

Guide 6: Confidentiality

The process of buying and selling businesses is commercially sensitive and both parties have a duty of care with regard to information of a confidential nature. Maintaining confidentiality is a critical aspect of risk management. Here are a few pointers to help:

Different types of document

- A Confidentiality Agreement and a Non-disclosure Agreement are in essence, the same thing.
- Confidentiality Agreements are generally longer, more in-depth documents and will often include more detail around the protection of each firms' employees, from solicitation by the other.

Key terms

- Whatever form the document takes, it will be between two parties (buyer and seller).
- It should cover the purpose of the agreement, the scope of confidentiality, the protection of intellectual property, non-solicitation, remedy for breach, duration and the other basic aspects of a legal agreement (i.e. legal jurisdiction, assignment provisions, notices etc.).

Important points to consider

- The party that instigates the discussion will often supply a confidentiality document, but the seller could require that their own agreement be used.
- Basic templates are available online and can be easily customised by adding the details of each legal entity and other related detail.
- Some buyers (and their representatives), use non-disclosure agreements as a way of limiting the ability of a firm to properly explore their exit options. If in doubt, take legal advice and consider supplying your own agreement.
- The scope of a confidentiality agreement should be relevant to the nature of the information being disclosed and in general, the seller has more to protect than the buyer.
- It's worth keeping in mind that all negotiations become a matter of company record, so while the existence of a confidentiality agreement protects the parties from disclosure while commercially sensitive negotiations take place, the record of those discussions will exist long after any confidential period has expired.
- Always seek legal advice if you intend to rely on a legal document.

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