

NEWS & INSIGHTS

The Importance of Confidentiality in Mergers and Acquisitions: Secure a Non-Disclosure Agreement Before Starting the Conversation

BY: [KATHERINE PANDELIDIS GRANBOIS](#) | [INSIGHTS](#) | [ARTICLE](#)

MARCH 19, 2019



This is the first installment in our four-part series, “Key Stages in Buying and Selling Businesses.” In this series, we explore critical stages in the mergers and acquisitions (M&A) process that both buyers and sellers should consider.

Confidentiality is crucial in the process of buying or selling a business. If leaked, information obtained through private discussions could derail the potential transaction and have a significant negative impact on the businesses' ongoing operations, value and prospects.

If you think it may be time to explore selling or buying a business, the first step before starting the conversation, even a casual one, should be obtaining a signed confidentiality agreement – also known as a non-disclosure agreement (NDA) – that is customized to both parties and the transaction. Establishing an NDA will help avoid potential lawsuits and protect the businesses' proprietary information and intellectual property assets.

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The purpose of an NDA is to provide legal framework to protect information and define the confidential relationship between parties by:

- Identifying the parties exchanging information
- Determining what pieces of information are subject to non-disclosure
- Identifying with whom the information may be shared, such as third-party advisors, lenders, key employees or regulatory agencies
- Stating the duration and manner of restriction
- Outlining a plan for the return or destruction of confidential information
- Defining the course of action should a breach occur

These sensitivities are best addressed at the outset of acquisition negotiations, where optimism and cordiality between the parties provides the best opportunity to arrive at an agreement that will fairly and appropriately address the respective interests of the parties.

The terms of the agreement will depend on several factors including the size and locations of operations, the business industry and whether a company is privately owned or publicly-traded. The goals of the transaction should also be considered – if it is strategic or financial. The type of transaction should be taken in account – if it is a merger, acquisition, consolidation or tender offer.

The parties' relationship prior to the discussions also has an impact on the provisions of the agreement. If the buyer and seller are in the same industry or competitors, it may be necessary to achieve a balance between the seller's desire for maximum protection and the buyer's desire to minimize exposure to future liability in the event the transaction does not proceed. Depending on the circumstances, it may also be necessary for a seller to disclaim warranties of accuracy or include terms that prohibit employee solicitation or prevent hostile takeovers.

Although it may be tempting to save on legal costs by pulling an agreement off the shelf from a different business transaction or from the Internet, such agreements may not adequately protect the seller in the context of the transaction at hand. Involving legal counsel prior to beginning any discussions can prevent costly mistakes down the line. Experienced counsel can quickly identify the areas of an NDA that need to be tailored to protect his or her client's interests.

If you are considering entering a discussion about buying or selling a business, contact [Kathy Granbois](#) to further discuss the importance of confidentiality and to learn how Saxton & Stump's [M&A team](#) can help you prepare to handle sensitive information.

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