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Checklist for Drafting or Negotiating Confidentiality and Non-Disclosure Agreements

Definitions. As used in this checklist:

- "**NDA**" refers generically to agreements focused on the handling of confidential information in various contexts, whether a standalone agreement or as provisions within a broader agreement (such as a business contract, an employment agreement, or a letter of intent).
- "**CI**" refers generically to the information protected under an NDA, which is often called "Confidential Information," "Confidential Material" or "Evaluation Material."
- "**discloser**" refers to the party whose CI is protected under the NDA and "**recipient**" refers to the party who is obligated to protect the other party's CI. In mutual NDAs, a party can be both a discloser and a recipient. In the employment context, typically the employer is the discloser and the employee is the recipient. In the M&A context, typically the target company or seller is the discloser and the potential buyer is the recipient

General Considerations. When drafting or negotiating an NDA, please note the following general considerations:

- Keep the underlying business objectives in mind. Often, it is preferable to quickly execute an NDA with customary non-use and non-disclosure protections on "market" terms and conditions rather than waste time trying to force agreement on non-standard terms.
- Parties typically pay little attention to the precise terms of NDAs, which are often buried in a filing cabinet as soon as they are executed. It also is very unusual for NDAs to be litigated or enforced. Given these facts, consider the relative costs and benefits of fighting for (or against) non-standard terms.
- Although NDAs are a necessary component of a discloser's overall strategy to protect its CI, an NDA should be used in conjunction with practical protections such as the following:
    - Disclose CI only to reputable parties that "need to know" such information.
    - Limit disclosures to only "need to know" information. Redact or withhold particularly sensitive information until the last possible time.
    - Consider making particularly sensitive information available only for in-person, supervised inspection.
    - Consider staging disclosures. For example, in an M&A context, provide progressively more information as the field of potential buyers narrows and a transaction becomes more and more likely.
    - Request (and confirm) the return or destruction of CI from recipients when they no longer have a permitted need for it.
    - Use digital rights management (DRM) and other technical means, such as restrictions on printing or downloading CI from a virtual data room, to limit risk of unauthorized disclosure.
    - Use watermarks, serial numbers, or other methods to assist in identifying the source of a breach.
- Draft NDAs in a manner that makes them easy to use (e.g. including numbered and clearly labelled subsections).
- Consider implementing a system to simplify tracking and administration of NDAs.

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Abbreviated Checklist (Table of Contents)

☑	Topic	Page No.
☐ A.	**Basics**	3
☐ A.1.	Parties.	3
☐ A.2.	Unilateral vs. Mutual NDA.	3
☐ A.3.	Symmetry of Obligations.	4
☐ A.4.	Purpose of CI Exchange.	5
☐ B.	**Protection of CI**	5
☐ B.1.	Basic CI Definition.	5
☐ B.2.	Exclusions from CI Definition.	6
☐ B.3.	Special Types of CI.	7
☐ B.4.	Basic CI Protections.	7
☐ B.5.	Transaction Information.	8
☐ B.6.	Reverse Engineering, Etc.	9
☐ B.7.	Anti-Circumvention.	9
☐ B.8.	Notification of Breach (“Tattle” Clause).	9
☐ C.	**Representatives**	10
☐ C.1.	Permitted Disclosure to Representatives.	10
☐ C.2.	Scope of Representatives.	10
☐ C.3.	Responsibility for Breach by Representatives.	10
☐ C.4.	Identification of Representatives.	11
☐ C.5.	Obligations Applicable to Representatives.	11
☐ C.6.	Representative Joinders.	11
☐ D.	**Other Customary Provisions**	12
☐ D.1.	Legally Required Disclosures.	12
☐ D.2.	Return or Destroy.	13
☐ D.3.	Disclaimers About CI.	14
☐ D.4.	Scope of Access, Obligation to Disclose.	15
☐ D.5.	Protection of Legal Privilege.	15
☐ D.6.	Term.	16
☐ E.	**Restrictive Covenants**	16
☐ E.1.	Employee Non-Solicit / No-Hire.	16
☐ E.2.	Customer/Vendor Non-Solicitation.	17
☐ E.3.	Non-Compete.	17
☐ E.4.	Non-Disparagement.	18
☐ E.5.	Non-Interference.	18
☐ E.6.	Non-Circumvention.	18

☑	Topic	Page No.
☐ F.	**Process Considerations**	18
☐ F.1.	Notification of Ceasing Interest.	18
☐ F.2.	No Contacts; Process Coordination.	18
☐ F.3.	No Obligation to Complete a Transaction.	19
☐ F.4.	Anti-Clubbing.	20
☐ F.5.	Use of Financing Sources.	20
☐ F.6.	Exclusivity of Financing Sources.	21
☐ F.7.	Deal Trees and Confidentiality Walls.	21
☐ F.8.	Letter of Intent or Exclusivity Provisions.	21
☐ G.	**Liabilities and Remedies**	22
☐ G.1.	Cumulative Remedies.	22
☐ G.2.	Specific Performance.	22
☐ G.3.	Indemnification.	22
☐ G.4.	Consequential Damages.	23
☐ G.5.	Costs of Enforcement.	23
☐ H.	**Boilerplate**	23
☐ H.1.	Assignment.	23
☐ H.2.	Third Party Beneficiaries.	24
☐ H.3.	Governing Law.	24
☐ H.4.	Forum Selection.	25
☐ H.5.	Severability or Reformation Provisions.	26
☐ H.6.	Entire Agreement.	26
☐ I.	**Other Provisions**	27
☐ I.1.	Legal Conflicts Waiver.	27
☐ I.2.	Representations and Warranties.	28
☐ I.3.	Most Favored Nations.	28
☐ I.4.	Ownership of Intellectual Property.	28
☐ I.5.	Other Activities.	29
☐ J.	**Provisions for Public Companies**	29
☐ J.1.	Standstill.	29
☐ J.2.	Insider Trading / Reg FD Considerations.	31
☐ K.	**Provisions for Other Specific Contexts**	31
☐ K.1.	Private Equity Context.	31
☐ K.2.	Employment Context.	32

Detailed Checklist

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
A.	**Basics**		
A.1.	***Parties.***	☐ Ensure the defined terms for discloser and recipient are appropriately drafted (disclosers generally want to ensure the defined terms are broad enough so that the NDA covers information provided by the discloser's affiliates or to the recipient's affiliates). ☐ If there are multiple recipient parties (e.g. co-bidders), consider specifying that obligations are joint and several. ☐ Ensure that the party signing the NDA on behalf of the recipient is the party actually receiving CI and would be an appropriate party in an action to enforce the NDA or recover damages for its breach.	☐ Ensure the defined terms for discloser and recipient are appropriately drafted (recipients generally want to limit the defined terms for the parties to ensure the scope of the obligations is not unintentionally overbroad). ☐ If there are multiple recipient parties (e.g. co-bidders), consider specifying that obligations are several (and not joint). ☐ If an investment bank or other agent is signing the NDA on behalf of the discloser, consider adding representations regarding its authority to bind the discloser. ☐ Occasionally in the M&A context, a potential buyer will be asked to sign an NDA that does not identify the target company prior to execution. Because this makes it difficult to appreciate the reach of the obligations, consider pushing back or limiting the scope of the obligations. A workaround is to provide a 24 hour window for the buyer to terminate the agreement after learning identity and prior to receipt of CI (with the agreement providing that the only obligation surviving such termination will be to keep the identity and fact of the potential deal secret).
A.2.	***Unilateral vs. Mutual NDA***. ☐ Consider whether a unilateral or mutual NDA is most appropriate for the circumstances.	☐ Disclosers typically prefer a unilateral NDA if the situation or negotiating leverage permit it, since it limits the discloser's obligations and typically allows the discloser to take a	☐ As a negotiating tactic, a recipient may wish to push for a mutual NDA even when it does not intend to disclose CI to the other party. A discloser may be less aggressive when it may

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	A "unilateral" NDA is one which generally protects only one party's CI. A "mutual" NDA is which protects each party's CI. In a mutual NDA, each party is simultaneously both a discloser and a recipient. *Unilateral NDAs are typically used when only one party will be disclosing CI, particularly where that party has greater bargaining power. They are nearly universal in the employment context and common in the context of an M&A "auction" or a commercial adhesion contract.* *Mutual NDAs are typically used when both parties may be disclosing CI, even if one party may be disclosing more CI than the other. They are fairly common in connection with negotiated transactions, joint ventures, ongoing commercial relationships, and independent contractor agreements.* *Even when an NDA is mutual, the provisions need not be symmetrical. See A.3 below.*	more aggressive position on terms.	have to "eat its own cooking." ☐ Occasionally, a unilateral NDA is drafted for execution only by the recipient (and not by the discloser). Because there are usually at least some provisions benefiting recipient even in a unilateral NDA, recipients will generally insist the discloser also be a party to the agreement.
A.3.	***Symmetry of Obligations***. *Even when an NDA is mutual, the particular circumstances of each party may justify asymmetrical obligations. Likewise, even when an NDA is unilateral, certain provisions would often be drafted for the benefit of both parties. See also A.2 above.* ☐ Confirm that each provision is drafted for the benefit of the appropriate party or parties. ☐ Be alert to imbalances between the parties, such as who will share the most information, who would be most damaged by a breach, and who has the most leverage.	☐ Be mindful that, where imbalances between the parties exist, it may be inappropriate to accept changes that are requested on the basis of mutuality.	☐ Even in a unilateral NDA, a recipient typically wants to have the benefit of certain provisions, such as (1) provisions providing that the parties have no obligation to consummate a transaction or reimburse expenses of the other party, (2) provisions protecting "transaction information" (e.g. prohibiting the other party from disclosing the identity of the recipient or any deal terms), (3) remedies and enforcement provisions, including venue, and (4) "boilerplate" terms. ☐ As a negotiating tactic, a recipient may wish to push to make certain terms reciprocal even when reciprocity is not important, since a discloser may be less aggressive when it may have to "eat its own cooking."

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A.4.	***Purpose of CI Exchange***. *An NDA typically identifies the purpose for which the CI is being exchanged. Often, the recipient is limited to using the CI for only this purpose. Either way, a clear purpose can be important for understanding and enforcing the scope of the NDA obligations.* ☐ Ensure the NDA clearly and appropriately identifies the context in which it is being executed and the purpose or purposes for which the CI is being exchanged. ☐ Be mindful to a change of purpose after the NDA is executed (and consider drafting the NDA to accommodate a future change of purpose). Do not assume a pre-existing NDA from one context will cover another context.	☐ A discloser typically prefers a narrow purpose. ☐ In the M&A context, a seller often states the purposes are limited to "evaluating a possible negotiated acquisition." (In the public company M&A context, the reference to "negotiated" is intended to limit use of the information for a hostile bid.)	☐ A recipient typically prefers a broader purpose. ☐ In the M&A context, be sure the purpose includes all stages of the deal (for example, not just evaluation but also negotiation, consummation and implementation). ☐ In the M&A context, limiting the purpose to a "negotiated" acquisition can prevent a would-be acquirer from pursuing a hostile transaction or engaging in a proxy fight (making the purpose provision a "backdoor standstill"). Recipients should consider whether this limitation is acceptable. See *Martin Marietta Materials, Inc. v. Vulcan Materials Co*.
B.	**Protection of CI**		
B.1.	***Basic CI Definition***. ☐ General: Confirm the definition appropriately covers the information that should be protected under the NDA. ☐ Context of disclosure: Consider whether CI should only include information disclosed in connection with the purpose of the NDA. This limitation, which is generally recipient-friendly, may be appropriate where the parties exchange information in other contexts that should not be subject to the NDA. ☐ Source: Consider whether only information obtained from or disclosed by discloser and its representatives should be included. ☐ Manner of disclosure: NDAs typically make clear that CI includes information whether disclosed orally or disclosed or stored in written,	☐ Disclosers generally prefer a broad, general definition of CI in order to minimize the risk that sensitive information falls outside the scope of the NDA. ☐ Consider whether to include a non-exclusive list of specific items (like a Confidential Information Memorandum) or categories of information that are *per se* confidential.	☐ Recipients generally prefer a narrower definition and "brightline" standards in order to limit their obligations and facilitate compliance with obligations. ☐ When derivative materials are included in the definition of CI, be sure that (1) they are CI only "to the extent" they contain CI and (2) if the NDA obligates recipient to return CI, the recipient has the option to destroy derivative materials.

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
	electronic or other form of media. ☐ Timing of disclosure: Consider whether CI should only include information disclosed during a certain time period, or if it should include all information whether disclosed before or after execution of the DNA. ☐ Identification: Consider whether only specific items identified in the NDA as confidential and/or specifically marked as confidential when disclosed should be considered CI. This provision, which is recipient-friendly, is uncommon in most contexts. ☐ Derivative materials: It is customary for CI to include notes and other materials the recipient creates to the extent they include CI.		
B.2.	***Exclusions from CI Definition***. *It is customary to provide that CI does not include: (1) information generally available to the public, (2) information that was in the recipient's or a representative's possession prior to disclosure by the discloser, (3) information that the recipient or a representative subsequently receives from a third party, and (4) information that was or is independently developed by the recipient or a representative without reference to CI.* ☐ Ensure customary carve-outs from the CI definition are included.	☐ Disclosers often want to qualify the standard carve-outs to: (1) impose a burden of proof or evidentiary standard requiring recipient to clearly establish the carve-out applies, (2) provide for the exclusions to only apply to information recipient received on a non-confidential basis, (3) require the recipient to investigate whether the information it receives from others is providing the information in breach of other confidentiality obligations, (4) make the exclusions unavailable if the recipient is the reason the CI has become available from other sources. ☐ Recipients sometimes ask that information subject to legally required disclosures be carved out entirely from the CI definition. In general, disclosers should resist this change and instead address legally required disclosures through separate provisions (see D.1 below).	☐ Although recipients often accept qualifications on the standard carve-outs, recipients should resist qualifications if they would make it impractical to rely on the carve-out or are inappropriate in the specific context.

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
B.3.	***Special Types of CI.*** *In certain cases, the nature of the information being disclosed under the NDA requires either special protection under the NDA or additional considerations outside the NDA. This may include:* ▪ *Competitively sensitive information (particularly where antitrust risk is present, such as the parties being competitors).* ▪ *Information that is subject to confidentiality obligations owed to a third party.* ▪ *Personally identifiable information (particularly information that may be subject to EU protections for "personal data" or "sensitive personal data" or similar applicable law).* ▪ *Health information that may be subject to the Health Insurance Portability and Accountability Act (HIPAA).* ▪ *Material non-public information relating to publicly traded securities. See J.2 below.* ▪ *Information the disclosure of which could result in the loss of a legal privilege (e.g. attorney-client communications – see D.5 below) or legal protections (e.g. information that is protected under intellectual property or trade secret laws only if its owner takes appropriate precautions).* ▪ *Computer source code or product formulas.*	☐ Consider whether any of the CI merits special protection under the NDA. If so, consult subject matter experts for appropriate provisions.	☐ Recipients will occasionally want assurances from the discloser that the CI will *not* include these special types of information (in order to avoid limitations or liabilities that might be associated with receiving or handling such information).
B.4.	***Basic CI Protections.*** *An NDA will typically require recipient to (1) keep the CI confidential, (2) not disclose the CI, and (3) not use the CI except for the permitted purpose (see A.4 above). Each of these protections has independent significance:* ▪ *The confidentiality obligation imposes some affirmative obligation to treat the CI in a*	☐ Ensure NDA includes the customary protections. ☐ Consider whether any special protections are necessary.	☐ These provisions are generally acceptable, but in certain contexts, a recipient may wish to agree to only certain of the standard protections (e.g. confidentiality but not non-disclosure). ☐ Recipients typically resist provisions which forbid any generic prohibition on "detrimental" use of the CI. (For example, in

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
	confidential manner, but alone would not necessarily restrict disclosure of the CI to third parties on a confidential basis or the recipient's own use of the CI. ▪ *The non-disclosure obligation prevents disclosures to third parties, even if done on a confidential basis.* ▪ *The non-use obligation prevents the recipient from using the CI for its own purposes.* *Occasionally, an NDA will go further than limiting use to the permitted purpose and expressly forbid any use that is "detrimental" to the recipient.* *Occasionally, an NDA will impose specific obligations such as handling CI "with at least the same degree as recipient handles its own CI, but not less than a reasonable degree of care." Note that when an NDA contains this provision, a dispute over the handling of CI may require an intrusive inquiry into the recipient's handling of its other, unrelated CI.*		the M&A context, the purchaser will want to be able to use the CI to adjust its valuation of the business even though this might be detrimental to discloser.) ☐ Recipients often resist specifying a specific duty of care. ☐ Ensure disclosure is permitted to representatives (see C below) and as required by law (see D.1 below).
B.5.	***Transaction Information.*** *Particularly in the M&A context, NDAs typically provide that the existence of the NDA, the fact that the parties are considering the transaction, and the status and terms of the transaction are all protected from disclosure. Because this information is not necessarily proprietary to or provided by one party to the other, it may not otherwise be covered in the definition of CI. Although this provision is sometimes for the benefit of one party only (particularly in an M&A auction), it is often mutual even in unilateral NDAs.* ☐ Consider whether this provision is appropriate. (While very common in the M&A context, it may be inappropriate in other circumstances.)	☐ In an M&A auction context, disclosers typically insist on flexibility to disclose status and terms of each bid (at least on a no-names basis)—i.e. flexibility to "shop" a bid.	☐ Recipients often request that this provision be mutual. In particular, buyers in the M&A context often object to the possibility that their proposal could be used as a "stalking horse" for other potential buyers. ☐ If unable to make the entire provision mutual, recipients typically ask that they at least not be specifically identified.

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
	☐ If included, be sure it flows through other provisions of the NDA as appropriate – for example, the provisions permitting disclosure representatives (see C below) and as required by law (see D.1 below). ☐ Public companies should be mindful of their disclosure obligations, including the possibility that the transaction terms may eventually need to be disclosed in a proxy or information statement in connection with an M&A transaction.		
B.6.	***Reverse Engineering, Etc.*** *Although uncommon outside certain contexts, some NDAs (particularly those that relate to the sharing of certain types of intellectual property) will expressly prohibit reverse engineering intellectual property or decompiling source code.*	☐ Consider whether this provision is necessary in specific circumstances.	
B.7.	***Anti-Circumvention (of IP Protections).*** *Although uncommon outside certain contexts, some NDAs will contain prohibitions against circumventing any specific security safeguards, such as restrictions on downloading or printing materials from a virtual data room or digital rights management (DRM) features on software products.*	☐ Consider whether this provision is necessary in specific circumstances.	
B.8.	***Notification of Breach ("Tattle" Clause).*** *Some NDAs obligate the recipient to notify the discloser of any disclosure of CI or other breach of the NDA. Ostensibly, this allows the discloser to take appropriate action to remedy the breach.* *A potential compromise could be an obligation to use commercially reasonable efforts to mitigate the consequences to discloser of any identified breach (without necessarily having to provide notice to the discloser).*	☐ Consider whether this provision is necessary in specific circumstances.	☐ Recipients often strongly resist this provision, since it may be difficult to administer, requires a recipient to incriminate itself, and could potentially escalate a trivial breach into a bigger issue.

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
C.	**Representatives**		
C.1.	***Permitted Disclosure to Representatives.*** *Despite the basic CI protections, NDAs typically permit the discloser to share information with its representatives. This concept is virtually universal in the M&A context but may not be applicable in certain contexts, particularly employment.* ☐ Ensure NDA permits appropriate disclosure of CI to recipient's representatives.	☐ Ensure disclosure is permitted to representatives only to the extent they "need to know" the information for permitted purposes (see A.4 above). ☐ Disclosers often insist that the recipient provide information only to representatives who either agree to all the NDA terms or at least have an obligation to keep the CI confidential.	☐ Some NDAs permit disclosure only to representatives that expressly agree to all of the terms of the NDA. Because this can be impractical, a recipient would often revise such a provision to permit sharing with representatives who otherwise have a general obligation of confidentiality to the recipient.
C.2.	***Scope of Representatives.*** *Representatives are typically defined to include the recipient's affiliates and its and their respective directors, managers, employees, general partners, agents and consultants (including attorneys, financial advisors and accountants). It sometimes includes co-bidders, potential debt and equity financing sources, the recipient's existing or potential investors (e.g. stockholders, limited partners, etc.), and other representatives.*	☐ Ensure that the definition of representatives is tailored to permit only those types of representatives that the discloser is willing to receive CI. ☐ In the M&A context, disclosers will often want to exclude co-bidders (see F.4 below) and may want to limit financing sources (see F.5 below). ☐ In certain competitively sensitive situations (e.g. in an auction setting involving a company in a small, specialized industry), disclosers may want to limit the ability of bidders to work with market researchers to minimize the risk that news of the auction process could spread before the discloser is prepared to make an announcement.	☐ Confirm list of permitted representatives includes all the persons to whom recipient may need to disclose the information. Recipient generally pushes for the definition of representatives to be as broad as possible to permit the recipient to disclose information. ☐ Consider adding generic language ("and other representatives") to provide additional flexibility. ☐ Because the recipient's representatives typically have obligations under the NDA and the recipient is responsible for the actions of its representatives, a recipient (especially a private equity firm) will typically qualify the definition of representatives to those of such persons who have actually received CI from the recipient or who are acting at recipient's direction in connection with the transactions contemplated by the NDA.
C.3.	***Responsibility for Breach by Representatives.*** *NDAs typically provide that the recipient will cause or direct its representatives to comply with the obligations applicable to representatives, and that*	☐ Disclosers typically want to provide that the recipient shall "cause" its representatives to comply and will be responsible for any breach of the NDA by its representatives,	☐ Recipients sometimes want to be obligated only to "direct" (rather than "cause") their representatives to comply. ☐ Recipients sometimes push back on liability

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
	the recipient will be responsible for any breach by such representatives.	even if those representatives execute joinders or separate NDAs. This could make enforcement or collection of damages easier and encourages recipients to be thoughtful in their selection and use of representatives.	for actions by their representatives. ☐ As a compromise, consider proposing that recipient is not liable for representatives who execute a joinder or separate NDA making them directly liable to the discloser.
C.4.	***Identification of Representatives.*** *Although uncommon, NDAs sometimes require recipients to maintain a list of each person who receives CI. The NDA might require that this list be provided to discloser automatically, upon request, or in the event of a breach.*	☐ Consider whether this provision is necessary in specific circumstances. Requiring disclosure of recipients of CI in the event of a breach could help the discloser minimize the fallout of such breach.	☐ Recipients typically push back strongly on this provision, as it can be impractical. In certain contexts, it can also betray sensitive information or processes of the recipient.
C.5.	***Obligations Applicable to Representatives.***	☐ Ensure that the basic CI protections apply to representatives. ☐ Consider whether other provisions, such as restrictive covenants, should apply to the representatives.	☐ Ensure that carve-outs (e.g. permission to make legally required disclosure and to retain compliance copies) also benefit representatives. ☐ Recipients typically seek to limit the obligations of representatives to the basic CI protections. Most recipients cannot compel outside representatives (such as accountants, consultants, attorneys, and financing sources) to comply with restrictive covenants and standstill provisions. ☐ As a compromise, consider proposing that inside representatives (such as employees and subsidiaries) be subject to greater obligations than outside representatives. ☐ Provide that representatives are subject to the NDA only to the extent that they receive CI or are acting at the direction of the recipient. This is especially important for private equity firms (see K.1 below).
C.6.	***Representative Joinders.*** *While not typical in most contexts, NDAs sometimes require or permit a recipient to obtain "joinders" from*	☐ Consider requiring that representatives that receive CI must sign a joinder to the NDA or otherwise be subject to substantially similar	☐ If the discloser proposes requiring joinders to the NDA from each representative, consider pushing to exempt representatives

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
	its representative, pursuant to which the representatives agree to be directly bound by the NDA. Alternatively, separate NDAs or "back-to-back" agreements may be used. *Even where joinders are generally required, NDAs may provide they are unnecessary where the representative is subject to substantially similar confidentiality obligations (e.g. employees may have a blanket employment-related NDA and attorneys are subject to ethical rules).*	confidentiality obligations.	that are already similar to substantially similar confidentiality obligations. ☐ Even if the discloser does not require joinders, recipients will sometimes require their representatives to sign joinders or back-to-back NDAs in order to minimize the risk of a breach and to provide recourse against the representative if necessary. ☐ Consider providing that the recipient is not responsible for breaches by representatives who execute joinders. See C.3 above.
D.	**Other Customary Provisions**		
D.1.	***Legally Required Disclosures.*** *Nearly all NDAs permit the recipient to disclose CI to the extent legally required, and typically impose certain procedural requirements on such disclosure. A typical provision will generally require the recipient to notify the discloser before making a legally required disclosure (so the discloser may seek a protective order) and to seek confidential treatment of information disclosed.* ☐ Ensure NDA appropriately addresses disclosures required by law. ☐ Ensure representatives (and not just the recipient) are covered by the provision. ☐ Ensure transaction information (which is typically protected under separate provisions than CI) is also covered by the provision. ☐ Be mindful that this provision applies both to requests from a government agency but also from a third party (e.g. a discovery request). Although NDAs do not typically distinguish between these types of legal obligations, consider whether your circumstances justify	☐ Disclosers often seek to limit the circumstances in which legally required disclosure is permitted. In the most aggressive (and usually inappropriate) form, legally required disclosure requires a "written opinion of outside counsel," may be permitted only "to a tribunal," and may be done only where the recipient would otherwise "stand liable for contempt or suffer other censure or penalty." ☐ Ensure recipient is obligated to request confidential treatment of information disclosed and to cooperate with discloser's efforts to secure confidential treatment. ☐ If permitting disclosure in the course of regulatory exams or inspections without complying with customary procedures, consider limiting to "ordinary course" exams and inspections that do not focus specifically on the discloser, the CI, or the transactions contemplated by the NDA. Disclosers would also typically want the recipient to use	☐ Recipients should ensure the legally required disclosure exception is appropriately broad – a recipient friendly provision would permit any disclosure pursuant to "any law, regulation or legal, regulatory or judicial process, or audit or inquiries by a regulator, bank examiner or self-regulatory organization or pursuant to mandatory professional ethics rules or the rules or regulations of any stock or securities trading exchange." ☐ Recipients sometimes request flexibility to make disclosures as required "or requested" pursuant to applicable law. ☐ Recipients should ensure the procedures required for legally required disclosure are practical. In particular, action should be permitted based upon "advice of counsel" (rather than an "opinion" or "written" advice), in-house attorneys (rather than only outside counsel) should also be permitted to provide such advice, and advance notice

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
	such a distinction.	commercially reasonable efforts to secure confidential treatment of CI even for the regulatory exam or inspection carve-out.	requirements should apply only to the extent reasonably practicable and legally permissible. ☐ Recipients (especially private equity firms, large institutions, and regulated entities) will sometimes request permission to disclose to regulators in the course of an exam or inspection without having to comply with the procedures otherwise applicable to legally required disclosures. ☐ Ensure the NDA actually permits recipient and its representatives to make legally required disclosures without liability for breach of the NDA (and does not simply impose limitations on making such disclosures). ☐ Infrequently, an NDA might contain a representation, warranty or covenant that the recipient will not be subject to a requirement to disclose CI. Recipients usually resist these provisions. ☐ Infrequently, an NDA might require the recipient to provide copies of any information it disclosed. Recipients often resist such a provision (especially where derivative works are at issue).
D.2.	***Return or Destroy.*** *In most contexts, it is very common for the NDA to require the recipient and its representatives to return or destroy CI upon discloser's request at any time and, in some cases, upon the occurrence of certain events.* ☐ Include "return or destroy" obligation if appropriate.	☐ Disclosers should typically include this provision. ☐ Consider whether to provide that the obligation to return or destroy is automatically triggered on a certain date or upon the occurrence of certain events (e.g. termination of the relationship, completion of the transaction, etc.). ☐ Disclosers typically want to clarify that the	☐ Ensure there are appropriate carve-outs to enable recipient and its representatives to comply with applicable law and necessary retention procedures. A recipient friendly carve-out would read: "Notwithstanding anything contained herein to the contrary, recipient and its representatives shall not be obligated to return or destroy CI to the extent otherwise required by law, regulation,

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
	☐ Ensure representatives (and not just the recipient) are appropriately covered by the provision.	return or destruction of CI does not relieve the recipient of its obligations under the NDA, which continue in accordance with their terms. ☐ Disclosers will usually accept reasonable exceptions to the return or destroy obligation, but should consider providing that the information so retained must be handled in a certain way (e.g. securely stored with the applicable party's legal or compliance department and used solely for legal or compliance purposes) or that it be subject to the confidentiality obligations under the NDA for so long as it is so retained and continues to be CI (even beyond the expiration or termination of the NDA). ☐ Disclosers typically want to receive a written confirmation or certification that the return or destroy obligations have been complied with.	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." ☐ In many contexts (particularly M&A), the recipient will want the right to elect whether it returns or destroys CI. If CI includes derivative information (e.g. the recipient's notes), the option to destroy rather than return will be particularly important. ☐ Recipients typically push back on any "automatic" obligation. ☐ Recipients typically push back on any duty to "expunge" or "purge" electronic files, which is often impractical and is seldom actually done even where required. ☐ Recipients will sometimes request that the obligation to return or destroy CI be limited to CI that is in their custody or control.
D.3.	***Disclaimers About CI.*** *NDAs typically contain a broad disclaimer about the accuracy and completeness of the CI and disclaiming any liability relating to or resulting from the recipient's or its representatives' use of the CI or any errors or omissions in the CI.*	☐ Disclosers should generally include broad disclaimers and resist efforts to include representations or warranties about CI. ☐ Ensure disclaimers cover representatives as well as recipient. ☐ Ensure the disclaimer is drafted broadly so that subsequent negotiations or course of dealing will not give rise to any such obligation (not just that "there is no liability under this NDA").	☐ Although recipients typically accept this disclaimer, confirm it is consistent with the parties' expectations. ☐ Include a qualifier similar to the following: "except as provided in a definitive written agreement executed by each of the parties (excluding any letter of intent, bid letter or similar preliminary agreement)." ☐ Recipients sometimes ask disclosers to represent that the disclosure of CI to the recipient is not in breach of applicable law or the rights of a third party. ☐ Recipients sometimes qualify this provision so it does not apply to a party's intentional

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
			fraud. (Delaware courts have found this disclaimer provision effective to insulate a discloser from liability even when CI was intentionally false or misleading.)
D.4.	***Scope of Access; Obligation to Disclose.*** *Most NDAs (especially in the M&A context) expressly provide that the discloser is not under any obligation to share any CI and may withhold or terminate the sharing of CI at any time.* *In certain limited situations, it may be appropriate for the NDA (or an accompanying agreement) to specify that the discloser is required to provide certain information.* ☐ Ensure the NDA appropriately addresses the extent to which the discloser is or is not required to provide CI to the recipient.		
D.5.	***Protection of Legal Privilege.*** *Some NDAs contain a provision to the following effect, intended to help preserve legal privileges applicable to the CI: "To the extent that any CI includes materials subject to the attorney-client privilege, the discloser is not waiving, and shall not be deemed to have waived or diminished, its attorney work-product protections, attorney-client privileges or similar protections and privileges as a result of disclosing any CI (including CI related to pending or threatened litigation) to the recipient or any of its representatives."* ☐ Consider including this provision, which is generally acceptable to both parties. ☐ Be mindful that, while including this provision may be helpful, in many (or most) cases it may not be enough to preserve privilege. If preserving privilege is a concern, consult with		

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
	litigation counsel before disclosure.		
D.6.	***Term.*** *Most NDAs are subject to a specific term, with disclosers typically preferring a long term and recipient preferring a shorter term. In the M&A context, 1-3 year terms are "market."* *Typically, any restrictive covenants and standstill provisions are subject to a shorter term than the overall term of the NDA.* *Sometimes, certain types of CI (e.g. trade secrets) are subject to a longer term than generic CI. In addition, NDAs often provide for indefinite survival of certain provisions. For example, if a recipient is permitted to retain information after a request to return or destroy, it may be obligated to maintain such information in confidence (until it is returned, destroyed or ceases to be CI).* *Occasionally, the term of an NDA will run from the last date that CI was disclosed under the NDA. The parties using this mechanic should be mindful of the ambiguity that can result from this provision, and may wish to include a presumptive sunset date or a provision permitting recipient to provide notice that it no longer wishes to receive CI (which will stop tolling).* ☐ Ensure the NDA includes an appropriate term, taking into account the time period over which CI will be disclosed, the sensitivity of the CI being disclosed and the rate at which it becomes stale.	☐ As a negotiating tactic, consider being silent as to the NDA term. (A recipient is likely to notice an express provision providing for a long or indefinite term, but may neglect to notice the omission of a term limitation.) ☐ In the M&A context, disclosers typically resist provisions that would automatically terminate the NDA upon the signing or closing of a transaction.	☐ Consider proposing that the term automatically end upon the occurrence of certain events (e.g., in the M&A context, the discloser signing or closing a transaction (either with the recipient or with any party)).
E.	**Restrictive Covenants**		
E.1.	***Employee Non-Solicit / No-Hire.*** *NDAs sometimes contain a provision prohibiting the recipient from soliciting the discloser's employees for employment by the recipient (a "non-solicit") or*	☐ Consider whether this provision is necessary in specific circumstances. ☐ Although disclosers will generally accept reasonable exceptions to the non-	☐ Recipients often resist this provision entirely or will push for a non-solicit only (rather than a no-hire). ☐ If accepting this provision, recipients

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
	hiring them (a "no-hire"). Any such provision would often have a shorter term than the overall NDA (e.g., one year). *The provision often contains some form of the following carve-outs: "the foregoing provisions shall not prohibit the solicitation or employment of any person (i) resulting from general advertisements for employment (including any recruitment efforts conducted by any recruitment agency, provided that such efforts are not directed specifically at one or more of discloser's employees), (ii) if such person approaches the recipient on an unsolicited basis, or (iii) following the cessation of such person's employment with discloser without any solicitation or encouragement by recipient." Occasionally, a post-termination "cooling off period" (e.g., 3 to 6 months) applies before solicitation (or employment) is permitted under a carve-out.*	solicit/non-hire obligations, consider requiring a cooling off period to minimize the chance of abuse. Also consider adding provisions addressing evidentiary and burden of proof issues (e.g., in order to rely on an exception, recipient must be able to demonstrate by its written records that it applies).	typically seek to limit the scope (e.g. restrictions apply only to specified employees or categories of "key" employees, and is further limited to those "with whom recipient first had contact or become aware of in connection with the transaction."). ☐ Recipients should ensure customary carve-outs are included and that the term is limited as much as possible. ☐ Recipients should ensure they have the information (e.g. discloser's employee list) and internal controls (e.g. no hire list) necessary for compliance. ☐ Recipients, particularly private equity firms, will typically want to strike references to affiliates and representatives (and "directly or indirectly") to avoid limiting independent actions of those parties. ☐ Disclosers should ensure this provision is subject to an appropriate term (often 6 to 18 months).
E.2.	***Customer/Vendor Non-Solicitation.*** *NDAs sometimes contain a provision prohibiting the recipient from soliciting the discloser's customers, vendors, or other business counterparties. Although fairly common in the employment context and in certain unique commercial relationships, such a non-solicitation provision is exceedingly rare in most other NDAs.*	☐ Consider whether this provision is necessary in specific circumstances.	☐ Outside the employment context, recipients should typically strongly resist this provision. ☐ Even if a recipient is willing to accept this provision, it should ensure the provision is tightly drafted, includes appropriate exceptions, and does not cover solicitation by outside representatives.
E.3.	***Non-Compete.*** *NDAs sometimes contain a provision prohibiting the recipient from competing with the discloser's business. Although fairly common in the employment context and in certain unique commercial*	☐ Consider whether this provision is necessary in specific circumstances.	☐ Outside the employment context, recipients should typically strongly resist this provision. ☐ Even if a recipient is willing to accept this provision, it should ensure the provision is tightly drafted, includes appropriate

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
	relationships, a non-compete provision is exceedingly rare in most other NDAs.		exceptions, and does not cover outside representatives.
E.4.	***Non-Disparagement.*** *NDAs sometimes contain a provision prohibiting the recipient from disparaging the discloser. Although fairly common in the employment context, a non-disparagement provision is exceedingly rare in most other NDAs.*	☐ Consider whether this provision is necessary in specific circumstances.	☐ Outside the employment context, recipients should typically strongly resist this provision. ☐ Even if a recipient is willing to accept this provision, it should ensure the provision is tightly drafted, includes appropriate exceptions, and does not cover outside representatives.
E.5.	***Non-Interference.*** *While uncommon, NDAs sometimes contain a broad provision generally prohibiting the recipient from interfering with the discloser's business or relationships.*	☐ Consider whether this provision is necessary in specific circumstances.	☐ Outside the employment context, recipients should typically strongly resist this provision. ☐ Even if a recipient is willing to accept this provision, it should ensure the provision is tightly drafted, includes appropriate exceptions, and does not cover outside representatives.
E.6.	***Non-Circumvention (of Relationship/Purpose).*** *While uncommon, NDAs sometimes might contain a broad provision generally prohibiting the recipient from circumventing the discloser (which might involve, for example, "cutting out the middleman" and going directly to the discloser's underlying suppliers or investors).*	☐ Although usually not appropriate, consider whether this provision is necessary in specific circumstances.	☐ Outside the employment context, recipients should typically strongly resist this provision. ☐ Even if a recipient is willing to accept this provision, it should ensure the provision is tightly drafted, includes appropriate exceptions, and does not cover outside representatives.
F.	**Process Considerations**		
F.1.	***Notification of Ceasing Interest.*** *Although relatively uncommon, NDAs in the M&A context sometimes require the recipient to notify discloser if it is no longer interested in pursuing a transaction.*	☐ Consider whether this provision is necessary in specific circumstances. Disclosers sometimes request this provision to maintain visibility into the status of an auction and to more effectively limit access to CI.	☐ Recipients typically resist this provision, since it reduces negotiating flexibility and can be difficult to administer.
F.2.	***No Contacts; Process Coordination.*** *NDAs, particularly in the M&A context, often require the recipient to direct all inquiries and requests for information through specific channels (often the*	☐ Consider whether this provision is necessary in specific circumstances. ☐ If seeking to constrain contacts, before agreeing to permit industry or market	☐ Although recipients often accept a no contacts provision with respect to the discloser's personnel, many recipients would push back on restrictions on contacting third

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
	discloser's investment bank) and forbids contacting any of discloser's other representatives regarding the transaction. *In some cases, disclosers also expand this provision to prohibit contacts with suppliers, customers and other persons with whom the discloser maintains business relationships.* *These provisions can be critically important to maintaining confidentiality about the pending transaction and allowing the discloser to continue to operate its business in the ordinary course without undue disruption. Disclosers also use these provisions to sequence and control the flow of information in order to gain strategic advantage in negotiations (particularly in the M&A auction context).* ☐ If this provision is included, ensure that it adequately reflects the process to be used by the parties and is flexible enough to accommodate changes in circumstances (including the possibility that in certain cases circumventing an investment bank intermediary may be in both parties' interests).	studies on a "no names" basis, disclosers should be mindful that in practice these studies are often conducted in a way that raises the same concerns as direct contacts about the transaction.	parties. ☐ Recipients would typically seek a carve-out for any contacts "in the ordinary course of business" and/or "unrelated to the potential transaction." ☐ Some recipients request flexibility to contact parties conduct industry or market studies on a "no names" basis.
F.3.	***No Obligation to Complete a Transaction.*** *NDAs that relate to a potential M&A transaction or a prospective commercial relationship typically expressly provide that the parties are under no obligation other than the express terms of the NDA, and in particular that there is no obligation to (i) consummate a transaction, (ii) conduct or continue discussions or negotiations, or (iii) enter into or negotiate a definitive agreement. Many NDAs explicitly disclaim any obligation to reimburse expenses of the other party.* ☐ Each party will want to ensure this provision is included (in such party's favor) if appropriate.		

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
	☐ Typically, each party will want to ensure the disclaimer is drafted broadly so that subsequent negotiations or course of dealing will not give rise to any such obligation (not just that "there is no obligation under this NDA"). ☐ Consider qualifying: "except as provided in a definitive written agreement executed by each of the parties (excluding any letter of intent, bid letter or similar preliminary agreement)."		
F.4.	***Anti-Clubbing.*** *In the context of an M&A auction, NDAs sometimes prohibit consortium bidding (or "clubbing") by the bidder.* *Certain bidders, particularly private equity firms, often seek to prepare joint bids so that they can pool capital, distribute risk, increase access to financing sources, and share industry expertise. However, sellers running an auction often want to limit cooperation among bidders so as to maintain a competitive process.*	☐ Disclosers would often include in an M&A auction. ☐ Disclosers should be mindful that in certain circumstances, a consortium may be able to present a better offer than individual bidders and that certain bidders will only participate if they are able to bid jointly with others. Therefore, exceptions to anti-clubbing restrictions should be made in certain circumstances. A "permitted co-bidder" concept is sometimes included for these reasons.	☐ Recipients should consider whether they will need to work with other bidders and negotiate accordingly. ☐ Recipients should ensure the anti-clubbing provision is not drafted in such a way that it would prevent use of existing capital resources (e.g. a subsidiary getting capital from its parent company or a private equity firm getting capital from multiple funds and their LPs).
F.5.	***Use of Financing Sources.*** *In the context of an M&A transaction, NDAs sometimes limit bidders from involving financing sources. This may include a blanket prohibition, a requirement to provide notice or obtain consent with respect to particular financing sources, or a limit on the number or types of financing sources that may be involved.* *These provisions are included because involving financing sources significantly expands the distribution of CI and can increase the risks of disclosure of CI or a leak about the deal (whether a public disclosure or the exchange of information about competing bids).*	☐ Disclosers should consider whether to include in an M&A auction. ☐ Disclosers should be mindful that in certain circumstances bidders will often need to involve a financing source in order to solidify a bid, and that allowing financing sources to be involved may allow bidders to present better offers than they otherwise could. A "permitted financing source" concept is sometimes included for these reasons.	☐ Recipients that need financing for a transaction would typically push back on this provision or request a carve-out to allow use of financing sources subject to appropriate conditions.

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
F.6.	***Exclusivity of Financing Sources.*** *In the context of an M&A auction, NDAs sometimes prohibit the bidder from "locking up" (typically debt) financing sources so that such financing sources are contractually permitted or otherwise available to provide financing to any other potential bidders or other interested purchasers of the target.* *This provision can include a representation that no such relationships exist at the time the NDA is executed and/or a covenant not to enter into any such arrangements.*	☐ Disclosers should consider whether to include in an M&A auction.	☐ Recipients should consider pushing back (as they often want to lock-up their financing sources so that they will not use information which they gained from the recipient to advance another prospective buyer's deal). ☐ Recipients will sometimes seek to limit the language to arrangements the purpose of which is to lock up a financing source (so that is it not violated by practical limitations, such as a financing source's available capital or bandwidth). ☐ If recipient intends to work with a co-bidder or equity financing source, it should generally ensure they may do so on an exclusive basis (as exclusivity may be important than with debt financing sources). ☐ Provide that the establishment of customary "deal trees" (see F.7 below) will not violate the restriction.
F.7.	***Deal Trees and Confidentiality Walls.*** *In the context of an M&A "auction," NDAs might require a recipient (or certain of its representatives, such as financial institutions) to establish "deal trees" or "Chinese walls" to prevent CI from being shared within an institution that might be working with multiple parties.* *This provision is sometimes included in tandem with restrictions on the use of financing sources (see F.5 above), where the use of deal trees is often expressly permitted even though it would result in each deal team being exclusive to a particular bidder.*	☐ Consider whether this provision is necessary in specific circumstances.	
F.8.	***Letter of Intent or Exclusivity Provisions.*** *NDAs that relate to a potential M&A transaction or a prospective commercial relationship are sometimes*		

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
	combined with a letter of intent or an exclusivity agreement. ☐ Consider whether it is desirable to include these provisions in the NDA, or to have them in a separate agreement. ☐ Be careful to distinguish between binding provisions (such as the NDA terms) and non-binding provisions (such as most LOI terms).		
G.	**Liabilities and Remedies**		
G.1.	***Cumulative Remedies.*** *Most NDAs specify that any rights and remedies mentioned in the agreement are "cumulative" and are not exclusive of other rights or remedies (including any rights under intellectual property or trade secrets legislation).*	☐ Ensure appropriate cumulative remedies provision is included.	☐ If included, recipients would generally want the provision to be reciprocal.
G.2.	***Specific Performance.*** *Most NDAs provide for specific performance, an injunction, and other equitable relief to enforce the NDA.*	☐ Ensure NDA provides for availability of specific performance, an injunction, and other equitable relief.	☐ Recipients sometimes seek to provide that the discloser is entitled to "seek" equitable relief and that money damages "may" be inadequate (so that they preserve the right to argue it is inappropriate in a particular case). ☐ Recipients sometimes seek to strike any advance waiver of a requirement for the party seeking equitable relief to establish proof of damages provide security or post a bond. ☐ If included, recipients would generally want the provision to be reciprocal.
G.3.	***Indemnification.*** *Although uncommon in many contexts (particularly M&A), some NDAs require a breaching party to indemnify the other party for losses arising from the breach. In the absence of such a provision, parties*	☐ Consider whether this provision is necessary in specific circumstances. Because indemnification provisions are less common, often controversial, and heavily negotiated, most disclosers would omit them in most	☐ Recipients generally resist or seek to limit indemnification provisions. ☐ If included, recipients would generally want the provision to be reciprocal.

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
	would look to customary contractual remedies.	situations.	
G.4.	***Consequential Damages.*** *Although many NDAs are silent as to a party's ability to recover for consequential damages, some expressly address the availability of such damages.*	☐ Consider being silent or expressly providing for recovery of consequential damages. ☐ Disclosers should typically resist waivers of consequential damages, since the term can be ambiguous and would exclude many common types of damages.	☐ Recipients sometimes disclaim responsibility for consequential damages, especially where there is an indemnification obligation. ☐ If an express right to consequential damages is included, recipients would generally want the provision to be reciprocal.
G.5.	***Costs of Enforcement.*** *Although many NDAs are silent as to recover of costs of enforcement (including legal costs), some NDAs provide that costs of enforcing the NDA must be reimbursed by the other party.*	☐ Consider providing that the recipient must reimburse discloser for costs of enforcement.	☐ Recipients generally prefer to be silent as to costs of enforcement, to provide that each party pays their own expenses, or to provide a "loser-pays" provision. A "loser-pays" provision may deter frivolous suits by the discloser (the party more likely to be plaintiff). ☐ If included, limit to reasonable and documented out-of-pocket expenses. ☐ Consider providing that reimbursement is only available after litigation is concluded in a final, non-appealable order finding the recipient responsible for a breach. ☐ If included, recipients would generally want the provision to be reciprocal.
H.	**Boilerplate**		
H.1.	***Assignment.*** *It is fairly typical that the recipient is expressly forbidden from assigning the NDA to a third party, but generally the discloser is not restricted from assigning the NDA. At the very least, a discloser is usually permitted to assign in connection with a sale of the business or the assets to which the CI relates.* *See* Depomed, Inc. v. Horizon Pharma PLC *for an example of a case where a third party (that had purchased assets from the discloser) was able to use*	☐ Ensure the recipient is not able to assign or delegate the NDA without consent, but that its successors are bound by it. ☐ Ensure that an acquirer or successor of the discloser or the CI covered by the NDA is an express beneficiary of the NDA, whether or not it is specifically assigned.	☐ Consider requiring that recipient be notified of any assignment or transfer of the discloser's rights under the agreement. ☐ Consider providing that certain provisions (such as restrictive covenants) may not be assigned by the discloser.

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
	a confidentiality agreement to block action by a recipient.		
H.2.	***Third Party Beneficiaries.*** *Although many NDAs are silent as to third party beneficiaries, some expressly provide for or disclaim them.*	☐ Consider whether to expressly provide for any third party beneficiaries.	☐ Consider expressly providing that the NDA is only for the benefit of the parties and disclaiming third party beneficiaries.
H.3.	***Governing Law.*** *Most NDAs contain a provision specifying which law is to govern the NDA. Often this is the local law of the party with the most leverage (or such party's counsel) or a "neutral" option such as Delaware or New York. A "neutral" option such as Delaware or New York is typically acceptable to all parties and can be an expedient choice.* *Illinois and Texas have a strong form of the "inevitable disclosure" doctrine and should generally be avoided by recipients. If the NDA includes restrictive covenants, particularly a no-hire clause, disclosers may prefer to avoid California law which can disfavor these provisions.* *Where multiple NDAs are being executed in connection with a single transaction or matter, it may be preferable to use the same governing law for each of them.* *For international transactions, parties will often agree to compromise on New York law or English law, which are generally agreeable for both disclosers and recipients. (Note "UK" law is not the same thing as "English" law.)* *In some cases, it may be expedient to be silent as to the governing law of an NDA (in which case, conflicts of law principles would determine the governing law in the case of any dispute). This approach may result in some ambiguity and the likely possibility that the*		

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
	laws of any one of multiple different jurisdictions could be applied. ☐ Ensure the agreement contains an appropriate choice of law (or that the parties are comfortable without one).		
H.4.	***Forum Selection.*** *NDAs often contain a provision that each party subjects themselves to the jurisdiction of courts in a particular jurisdiction. Although often tied to the governing law, it is possible for the choice of law and choice of forum to be different.* *If the parties are unable to agree on a single exclusive forum for disputes, alternatives may include:* ▪ *Providing an asymmetrical forum selection clause (so that any party commencing litigation must do so in the defendant's preferred forum).* ▪ *Providing that the forum selection is non-exclusive (so that a party could try to move any litigation if it actually arises).* ▪ *Being silent as to forum selection (in which case, jurisdiction and venue principles would determine the appropriate venues in the case of any dispute). This approach may result in some ambiguity and the likely possibility that the multiple different venues could be used.* *Because a discloser is more likely to be the plaintiff in any litigation under the NDA (and therefore will have the chance to choose a forum), disclosers are typically more comfortable with a non-exclusive forum selection clause or the omission of a forum selection clause. As a corollary, recipients often prefer an exclusive forum selection clause (at least where the selected forum is acceptable to recipient).* *Although parties often prefer a "home field"*		☐ Occasionally, a discloser will propose an asymmetrical forum selection clause (i.e., leaving the discloser with unilateral ability to forum shop). Recipients will generally want to ensure the forum selection clause is reciprocal.

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
	advantage, disclosers should be mindful that it may be easier to enforce an NDA against a recipient in that recipient's jurisdiction. *Although rare (except perhaps in the contexts of employment or cross-border transactions), NDAs sometimes provide for binding arbitration as an exclusive dispute resolution mechanic. This is often driven by the preferences of the parties.* *If dealing with an international counterparty who insists on the application of their local law and dispute resolution in their jurisdiction, consider providing that disputes must be resolved by binding arbitration conducted in English in that country (rather than subjecting your client to the uncertainties of a foreign court).* ☐ Ensure the agreement contains an appropriate forum selection (or that the parties are comfortable without one). ☐ Although uncommon, consider whether to rely on binding arbitration to resolve than legal disputes.		
H.5.	***Severability or Reformation Provisions.*** *A severability provision provides that the invalidity of one provision of an agreement does not affect the invalidity of another provision. A reformation (or "blue pencil") provision permits a court to re-write an overly broad covenant to make it enforceable.* *NDAs often contain severability and/or reformation provisions, which typically are not controversial.*	☐ Ensure the NDA contains appropriate severability and/or reformation provisions, particularly if restrictive covenants are included.	
H.6.	***Entire Agreement.*** ☐ Ensure the NDA includes an appropriate integration or entire agreement clause. ☐ Where a virtual data room will be used, most parties (especially the recipient) will want to		

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
	provide that the NDA trumps any "click-through" agreement by including a provision such as the following: "The terms of this NDA shall control over any additional purported confidentiality requirements imposed by any offering memorandum, web-based database or similar repository of CI to which the recipient or any of its representatives is granted access in connection with the evaluation, negotiation or consummation of the transaction, notwithstanding acceptance of such an offering memorandum or submission of an electronic signature, "clicking" on an "I Agree" icon or other indication of assent to such additional confidentiality conditions, it being understood and agreed that its confidentiality obligations with respect to CI are exclusively governed by this NDA and may not be enlarged except by a written agreement that is hereafter executed by each of the parties hereto."		
I.	**Other provisions**		
I.1.	***Legal Conflicts Waiver.*** *Because NDAs are often the first agreement executed in connection with a potential transaction, it may be a convenient place to secure a legal conflicts waiver. In particular, in the context of an M&A auction, it is often desirable for the target company to include a conflicts waiver for its deal counsel in the form NDA so that any conflicts can be identified and cleared early in the process.* ☐ Consider whether it is desirable to include these provisions in the NDA, or to have them in a separate agreement. ☐ Ensure any legal conflicts waiver by a party is appropriately tailored to protect that party's		

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
	interests. ☐ Be mindful that some conflicts of interest cannot be waived and that, even for waivable conflicts, a boilerplate provision in an NDA may not be adequate as a waiver. Consult local ethics rules, ethics counsel if appropriate, and the terms of applicable engagement letters before relying on a waiver contained in an NDA.		
I.2.	***Representations and Warranties.*** *NDAs typically include very few representations and warranties, if any, even as to basic matters such as authority and due execution.* ☐ Most parties, particularly the discloser, should generally resist making representations or warranties in an NDA. ☐ However, consider whether any representations or warranties are appropriate in a particular circumstance.		
I.3.	***Most Favored Nations.*** *Although rare (especially outside the context of a standstill – see J.1 below), some NDAs include a provision providing that, if the discloser enters into an NDA with another interested party that contains less restrictive provisions or if the discloser waives another interested party's NDA provisions, then the recipient should be notified and receive the benefit of such less restrictive provisions or such waiver.*	☐ Disclosers should generally strongly resist any MFN provision. If included, limit to specific "bright line" items (such as term).	☐ A recipient would generally not request an MFN in an NDA (other than in a standstill), but consider whether it may be appropriate in a particular circumstance.
I.4.	***Ownership of Intellectual Property.*** *Some NDAs will clarify that the disclosure of the CI is not intended as a grant of a license or the transfer of any intellectual property rights.*	☐ Consider whether this provision is necessary in specific circumstances.	☐ If included, ensure that the provision is not drafted so broadly as to suggest the recipient is not permitted to use the CI for the permitted purposes under the NDA or that the discloser is somehow receiving ownership of intellectual property that it did not previously own (such as the recipient's

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
			notes and analyses).
I.5.	***Other Activities.*** *Some NDAs will acknowledge that the parties engage in a variety of activities and will clarify that the agreement is not intended to generally restrict those activities (such as the acquisition or operation of a competitive business or the independent development of similar information).*	☐ If included, ensure the provision is not drafted so broadly as to supersede the express terms of the NDA.	☐ Consider whether this provision is necessary in specific circumstances, including where the parties are engaged in the same or similar lines of business, or in the private equity context where the recipient may also receive information about competitors in a similar process.
J.	**Provisions for Public Companies**		
J.1.	***Standstill.*** *NDAs relating to the possible sale of a public company will often include a "standstill" provision, which prohibits the recipient from taking certain actions, including (1) acquiring or commencing a tender offer for securities of the discloser, (2) making any public announcement or proposal about an extraordinary transaction involving the discloser, (3) making any proposal to the recipient's board that would reasonably be expected to require such a public announcement, (4) launching a proxy fight for seats on the discloser's board of directors, or (5) otherwise trying to influence or gain control of the discloser without approval of its board or management.* *The purpose of a standstill is to ensure that CI is not misused by recipients whose interests are not aligned with a discloser, to establish rules of the game that promote an orderly auction, and to give the target leverage to extract concessions from the parties who seek to make a bid. Delaware courts recognize the validity of such provisions for these reasons. See* In re The Topps Co. Shareholders Litigation.	☐ Consider whether this provision is necessary in specific circumstances. Because standstills are often controversial and heavily negotiated, most disclosers would omit them except in connection with the sale of a public company or where there otherwise is a risk that the recipient could seek to influence discloser's management or acquire an interest in discloser in connection with the subject matter of the NDA. ☐ Before including a "don't ask, don't waive" provision (which forbids the recipient from even requesting a waiver of the standstill provision), be aware that these provisions may be a breach of the board's fiduciary duties (since they may be used to entrench management and prevent a transaction that maximizes value for shareholders) and may not be enforceable. While these provisions are appropriate in some circumstances, the board of directors should carefully consider and make the determination as to whether to include in any specific situation. Such provision may need to be disclosed in subsequent stockholder disclosures relating to the transaction. See *In re Complete*	☐ In general, standstills are inappropriate in connection with transactions that do not involve a sale of a public company. Most recipients will strike in other contexts (including relatively small "carve-out" transactions from public companies). ☐ Because outside representatives typically will not agree to a standstill, recipients should ensure they are not covered by the provision. ☐ Recipients should ensure the actual prohibitions of the standstill are appropriately tailored to protect the discloser's interest (e.g. limit requiring "substantially all assets" or "material assets" rather than "any assets"; remove ambiguous open-ended language about "otherwise taking any action"; consider limiting to equity securities only and not also debt securities; etc.) ☐ Some standstills require the recipient to provide notice to the discloser if the recipient is approached by a third party about a transaction involving the discloser. Most recipients resist these provisions,

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
		Genomics and *In re Ancestry.com*. ☐ Disclosers should generally strongly resist requests to include "most-favored nations" provisions, as they can be difficult to administer, limit flexibility, and generally don't take into account the nuanced compromises between different provisions. If an MFN is included, consider limiting to specific "brightline" items (such as length of the standstill) rather than all terms. ☐ Disclosers often try to limit "automatic out" provisions, since the reasons for the standstill may still be applicable (or even more applicable) once the company is "in play."	which can be difficult to administer and can jeopardize third party relationships. ☐ Ensure the standstill has an appropriate term (1 to 2 years is typical). ☐ Recipients will generally want to ensure they have the ability to make a private proposal to the discloser's board of directors (that would not reasonably be expected to require public disclosure) and/or to request that the discloser waive the provisions of the standstill. ☐ Consider adding an "automatic out" that causes the standstill to become inapplicable once the company is publicly "in play" – i.e., the recipient announces a sale process, the recipient approves a change of control, or a third party commences a takeover attempt for the recipient. ☐ Recipients typically request carve-outs permitting de minimis acquisitions of securities (e.g., 3% or 5%) to avoid foot faults. Recipients should also consider, and include appropriate carve-outs for, any ordinary course activities (e.g., financial institutions that regularly engage in trading activities that are unrelated to the proposed transaction, purchases by affiliated employee benefit plans, etc.) ☐ Recipients will often ask for a "most-favored nations" clause that requires that, if the discloser enters into an NDA with another interested party that contains less restrictive standstill provisions or if the discloser waives another party's standstill provisions, then the recipient should be notified and receive

	Provision and General Considerations	Discloser Considerations	Recipient Considerations
			the benefit of such less restrictive provisions or such waiver.
J.2.	***Insider Trading / Reg FD Considerations.*** *If one of the parties is a public company (or if the CI otherwise includes information about publicly traded securities), the NDA would often contain provisions intended to address applicable securities laws.* *In general, the basic CI protections found in most NDAs may be sufficient for discloser to comply with securities laws (in which case, some parties may elect to omit these provisions).*	☐ If the CI will include information subject to Regulation FD, ensure the NDA is drafted in a way that permits the disclosure under Regulation FD. (Generally, an express agreement to keep the information in confidence is sufficient. An agreement to comply with securities laws or not to trade with the information, absent an agreement to keep the information in confidence, is not sufficient to comply with Regulation FD.) ☐ Consider including a disclaimer that the CI constitutes (or may include) material non-public information. ☐ Consider obtaining the recipient's agreement to comply with (or an acknowledgement that recipient is aware of) its obligations under securities laws with respect to the CI.	☐ Recipients that may trade in the securities of the discloser sometimes request representations, warranties and covenants that the CI will not include "material non-public information" (and that, if the recipient is nonetheless exposed to MNPI, the discloser will promptly issue a "cleansing" 8-K to make such information public). ☐ Rather than acknowledging that any CI "constitutes" MNPI, recipients often prefer to say CI "*may* include" MNPI. ☐ Rather than expressly agreeing to comply with securities laws (or any specific standard of conduct intended to track securities laws), recipients often prefer to "acknowledge" that they are aware of their obligations under securities laws. Recipients prefer this formulation since the securities laws may have additional nuance and to avoid turning a breach of law into a breach of contract. ☐ If recipient is a public company, it should ensure that the NDA appropriately addresses its own public company considerations (e.g., the fact that the recipient is considering a transaction and the terms thereof may be MNPI of the recipient).
K.	**Provisions for Other Specific Contexts**		
K.1.	***Private Equity Context.*** *When the recipient is a private equity firm, NDAs will often include:* ▪ *Provisions seeking to prevent portfolio companies, unrelated funds that do not receive CI, and*	☐ Although disclosers are often willing to accept some form of most of these provisions, disclosers should be sure they are not drafted so broadly as to eviscerate the express provisions of the NDA.	☐ Recipients that are private equity firms or similarly situation institutions should consider adding some or all of these provisions.

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	representatives acting independently from recipient from becoming subject to the NDA. ▪ *Qualifications providing that the fact that the recipient's personnel may be officers or directors of other companies does not make those other companies the recipient's "representatives."* ▪ *Acknowledgements that exposure to the CI may "inevitably enhance" the general knowledge and understanding of the recipient's personnel and agreement that use of this "residual" general knowledge and understanding is not in and of itself a violation of the NDA.* ▪ *Express acknowledgement of the private equity firm's other activities (see I.5 above).* ▪ *Flexibility to work with financing sources (see F.5 above) and co-bidders (see F.4 above) and to conduct market studies (see F.2 above).* ▪ *Recourse solely to the recipient (and not to any of its partners, managers, officers, investors, or other personnel).*	☐ Disclosers should be particularly thoughtful before accepting exclusion of "residuals" that "inevitably enhance."	
K.2.	***Employment Context.*** *NDAs in the employment context generally are not heavily negotiated by the employee (the recipient under the NDA). These agreements raise special considerations and should usually be drafted in careful consultation with counsel specializing in employment and intellectual property matters. This section of the checklist includes some common considerations for employment-related NDAs.* ☐ Ensure that the restrictions in the NDA do not inappropriately limit the ability of an employee to act as a "whistleblower" or to engage in protected activities (such as discussing employment terms) under the National Labor	☐ Consider including provisions ensuring that the employee has no conflicting obligations (such as an existing NDA or non-compete). ☐ Consider requiring employee to provide notice before commencing subsequent employment so the employer can assess risk that such employment will involve a breach of the NDA provisions. ☐ Provide expressly that the employer has the right to supplement or amend personnel policies from time to time and that the employee will comply with them. ☐ Consider whether to obtain a publicity consent from the employee (permitting use	

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	Relations Act or other applicable law. ☐ Ensure adequate consideration (under applicable state law) is provided to the recipient. ☐ Be mindful that NDAs with employees are typically adhesion contracts and may be viewed more skeptically than commercial NDAs. ☐ Ensure NDA is appropriately tailored to reflect the specific circumstances of the discloser (including the nature of the CI and the discloser's IT systems).	of their name and likeness). ☐ Include a disclaimer that the NDA does not entitle the recipient to continued employment or other rights. ☐ Consider social media provisions, including any requirement to include a disclaimer. ☐ Include appropriate provisions (in consultation with an intellectual property lawyer) to ensure the discloser has ownership of intellectual property generated by the employee, including (1) assignment of invention, (2) work for hire provisions, (3) waiver of moral rights, (4) further assurances and power of attorney to facilitate registration and protection of IP, even after termination of employment, (5) representations at commencement of employment regarding pre-existing inventions, to avoid subsequent disputes over whether an invention pre-dated the employment relationship, and/or (6) obligation to disclose an invention when created. ☐ Consider including restrictive covenants if not addressed in a separate employment agreement (see E above). ☐ Consider setting forth affirmative obligations relating to the termination of employment, particularly the return of all CI.	