

Morgan Lewis

# THE INS AND OUTS OF NON-DISCLOSURE AGREEMENTS AND LETTERS OF INTENT

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The background features a dynamic, abstract composition of light trails. A series of bright red lines streaks across the upper portion of the frame, while a series of bright blue lines streaks across the lower portion. These lines converge towards the right side of the image, creating a sense of motion and depth. The overall color palette is dominated by deep blues and vibrant reds.

# **NON-DISCLOSURE AGREEMENTS**

**INITIAL CONSIDERATIONS**

# Non-Disclosure Agreements

## Why Have a Written Confidentiality Agreement?

- Confidentiality agreements are standard and an expected part of most negotiated deals
- Protection of trade secrets under state law can be lost (deemed waived) if they are disclosed without a written agreement
- Written contracts are typically easier to enforce
- Written confidentiality agreements are often required under prior agreements with third parties
- They avoid confusion over what the parties consider to be confidential
- The parties have more flexibility in defining what is confidential
- The parties can specify what they expect from each other
- Confidentiality agreements often cover issues unrelated to confidentiality, such as non-solicitation, exclusivity and absence of binding commitments to complete a transaction

# Non-Disclosure Agreements

## Are You More Likely to Receive or Disclose Information?

Whether you are primarily disclosing confidential information or receiving confidential information will drive some of your strategy for the structure of the confidentiality agreement

### Buyer

A Buyer typically wants the exclusions from confidential information to be as broad as possible and permission to disclose all confidential information to Buyer's advisors and representatives and any financing sources

### Seller

A Seller typically wants the Buyer's exclusions to be as narrow as possible and, to the extent possible, to exert control over the sale process through confidentiality provisions and limitations on disclosures to third parties

# Non-Disclosure Agreements

## Unilateral NDA

### Positive:

- Restricts the disclosing party only

### Challenges:

- Does not protect confidential information of the other party that may be disclosed later
- Does not protect nonbusiness information (such as deal terms or deal process) that both parties will likely want to keep confidential

## Mutual NDA

### Positives:

- Protects confidential information of both parties
- Protects nonbusiness information about the actual deal
- Provides a more balanced form that typically results in a faster review and signing process

### Challenge:

- Imposes restrictions on both parties to the transaction, regardless of which party has more leverage in the deal

# Non-Disclosure Agreements

## When Should We Sign an NDA?

- As soon as possible
- Prior to disclosure of any confidential information

### Practice Tip

- If disclosures of confidential information have been made prior to entering into a confidentiality agreement, make sure that the confidentiality agreement specifically covers all prior disclosures (written and oral)

# Non-Disclosure Agreements

## Should the NDA be separate from the LOI?

- Gives the parties the flexibility to conduct due diligence of certain nonpublic information before negotiating a letter of intent
- Provides the parties with written protection in the event of disclosure of confidential information prior to entering into a term sheet or letter of intent

### Practice Tips

- Confidentiality provisions included in a term sheet or letter of intent should be made expressly binding on the parties
- A separate confidentiality agreement should be incorporated by reference in the term sheet or letter of intent

# Non-Disclosure Agreements

## Is the Disclosing Party a Public Company?

If you answer "**YES**" to this question, then consider the following:

- Include a standstill agreement in the confidentiality agreement restricting Buyer's unsolicited bids for the Seller
- Obtain a representation that the recipient and its representatives are in compliance with securities laws (or, at a minimum, are aware of their obligations under securities laws)
- Determine whether the terms of the confidentiality agreement qualify for Regulation FD under the Securities Exchange Act of 1934, as amended – should qualify in most circumstances



# Non-Disclosure Agreements

## Limitations on Effectiveness

- The disclosing party cannot “undisclose” confidential information that has been wrongfully disclosed. Disclosing party has the burden of proof to prove a breach.
- The disclosing party’s remedy for wrongful disclosure of confidential information is limited and damages for breach of contract may be the only legal remedy
- The disclosing party may not be able to effectively prevent the recipient of confidential information from inevitably taking the confidential information into account in its own commercial plans

### Practice Tip

- To protect confidential information, the disclosing party should carefully manage the disclosure process, consider additional confidentiality procedures (i.e., “clean teams”) for extremely secretive information, and have a contingency plan for dealing with leaks

The background features a dynamic, abstract composition of light trails. On the left, numerous thin, parallel lines in shades of red and orange streak across the frame, creating a sense of motion. These lines transition into a more solid, bright blue area on the right, which also contains some lighter, wispy blue trails. The overall effect is one of speed and energy, with a dark blue gradient at the bottom and right edges.

# **NON-DISCLOSURE AGREEMENTS**

**PROVISIONS OF NOTE**

# Non-Disclosure Agreements

## Who are the Parties

- Buyer
- Seller
- Others
  - Investment Bank
  - Parent
  - Key Sellers

## Permitted Disclosures

- Disclosing party may require Affiliates/Representatives to sign a separate acknowledgment agreement to be bound by the NDA
- Disclosing party may hold receiving party responsible for any breach of Affiliates/Representatives.

# Non-Disclosure Agreements

## Definition of “Confidential Information”

- Defining what is confidential is central to any confidentiality agreement
- Types of Matters:
  - Business information (including trade secrets)
  - Derivatives of business information
  - The contemplated transaction itself, including any terms
- Labeling disclosed information as “Confidential”

### Practice Tips

- The confidentiality agreement should make it clear when confidential information is being disclosed.
- If the confidentiality agreement requires certain steps to be taken for information to be protected, such as marking the information as confidential, the disclosing party must be very careful that this process is followed. In general, providers of confidential information should resist this requirement.
- Disclosing parties must also be careful not to disclose information that is restricted by other confidentiality agreements.

# Exceptions to Confidentiality

**IS OR BECOMES PUBLIC THROUGH NO FAULT**

**ALREADY IN RECIPIENT'S POSSESSION**

**AVAILABLE THROUGH THIRD PARTY  
NOT BOUND BY CONFIDENTIALITY**

**INDEPENDENTLY DEVELOPED**

**REQUIRED BY LAW**

**AFFILIATES**

# Non-Disclosure Agreements

## Permitted Use and Restrictions on Disclosures

- Making clear what the information can be used for
- Mutually acceptable or agreed form of transaction
- Financing commitments

## Term

- Indefinite or termination upon a certain date or event
- Depends on the type of information involved and how fast such information changes
- Disclosing parties typically prefer an indefinite period
- Recipients typically prefer a set term
- **Practice Tip:** Set specific expiration dates for those provisions that are not related to confidentiality obligations (for example, standstill agreements or non-solicitation clauses)

# Non-Disclosure Agreements

## Issues with Direct Competitors

- What level of information should the parties disclose if they are direct competitors?
  - Consider business and legal (antitrust) risks
- Direct competitors should consider the following when contemplating the terms of a confidentiality agreement:
  - Disclosures may be limited to aggregated information, or sensitive information may otherwise be masked
  - For sensitive information, consider signing a separate nondisclosure agreement (NDA) and a “clean team” approach with much more specific provisions and controls regarding the disclosure of such information
  - Avoid reviewing any documents that may lead to a claim of misappropriation of information
  - Be sure to check whether sharing certain information with a competitor violates any antitrust laws; a violation could kill the deal or result in regulatory action

# Non-Disclosure Agreements

## Return of Confidential Information

- Confidentiality agreements typically provide for the return of confidential information in the following circumstances:
  - On the termination of negotiations between the parties
  - At the end of the term of the agreement
  - At any time upon the disclosing party's request
- Destroy vs Return

### Practice Tip:

- Disclosing parties should make sure they have rights to the return of their confidential information or an adequate process to confirm destruction or archival under satisfactory procedures
- Remember exception for retention for archival or evidentiary purposes



# Non-Disclosure Agreements

## Remedies

- Injunctive relief in addition to monetary damages
- Indemnification provision holding the recipient responsible for all costs relating to the enforcement of the agreement
  - Recipients will resist including the indemnification provision
  - A typical compromise is to have the losing side to a dispute pay the fees and expenses (including legal fees)

# Non-Disclosure Agreements

## Other Covenants/Provisions

- No Representations or Warranties
  - The disclosing party may clarify that it makes no representations or warranties with respect to any of the disclosed information. If the recipient claims that the information is incomplete or inaccurate in any way, the disclosing party points to this clause to avoid liability.
- Non-solicitation / Nonhire
  - Restricts the recipient from soliciting and/or hiring the disclosing party's employees for a certain period of time (one year is common). Parties will negotiate whether this is non-solicitation or nonhire, and whether it applies to all employees or just more senior people.
  - Sometimes will restrict the recipient from soliciting the disclosing party's customers and suppliers.

# Non-Disclosure Agreements

## Other Covenants/Provisions

- Standstill Agreement
  - May be included in the confidentiality agreement when the Seller is a public company.
  - Prevents the prospective Buyer from making a hostile takeover attempt after the parties fail to complete a friendly deal when the Buyer has had access to the Seller's confidential information.
  - Often limits the Buyer's ability to buy and sell the Seller's stock.
  - Buyers often seek to limit the term of the standstill to a period typically ranging from 6 months to 18 months.
  - Sometimes includes a "don't ask, don't waive" provision limiting a Buyer from requesting a waiver of the standstill. This may raise issues about the adequacy of the sale process and the Seller board's fulfillment of its fiduciary duties and should be reviewed carefully.
  - Buyers may also seek to have the standstill "fall away" in certain circumstances, such as once the Seller signs up a deal with another party, or if the Seller becomes subject to a "hostile" bid, to preserve Buyer's options.

# Non-Disclosure Agreements

## Other Covenants/Provisions

- Trading in Securities
  - Use when the disclosing party is a public company.
  - Reminds the parties of their obligations under securities laws.
- Keeping quiet about the deal
  - Prohibits the parties from making a public announcement or other disclosure about the deal unless agreed to in advance by both sides. Both sides can have an interest in keeping negotiations quiet.
- Exclusivity
  - Sometimes referred to as a “no-shop” clause, this provision requires the Seller to deal exclusively with the Buyer for a certain period of time.
  - Exclusivity agreements are usually separate agreements or sometimes included in the term sheets/letters of intent for deals.
  - Can be problematic for a public Seller, depending on the length of the exclusivity period and size of the deal.

# Non-Disclosure Agreements

## Other Covenants/Provisions

- No license granted
- Obligation to inform of unauthorized disclosure
- No further obligations
- Residual rights
  - Residual rights clauses allow the recipient's employees to use any confidential information retained in their memories
  - Sellers often strongly object to residual rights clauses and have concerns over abuse

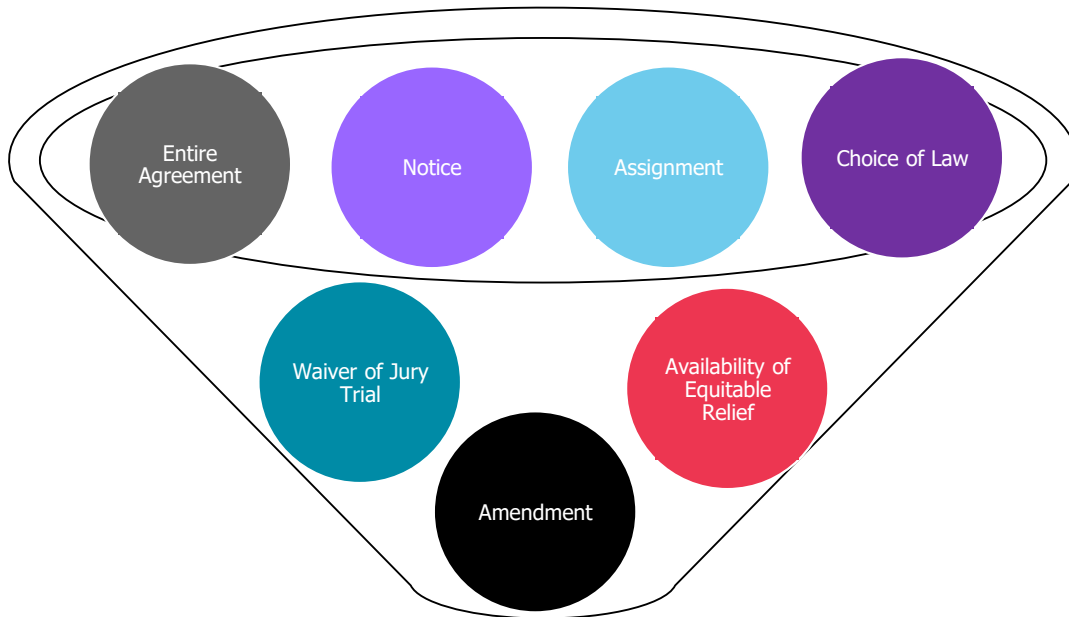
### Practice Tip:

- To limit potential abuse, some residual rights provisions state that employees cannot “intentionally” remember information to sidestep confidentiality obligations

# Non-Disclosure Agreements

## Miscellaneous Provisions

- Often viewed as “standard” or “boilerplate” but these can be consequential



# LETTERS OF INTENT

A long-exposure photograph of a highway at night, showing vibrant red and blue light trails from traffic. The trails are curved and converge towards the top right corner of the frame. The background is a dark, deep blue.

# Sign or Not to Sign

## Sign

- Opportunity to confront certain issues up front before incurring substantial expenses  
Develop a “roadmap” for the transaction
- Seller sees a level of commitment before disclosing confidential information
- Buyer can obtain exclusivity, break-up fee, expense reimbursement provisions

## Not Sign

- Time to negotiate – could spend this time on negotiating definitive documents
- Obligation to negotiate in good faith
- May prematurely lock in parties to terms they later don't like

### Practice Tips

- Prior to negotiating a Letter of Intent (LOI), think through and assess:
  - Why are we negotiating an LOI? Is my side better off just signing an NDA and (maybe) an exclusivity agreement, rather than an LOI?
  - If an LOI will be prepared, is my side better off with a more detailed/less detailed LOI or more binding/less binding LOI?



# Contents of an LOI

- Parties to letter of intent
  - Buyer
  - Seller
  - Ultimate Parent, Bankers, Key Stockholders
- Description of transaction
  - Stock/asset/merger
  - Price
  - Purchase price adjustments, Holdbacks, Earnouts
- Conditions to the transaction
  - Escrow
  - Financing Requirement
  - Employment

# Contents of an LOI Cont.

- Nonbinding with exceptions:
  - Exclusivity
  - Break Up Fee, Reverse Break Up Fee, Expense Reimbursement
  - Conduct of business after execution of LOI
  - Expenses
  - Governing law, forum, jury trial waiver

## **Practice Tip:**

- Consider adding a provision eliminating any implied duty to negotiate in good faith. As an alternative, minimize the impact of any implied duty by adding unilateral termination provisions to the LOI or outside termination dates.
- Even though the LOI may be nonbinding, prepare for possibility of disputes

# KEY TAKEAWAYS

The background of the slide is a long-exposure photograph of a highway at night. The image is oriented vertically, with the road curving from the bottom left towards the top right. The light trails from cars are the primary visual element, with a color gradient from deep red on the left to bright blue on the right. The overall composition is dynamic and modern.

# Key Takeaways for NDAs and LOIs

- Focus on definition of “confidential information” and exclusions
- Ensure that the NDA permits sharing of information to those representatives you need to get the deal done
- Have a contingency plan for dealing with leaks and take appropriate measures to protect extremely sensitive information.
- Be careful not to create binding contract when entering into an LOI– clarify which provisions, if any, are binding, and which are not binding.
- Although deal terms set forth in an LOI are typically marked as not binding, deviating from those terms in the definitive can cause negotiation disputes.

A long-exposure photograph of a highway at night, showing vibrant red and blue light trails from cars moving away from the viewer. The trails are dense and create a sense of motion and speed. The background is a dark, deep blue.

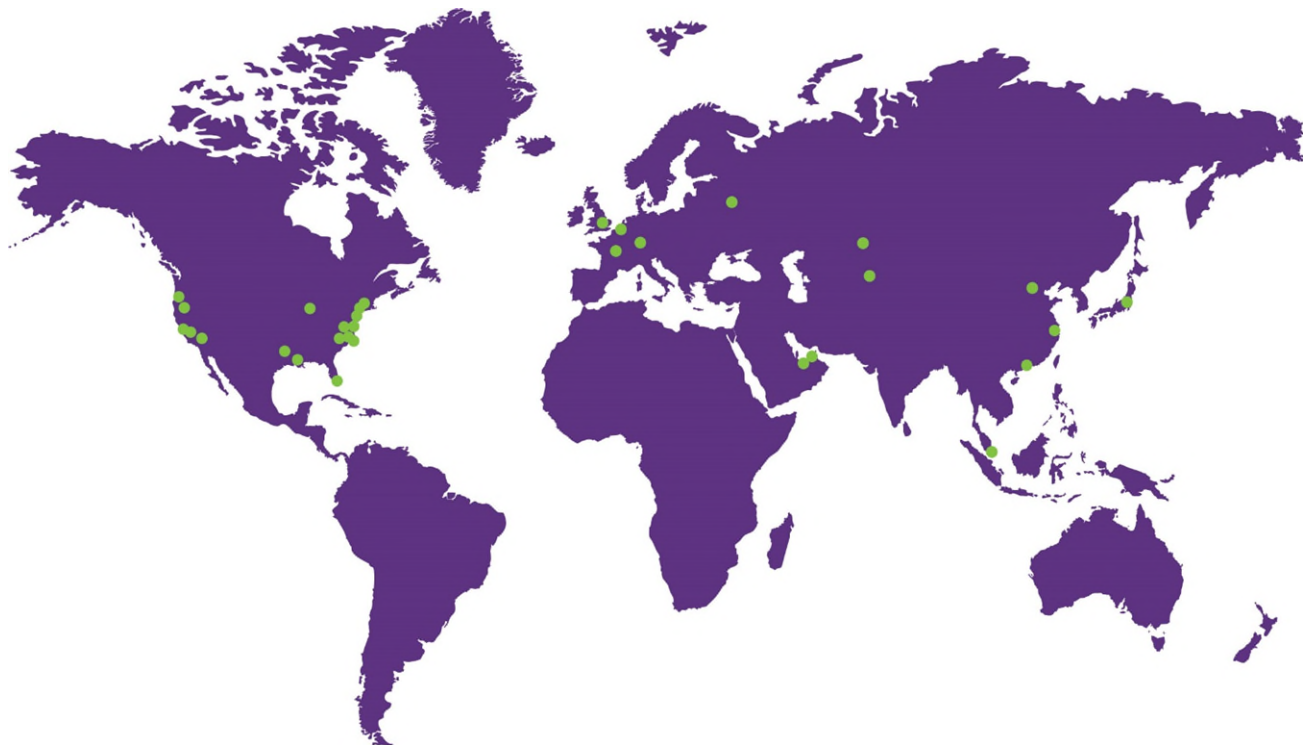
**QUESTIONS?**

## Our Global Reach

Africa  
Asia Pacific  
Europe  
Latin America  
Middle East  
North America

## Our Locations

Abu Dhabi  
Almaty  
Beijing\*  
Boston  
Brussels  
Century City  
Chicago  
Dallas  
Dubai  
Frankfurt  
Hartford  
Hong Kong\*  
Houston  
London  
Los Angeles  
Miami  
Moscow  
New York  
Nur-Sultan  
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