about Discloser’s business, business plans, pricing, customers, strategies, trade secrets, operations, records, finances, assets, technology, algorithms, data and information that reveals the processes, designs, methodologies, technology or know how by which Discloser’s existing or future products, services, applications and methods of operation are developed, conducted or operated.



Issues to consider:

1. Written information only vs. information in any format (e.g., Buyer’s notes based on such information)
2. Clearly marked or designated as confidential
3. Date limitations (i.e., whether information furnished before the date of the NDA is included)
4. Confidential nature of negotiations

Carve-outs to “Confidential Information”

Sets out what information is not confidential



Notwithstanding the foregoing, the term “**Confidential Information**” shall not include information which (i) is or becomes publicly available other than as a result of a disclosure by Recipient or its Representatives in violation of this Agreement, (ii) is or becomes available to Recipient or any of its Representatives on a non-confidential basis from a source (other than Discloser or any of its Representatives) which, to Recipient’s knowledge, is not prohibited from disclosing such information to Recipient, (iii) is known to Recipient or any of its Representatives prior to disclosure by Discloser or any of its Representatives, (iv) is or has been independently developed by Recipient without use of any information furnished to it by Discloser, or (v) is transmitted by a party after delivery of notice by the other party that it no longer wishes to receive confidential information hereunder.




Issues to consider:

1. “Knowledge” qualifier regarding third party sources
2. Requirement of written documentation for previously known or independently documented materials
3. Information furnished post-“termination”

Use Restrictions

How Recipient must treat Confidential Information



Recipient shall, and shall cause its Representatives to (i) **keep the Confidential Information confidential and not, without Discloser's prior written consent, disclose to any person outside its organization** (other than its Representatives who have a need to know such information for the purposes of evaluating the Transaction) any Confidential Information, and (ii) **not use any Confidential Information other than in connection with its consideration of the Transaction.** Recipient shall, and shall cause its Representatives to, use the **same degree of care, but no less than a reasonable degree of care**, as Recipient uses with respect to its own confidential information to protect the confidentiality of Confidential Information.




Issues to consider:

1. Disclosures within recipient's organization
2. "Use" only in furtherance of the transaction
3. Degree of care

“Representatives”

Internal/external parties to whom Recipient is permitted to disclose Confidential Information



“**Representatives**” means, with respect to either party, its respective **affiliates**, directors, officers, employees, consultants, agents, contractors, representatives, **[potential financing sources]**, **[insurers]** and professional advisors; **[provided that no potential financing sources or insurers shall be deemed to be Representatives hereunder unless Disclosure has previously provided its consent in writing]**.



Issues to consider:

1. Primary liability for breach by representatives
2. Affiliates is likely overbroad
3. Financing sources / insurers
4. Back-to-back NDAs / joinders

Financing Sources

**Seller may restrict engagement with debt finance providers.
Some possible positions:**



No restriction (in PE auction context)



Obligation to notify if exclusive with any lender



Obligation to notify with respect to each lender with whom Buyer is in discussions



Restriction on any exclusive arrangement with a lender without consent




No discussions with any financing source without consent



Not unusual for a seller to insist on a blanket restriction at the time of signing the NDA and then lift that restriction at a later stage

Mandatory Disclosures

Recipient must be able to disclose Confidential Information if compelled by law



In the event that Recipient or any of its Representatives are requested or required by law or legal process to disclose any of the Confidential Information, Recipient will notify Discloser so that Discloser may seek a protective order or other appropriate remedy, or, in Discloser's sole discretion, waive compliance with the terms of this Agreement. In the event that no such protective order or other remedy is obtained, or that Discloser waives compliance with the terms of this Agreement or, Recipient and its Representatives will furnish only that portion of the Compelled Information which Recipient reasonably believes is legally required and will use reasonable efforts to obtain reasonable assurances that the Compelled Information will receive confidential treatment



Issues to consider:

1. Opinion of [outside] legal counsel required for disclosure?
2. Limit to only portion of information required to be disclosed
3. Assurances of confidential treatment for disclosed information
4. Circumstances in which no notice to Discloser is required

Return / Destroy Obligations

How Confidential Information is to be treated if the deal does not proceed



Upon receipt of a written request from Discloser, Recipient shall, and shall cause its Representatives to, at Recipient's sole discretion, **promptly return or otherwise destroy all Confidential Information received from Discloser**, together with all copies of such Confidential Information.

Notwithstanding the foregoing, (a) each party and its Representatives may keep a copy of Confidential Information to the extent such retention is required to comply with applicable law or regulation, **provided that such Confidential Information is not used for any purpose other than compliance with such law or regulation**, (b) neither party will be required to return or destroy copies of Confidential Information made as a matter of **routine information technology backup**.



Issues to consider:

1. Efforts with respect to "Representatives"
2. Retention of analyses, compilations, studies, etc.
3. IT retention / cloud-based documents
4. Use / access restriction on retained information

Term / Duration



Sell-side drafts are often silent; market standard in tech is 1-3 years



In slow moving industries with high barriers to entry, longer terms may be acceptable



Typical to have a shorter period for any non-solicit obligations (12-18 months), if any



Term should run from the date of the letter, not from the termination of discussions or the date of a request for the return or destruction of information



Remedies



Injunction to prevent further breach



Damages



Indemnities

- Contractual indemnity eliminates requirements to mitigate and to prove that losses were reasonably foreseeable
- May increase the amount of damages payable
- Position similar in other jurisdictions (including New York), but not in every case, e.g., Belgian law



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Pitfalls and Areas of Contention



Employee Non-Solicits

Seller may seek to include an obligation on Buyer not to solicit (or hire) its employees



Scope should be limited to “senior” employees with whom Buyer first made contact during the course of transaction

- Compromise position that Buyers often take is to list out “no touch” employees who are off-limits to solicitation



No applicability to any internal “representatives” (e.g., directors) who have not received confidential information



External representatives also generally exempted from non-solicitation covenant



Include customary carve-outs for non-targeted searches and reacting to unsolicited outreaches by employees



Large acquirors frequently resist (and are successful in resisting) broad-based employee non-solicitation restrictions in NDAs

Standstills

Public company Seller may seek to prohibit buyers from trading in sellers' stock for some period of time



Usually includes laundry list of prohibited actions during the “standstill period”

- Acquiring securities or assets of seller
- Joining a “group” for purposes of a club bid
- Making certain public announcements re acquisitions
- Attempting to influence Seller’s board of directors



Standstill period is generally 1-2 years



An imprecise definition of the “Transaction” (together with use restriction) can act as a “backdoor” standstill

- *Martin Marietta v. Vulcan Materials*



Large acquirors frequently resist (and are successful in resisting) broad-based employee non-solicitation restrictions in NDAs

“Residuals” Clauses

How to address human memory in NDAs



Notwithstanding anything herein to the contrary, each party recognizes that the other party may currently or in the future be developing products or services, or receiving information from other persons, that are similar to the subject matter of Confidential Information. Accordingly, either party may use Residuals for any purpose.

The term “**Residuals**” means **information that is retained in the unaided memories** of a party’s employees or Representatives who have had access to Confidential Information pursuant to the terms of this Agreement. A person’s memory is unaided if such person **has not intentionally memorized** the Confidential Information for the purpose of retaining and subsequently using or disclosing it.



Issues to consider:

1. A very common pain point for sellers, buyers should not budge
2. Necessary for buyers to (a) avoid foot-faults and (b) ensure deal thesis is being properly evaluated
3. Sellers can always choose to withhold the “secret sauce” or limit audience under “clean team” arrangement
4. Buyers must nevertheless be mindful to avoid moral “taint”

Common Interest Clauses

Choice of governing law may impact interpretation of “common interest doctrine”



“Common interest” doctrine shields privileged information that is exchanged between buyer and seller during the course of an acquisition



Under New York law, common interest may only exist between buyer and seller if communications relate to pending or anticipated litigation

- *Ambac v. Countrywide Home Loans*



Simply signing a common interest clause / agreement does not create an automatic shield to discovery

- *Waymo v. Uber*



In light of recent case law, parties should not assume that common interest applies automatically in the M&A context

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Practical Considerations



Drafting and Negotiating NDAs

Depending on the transaction context, there may be advantages to not heavily negotiating NDAs



Since the NDA is often the first document exchanged between buyer and seller, NDA negotiations can often frame the broader deal dynamics



In a targeted outreach, Buyers generally prefer to serve up a “middle of the road” initial draft of NDA



In an auction context, Sellers will provide an auction draft – heavily negotiating this can often disadvantage a buyer



If heavy time pressure, information may be shared prior to NDA – if this is the case, ensure pre-NDA materials are covered



Buyers should “pick their battles” in the NDA – it is often not worth it to heavily negotiate NDAs, outside of a few “must have” provisions

Practical Considerations

Upon onboarding deal team members, require a “click through” acknowledgement for all deal team members prior to receiving confidential information



Establish central document repository and implement document hygiene protocols



Implement phased disclosure or “clean team” arrangements to protect highly sensitive information



Establish protocols for return/destroy compliance and certification



Closing Remarks and Q&A



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