

Potential Pitfalls in Entering into NDAs – a Blog Post by Brian Swanson

For technology companies, Non-Disclosure Agreements (NDAs) play a crucial role in protecting information and in facilitating open discussions with business partners and potential business partners. They are entered into frequently, and they all sort of look the same. As a result, they are often not fully reviewed or negotiated. That is a risky proposition, however, as there are some common issues with many NDA templates that, if overlooked, can have a significant impact. Here are a few.

Unbalanced Confidentiality Obligations and Protections

Many NDA templates are drafted in a way that protects only the party proposing the template (or that significantly favors that party). While there are circumstances where only one party is disclosing confidential information, in most cases the exchange of information goes both ways. It is crucial to review any proposed NDA to ensure it protects your confidential information and that it takes an even-handed, reasonable approach.

Inadequate Scope

The scope of what information needs to be protected and how that information may be used by the counterparty often varies from deal to deal, and the scope of any proposed NDA may not be tailored to the deal. For example, the definition of confidential information may not cover all of the information you expect to disclose. Or you may be restricted from disclosing the counterparty's information to your affiliates or to third parties in circumstances where you need to do so in order to accomplish the purpose of the NDA (for example, sharing designs with your manufacturer to get a sense of cost). Each NDA should adequately define confidential information and should describe the permitted uses and disclosures of the information that the parties intend for that deal without being overbroad.

Failure to Address Exclusions

NDA templates also often fail to include all appropriate exclusions from confidentiality obligations. These exclusions protect the parties' ability to comply with court orders and other legal requirements, and to freely use or disclose information that is already in the public domain, independently developed, or received from other sources on a non-confidential basis. Failure to include one or more of these exclusions will place unnecessary restrictions on you and expose you to potential liability.

Failure to Protect Against Reverse Engineering

In the United States, reverse engineering is generally legal, and in order to prevent someone from reverse engineering your product you need to restrict them from doing so by contract. If you are in

preliminary discussions with a counterparty, you may be providing prototypes of your hardware products, beta versions of your software products or other similar tangible items incorporating your technology as part of those discussions. An NDA may be your only contract at that stage. In that event, you will want to make sure the NDA includes a restriction on reverse engineering. Most NDAs do not.

Inappropriate Confidentiality Period

Many NDA templates fail to clearly define the time period for which the receiving party needs to keep the information confidential, or they include time periods that do not align with the parties' needs. While some information may require indefinite or long-term protection, other information may only be valuable in its secrecy for a short period of time. To avoid unnecessary restrictions, each NDA should be reviewed and tailored to set a timeframe for confidentiality protection that aligns with the parties' intent and needs.

Requirement to Return/Destroy Information on Termination

Many NDAs require a receiving party to automatically return or destroy confidential information of the disclosing party on expiration or termination of the NDA without request or condition. While this may seem reasonable on its face, few companies have the processes in place to comply with this requirement. In addition, some information may be impractical to delete or return, or may need to be retained for legal or regulatory purposes. Including appropriate limits in the NDA can avoid liability for the inadvertent breach of or the inability to comply with this obligation.

Extraneous Provisions

While less common, NDA templates can also contain hidden "land mines" such as provisions purporting to assign ownership of intellectual property, non-solicitation and no-hire provisions, and provisions purporting to grant some level of exclusivity. If left in the NDA, these types of provisions can materially impact your technology or business and result in significant liability.

Few if any NDA templates get it right in all aspects. And even well-drafted NDA templates may not be appropriate to the specific needs and circumstances of the parties involved. A review of your NDAs by a qualified attorney can be done efficiently and expeditiously and can avoid a host of problems down the road.