

CONFIDENTIALITY AGREEMENTS

Confidentiality Agreement – A pact that forbids buyers, sellers, and their *agents* in a given business deal from disclosing information about the transaction to others.

The M&A Dictionary

It is common practice for the seller, or his or her intermediary, to require a prospective acquirer to sign a confidentiality agreement, sometimes referred to as a non-disclosure agreement. This is almost always done prior to the seller providing any important or proprietary information to a prospective acquirer. The purpose is to protect the seller and his or her business from the acquirer disclosing or using any of the information provided by the seller and restricted by the confidentiality agreement.

These agreements, most likely, were originally used so that a prospective acquirer wouldn't tell the world that the business was for sale. Their purpose now covers a multitude of items to protect the seller. A seller's primary concerns are to insure that a potential acquirer doesn't capitalize on trade secrets, proprietary data or any other information that could essentially harm the selling company. A concern of the prospective acquirer may be that similar information or data is already known or is being developed by his or her company. This can mean that both parties have to enter into some discussion of what the confidentiality agreement will cover unless it is general in nature and non-threatening to the prospective acquirer.



A general confidentiality agreement will normally cover the following items:

- The purpose of the agreement. It is assumed that, in this case, it is to provide information to a prospective acquirer.
- What is confidential and what is not? Obviously, any information that is common knowledge or is in the public realm is not confidential. What information is going to be disclosed? And what information is going to be excluded under the disclosure requirements?
- How will confidential information be handled? For example, will it be marked "confidential," etc.?
- What will be the term of the agreement? Obviously, the seller would like it to be "for life" while the buyer will want a set number of years – for example, two or three years.
- The return of the information will be specified. For example, if the sale were terminated, then all documentation would be returned.
- Remedy for breach or a determination of what will be the seller's remedies if the prospective acquirer discloses or threatens to disclose any information covered by the confidentiality agreement.
- Legalese. Obviously, the agreement would contain the legal jargon necessary to make it legally enforceable.

One important item that should be included in the confidentiality agreement is a proviso that the acquirer will not hire any key people from the selling firm. This prohibition works both ways: the prospective acquirer agrees not to solicit key people from the seller and will not hire any even if the key people do the approaching. This provision can have a termination date for example, two years post-closing.

The sale of a company involves the disclosure of important and confidential company information. The selling company is entitled to protection from a potential acquirer using such information to its own advantage.

The confidentiality agreement may need to be more specific and detailed prior to commencing due diligence than a generic one that is used initially to provide general information to a prospective buyer.

Alamo Corporate Group and its advisors have specialized in ownership transfers of closely held companies since the late 1980's. We offer a range of intermediary services including mergers, acquisitions, divestitures, buyer identification, management buyouts, debt restructuring and in very limited instances, acquisition searches for high-net-worth individuals and private equity groups.

Alamo's primary purpose is to provide an extremely confidential national service that brings buyers and sellers together through our extensive contacts in the financial and intermediary communities.

Our process is very structured, as experience has shown us that while each buyer and seller is somewhat unique, there are enough similarities that specific steps must be followed in order for transactions to close. Confidentiality is guarded throughout each step of the process.

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