



MERGER & ACQUISITION LAW UPDATE

August 20, 2014

Confidential Non-Disclosure Agreement (“CNDA”) Negotiation Considerations in Mergers and Acquisitions

CNDAs are becoming more heavily negotiated in mergers and acquisitions. Based on our recent deals, we have listed some considerations to assist in your CNDA negotiations. We have identified considerations as either “sell-side” or “buy-side,” and have included some example provisions on pgs. 4 – 5 of this update to supplement these considerations.

These considerations are based on our CNDA negotiation experiences and, while they are not all “*must have*” points, they should provide you with the ability to negotiate a logical middle-ground.

Major Considerations

1. **No Legal Obligation.** The CNDA must include a provision that the parties have no legal obligation to enter into a transaction until the execution of a definitive agreement, regardless of *buy-side* or *sell-side* status. (*example attached*)
2. **No Representations or Warranties.** (*Sell-Side*) The disclosing party should make no representation or warranty regarding the accuracy or completeness of the disclosed information. (*example attached*)
3. **Similar/Competitive Business Arrangements.** (*Buy-Side*) This allows those in the business of evaluating opportunities of similar or competitive businesses to continue those evaluation efforts. (*example attached*)
4. **Definition of Confidential Information.** (*Buy-Side*) “Confidential Information” should be limited to materials identified as “confidential” or “proprietary,” and should ensure standard carve-outs (e.g., publicly available, already known, or disclosed from another source not bound by confidentiality). These are hard to get typically and there are some middle-ground positions.

5. **Trade Secrets.** Negotiations over trade secrets can be protracted, with many business people (and even some attorneys) not appreciating the subtle distinctions. A “trade secret” is any method or process that derives independent economic value from not being generally known to others. Frequently, the term “trade secrets” will be lumped into the generic definition of “confidential information” in CNDAs. Protection of a “trade secret” lasts only so long as it remains a secret; therefore, the disclosure of “trade secrets” in the CNDA context can trigger an indefinite obligation to protect, even beyond the term of the CNDA.
- a. *Buy-Side* – Require disclosing party to expressly identify materials as a “trade secret,” prior to disclosure, with an option for the recipient to elect not to receive such “trade secret.”
 - b. *Sell-Side* – Confidentiality obligations related to “trade secrets” should not expire with the CNDA but should exist indefinitely.
 - c. *Hallmark Decision*¹ – Last month, a federal court of appeals awarded Hallmark Cards \$31 million dollars against a private equity group (PEG) because it misused Hallmark’s trade secrets. The improper usage included powerpoint slides created by an affiliate of the PEG while representing Hallmark, and later improperly shared with the PEG in its pursuit of a Hallmark competitor. The affiliate was subject to a CNDA with Hallmark. In addition to the \$31 million award against the PEG, Hallmark received about \$16 million from the affiliate.

Secondary Considerations

1. **Exclude Portfolio Companies.** (*Buy-Side*) Portfolio companies should not be bound by the CNDA obligations, unless they receive confidential information.
2. **Non-Solicitation.**
 - a. *Sell-Side* – Be sure to include non-solicitation.
 - b. *Buy-Side* –
 - Limit non-solicitation to disclosing party’s senior management or key employees.
 - Disclaim solicitation or hiring efforts of recipient’s portfolio companies.

¹ *Hallmark Cards, Inc. v. Monitor Clipper Partners, LLC* 2014 WL 3408853 (8th Cir. (Mo.) July 15, 2014) (NO. 13-1905)

- A carve-out for general solicitations not directed at key employees may be permissible.
3. **Return/Destruction of Confidential Information.** (*Buy-Side*) Recipient can retain information for legal, regulatory or internal policy purposes, as applicable. (*example attached*)

Other Considerations

1. **Representatives.** (*Buy-Side*) “Representatives” should include all of the necessary parties for evaluation, e.g., attorneys, accountants, advisors, potential sources of financing, etc. (*example attached*)
2. **CNDA Term.** Maximum of two (2) years; if on the *buy-side*, propose a shorter term, say, 6-12 months.
3. **Magic Words.** The law governing confidential information and trade secrets is a mix of federal and state law and the law varies from state to state. Each state has specific provisions that determine the enforceability of the CNDAs. Be sure your CNDA contains this “magic language” or it may not be enforceable.

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Example Provisions

1. No Legal Obligation

“The parties agree that unless and until a final written definitive agreement providing for the Transaction has been executed and delivered by the Company and Purchase Candidate, neither Company nor Purchase Candidate shall be under any legal obligation of any kind whatsoever with respect to the Transaction by virtue of any written or oral expression by the Company or any of its Representatives, by Purchase Candidate or any of its Representatives or by virtue of this Agreement except for the matters specifically agreed herein. Purchase Candidate agrees that until a final written definitive agreement providing for the Transaction has been executed and delivered by Company and Purchase Candidate, no document (including this Agreement and the Confidential Information) or other information or materials shall constitute an offer to sell securities of the Company.”

2. No Representations or Warranties

“The parties acknowledge and agree that neither Disclosing Party nor any of its Representatives makes any representation or warranty (express or implied) with respect to the disclosed information, including its accuracy or completeness. This Agreement sets forth all obligations of the parties, except as may be otherwise provided in a subsequent written definitive agreement. The parties agree that only those representations or warranties which are made in a written definitive agreement regarding the Transaction, when, as and if executed and delivered by the Company and the Purchase Candidate, and subject to such limitations and restrictions as may be specified therein, shall have any legal effect.”

3. Similar/Competitive Business Arrangements

“The Company acknowledges that Recipient and its Representatives may currently or in the future be developing or receiving information from other parties that may be similar to the Confidential Information. Accordingly, nothing contained in this Agreement shall restrict or prevent Recipient or its Representatives, now or in the future, from (i) entering into any business arrangement (including an investment or acquisition) with any Person that competes or may in the future compete with the Company or (ii) developing, making, using, marketing, selling or distributing products, concepts, services technology or techniques that are similar to or competitive with products, concepts, services, technology or techniques developed, made, used, marketed, sold or distributed by the Company.”

4. Return/Destruction of Confidential Information

“Notwithstanding anything contained herein to the contrary and subject to the confidentiality obligations herein until the termination or expiration of this Agreement, the Recipient and its Representatives shall not be obligated to return or destroy Confidential Information to the extent otherwise required by any law, regulation, legal, regulatory or judicial process, rule or practice

governing professionals or any internal compliance policy or procedure relating to the safeguarding or backup storage of data.”

5. Representatives

“Each party shall only permit access to Confidential Information of the other party to those of its employees, directors, officers, authorized representatives (including, without limitation, attorneys, accountants, advisors, consultants, bankers and financial advisors), potential sources of financing and their representatives and other representatives (collectively, “Representatives”).”

Contacting Kutak Rock LLP

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