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Too Much Confidence in Your Confidentiality Agreements—Concern Over the Commoditization of NDAs

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In recent years many companies have turned to standard “form” contracts for common business arrangements such as nondisclosure/confidentiality agreements (generically referred to as NDAs). On the surface, this appears to be an efficient use of limited personnel and an effort to be more responsive to businesses’ interactions with current and potential customers, suppliers, investors, and collaborators. This trend, however, has led many to mistakenly believe that these agreements are simply “forms” to be filled out by anyone in the organization without much care or consideration for the subject matter being disclosed or the understanding of appropriate terms and conditions governing the relationship.

It should be appreciated that an NDA is often the gateway for targeted discussions that lead to business relationships, investments, product, service, and material evaluations, sales, product and market developments, and other business or technical arrangements. As such, it is critical that the agreement is written with consideration of the context of the relationship. Some common areas of concern involve



issues as modest as identifying the correct legal parties to more strategic decisions around what level or type of information will be disclosed and received and by whom.

There are several other areas to think about before completion of the agreement—without delaying the transactions that keep businesses moving toward their goals.

A first, sometimes confused, issue involves the format of the NDA—whether one-way or requiring mutual obligations of confidentiality. One-way agreements (i.e., one party sharing information), might typically be used with suppliers,

vendors, and consultants; they offer the most flexibility and include no reciprocal obligations to protect information.

Alternatively, although commonly the default because of “mirror image” terms, mutual NDA’s, which anticipate both parties sharing confidential information, should be reviewed with care. They should not be offered or accepted if information should only flow in one direction because it may place an undue burden on a party that has no legitimate interest to receive or protect the other party’s information.

Next, while it may appear straightforward, correctly identifying the parties to the agreement requires understanding not just that the accurate and appropriate legal entities are identified, but also recognizing if any others may have access to the information being shared. If one or both parties are part of a larger entity or they are related to or affiliated with another party that may participate in any way, then the third parties should be included in the agreement. It is also advisable to have individuals (employees or contractors) identified and named party to the agreement if they will have access to the confidential information. The agreement may also require all relevant employees and contractors to be made aware of and agree with confidentiality obligations before they receive access to any confidential information. Overall, it is important to remember that inaccurate or inadequate identification of a party may result in an unenforceable agreement or leave a party without recourse under the agreement.

The definition of confidential information in the NDA should be specific, understood by the parties, and relevant only to the use of the information within the purpose of the agreement. Of course, the disclosing party would prefer a broader definition while the recipient would prefer a narrower understanding of the information. Similar positions are typically held by the discloser and recipient regarding the need to mark or otherwise identify disclosed information as being confidential. It should be understood, however, that in all situations only information necessary

to achieve the agreement's purpose should be disclosed.

Common exceptions to confidentiality are also important to understand. Most are familiar with the exceptions to confidentiality, including information that is generally known, publicly available, in possession of the receiving party, and lawfully received on a non-confidential basis from third parties. Consideration should also be given to information that was or is independently developed by the receiving party without any use of the disclosing party's confidential information. This may be especially important to allow a company to exploit developments that may be technically related to the confidential information that it may have been exposed to.

The term of the NDA typically includes two time periods: a first defining a time limit for one or both parties to exchange confidential information, usually running from the effective date; and a second defining the period of the confidentiality obligation on the recipient(s) that may run concurrently with the agreement term or continue after the expiration of the NDA. In situations involving disclosure of confidential information protectable as trade secrets, the obligation of confidentiality on the receiving party should be indefinite (without time limit) or until the trade secret becomes available to the public. Limiting the confidentiality obligation to a shorter period opens the trade secret up to potential public disclosure and an inevitable loss of rights.

Other areas in NDAs to consider include assignability, return of information, governing law, dispute

resolution, and remedies. Although commonly viewed as legalese, these provisions are important to understanding the rights and obligations upon termination or in a dispute between the parties.

NDAs are important business tools and are often precursors to further agreements and business relationships. When discussions discontinue, however, the NDA sets reasonable boundaries for behavior. As such, the NDA should be viewed as a significant and necessary activity and should be treated accordingly. Standard and "form" contracts may still be useful to provide a starting point and framework for the NDA, but it must be appreciated that critical terms in these agreements can help the parties maintain and protect value in the disclosed and received information, as well as define the relationship, rights, and obligations of the parties.

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