One of the more common items to hit an attorney’s desk is a confidentiality agreement (or, if you prefer, a nondisclosure agreement). Whether in the context of a merger/acquisition transaction, a strategic venture or a consulting agreement, confidentiality agreements are often the first legal document to be entered into by parties to such transactions.

It is common for the client to believe that confidentiality agreements are routine, that they should not take much time to execute and that, in any event, all issues relating to the agreement must be resolved quickly since discussions have started. Nonetheless, specific areas need to be addressed and relevant issues need to be discussed with the client when negotiating such agreements.

Below is a checklist with accompanying commentary of the more significant areas to address when reviewing and negotiating a confidentiality agreement. The article examines the relevant issues in a confidentiality agreement from the perspectives of the party releasing information (the Disclosing Party) and the party receiving the information (the Receiving Party). In some cases, the confidentiality agreement between the parties may contain mutual obligations of nondisclosure, etc. If so, the points raised herein should be considered accordingly.

**Definition of “Confidential Information”**

The Disclosing Party should confirm that the definition of “Confidential Information” is broad enough to cover the items to be disclosed to the Receiving Party. In addition, the Disclosing Party should ensure that any information disclosed prior to the execution of the confidentiality agreement likewise should be subject to the definition of
Confidential Information. It also may be appropriate to separate a subset of Confidential Information as “trade secrets” provided that such items are indeed trade secrets under applicable state law.

Trade secrets may be subject to additional protections not otherwise available to the rest of the Confidential Information (typically the protections for trade secrets last much longer than those for other types of Confidential Information). Therefore, it may be advisable to separate the obligations of the Receiving Party with respect to such trade secret information. Finally, the Disclosing Party should be aware that any requirement to mark the various items constituting Confidential Information with a legend (or if oral, reduced to writing) creates the potential for accidental failures to so legend or memorialize such information, resulting in a loss of protection under the agreement.

The Receiving Party should review the definition of Confidential Information to see whether it provides appropriate exclusions for the following:

- Information publicly available;
- Information demonstrably available to the Receiving Party from a source other than the Disclosing Party (and such source being under no confidentiality obligation to the Disclosing Party); and
- Information in the prior possession of the Receiving Party.

Use of Confidential Information

The Disclosing Party will likely insist that the Confidential Information be used for the specific purpose contemplated by the transaction or engagement and not for any other purpose whatsoever. The Disclosing Party also may wish to verify that no license is being granted to the Receiving Party with respect to any of the Confidential Information. The Disclosing Party should insist that the Receiving Party, if a publicly traded company, will not use the Confidential Information in violation of the securities laws. Generally, the Disclosing Party insists:

- The Receiving Party only divulge Confidential Information to its representatives that need to have such information;
- Such representatives be informed of the duties under the confidentiality agreement;
- Identities of such representatives be disclosed to the Disclosing Party;
- The Receiving Party will be liable to the Disclosing Party for any representative in violation of the disclosure obligations in the confidentiality agreement; and
- Receiving Party requests for the disclosure of additional information be channeled through a specific person or process to allow the Disclosing Party to better track the totality of information being disclosed.

The Correct Form

Parties need to utilize the correct form of agreement. The attributes of confidentiality agreements can differ greatly depending on the intended use. Confidentiality agreements used for day-to-day engagements with vendors are typically not a good fit for those needed in a mergers and acquisitions transaction and vice versa.

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Most often, the Disclosing Party will do the following:

- Disclaim any representation or warranty regarding the accuracy or completeness of the Confidential Information (reserving such representations and warranties, at least in the case of a mergers and acquisitions transaction, to the final agreements of the transaction); and
- Clarify that the provision of Confidential Information does not constitute any binding obligation to enter into a transaction or even negotiate one.

**Nondisclosure of Discussions**

The Disclosing Party should confirm that the Confidentiality Agreement contains appropriate language protecting the confidentiality of further discussions between the parties. This protection is particularly important if the Disclosing Party is a publicly traded company. In the context of a mergers and acquisitions “auction” contest, the Disclosing Party should attempt to retain some ability to disclose the fact that the Receiving Party is bidding. If the identity of the Receiving Party cannot be negotiated, then the terms of the Receiving Party’s bid can be disclosed.

The Receiving Party should agree that the discussions between the parties remain confidential, including the identity of the parties and the terms of the potential bid. However, there is an exception. If the Receiving Party needs financing or advanced regulatory or other approvals with respect to a mergers and acquisitions transaction, the Receiving Party should obtain an exemption for such information to be disclosed to those interested parties.

**Legally Required Disclosures**

The Disclosing Party should consider including in the agreement a requirement that the Receiving Party:

- Notify it about requests from any third party relating to the Confidential Information; and
- Fully cooperate with the Disclosing Party in obtaining any protection (including protective orders or other injunctive relief) to prevent disclosure as requested.

Confidentiality agreements often have an exception allowing the Receiving Party to disclose information which is legally required to be disclosed. Some Receiving Parties may try to dilute this standard, particularly in the context of regulatory “requests” (i.e., short of a subpoena or similar order). From a Receiving Party’s perspective, such an exclusion is typically justified (at least in regulated industries such as banking and insurance) to keep harmony with existing regulators. Despite the increasing prevalence
of this issue being raised, such an exception may eradicate the Disclosing Party’s meaningful protection and, hence, may be strongly objected to by the Disclosing Party.

**Return or Destruction of Materials**

The Disclosing Party may desire to confirm that materials either be destroyed (and thus certified) or returned to the Disclosing Party. If a copy is to be retained by the Receiving Party for archival or evidentiary purposes, the Disclosing Party should consider insisting that such information be kept in escrow or by the Receiving Party’s outside counsel.

The Receiving Party may strive to be allowed to keep copies for archival or evidentiary purposes. However, if materials are to be returned or destroyed, the Receiving Party may wish to limit its obligation to reasonable commercial efforts to return or destroy such materials (particularly given that, in the context of destruction, it is difficult to eliminate all electronic traces of materials that were delivered or archived electronically).

**Non-Solicitation of Employees**

The Disclosing Party may wish to require that the Receiving Party refrain from soliciting the employees of the Disclosing Party for some period of time (usually a range from one to three years). The purpose of this requirement is to avoid disruption of the business and to protect the value of the Disclosing Party’s business.

The Receiving Party may attempt to limit the applicable time period and exempt general public solicitation of employees. In addition, the Receiving Party should attempt to reduce the number of employees subject to such a provision to those set forth on a list. Including all of the Disclosing Party’s employees is burdensome and could easily result in unintentional breach. These provisions often are hotly negotiated between the parties.

**Remedies**

The Disclosing Party typically insists on both injunctive relief and the ability to receive monetary damages. As for injunctive relief, the Disclosing Party generally insists on its ability to seek such relief upon an actual or a threatened breach of the confidentiality agreement by the Receiving Party and/or any of the Receiving Party’s representatives. The Disclosing Party also may insist upon indemnification of all of its enforcement costs, including legal fees.

The Receiving Party should reasonably agree to the ability of the Disclosing Party to “seek” relief but should take care to ensure that such relief is not automatic, meaning that the Disclosing Party shall be “entitled to an injunction.” Regarding reimbursement shall be “entitled to an injunction.” Regarding reimbursement of costs and expenses, the Receiving Party should strive to pay such costs only in the event, and to the extent, that the Disclosing Party prevails in any such action.

**Other Items**

Other items often addressed in confidentiality agreements (particularly in the mergers and acquisitions context) include:

- Express prohibitions on insider trading;
- So-called “standstill” provisions (Used in the public company context as a takeover defense, these provisions are detailed and complex. A discussion of them is beyond the intended scope of this article.);
- Waivers of advisors’ conflicts; and
- Requirements providing that disclosures do not waive attorney-client privileges or work-product doctrine protections.

As with any other agreement, the negotiation of a confidentiality agreement is influenced by a number of issues and factors as well as the respective bargaining position of the parties. Hopefully, this short list will serve as a handy reference when negotiating such agreements and discussing the relevant issues with clients.