

Confidentiality Agreements: What are the Most Important Elements When Selling Your Business?

Every business has to be concerned about maintaining confidentiality. It is common for business owners to become somewhat obsessed with confidentiality when they are getting ready to sell their business. M&A brokers and advisors recognize the validity of this concern and their processes are designed to preserve confidentiality.



For valid reasons owners don't want the word that they are selling to spread to the public, employees or most certainly their competitors. Yet, there is a tug of war between the natural desire for confidentiality and the desire to sell a business for the highest amount possible. In order to sell a business, an owner needs to respect a buyer's need to learn that the business is available for acquisition and then understand the business they are interested in buying.

In selling a business, there are two major issues in maintaining confidentiality. One is having an appropriate confidentiality agreement. Two is carefully managing the sale and disclosure process to best protect privacy while maximizing value for the seller. The privacy in the process is a mainstay of a M&A broker's priorities and is a key benefit of relying on such a professional mergers and acquisitions advisor to manage the M&A process.

Also, here are some key points to include in a business sale confidentiality agreement.

Foremost, the confidentiality should specify that negotiations are secret, including the fact of discussions and the identity of the seller as being available for purchase. A part of this will also be to specify what information can be revealed and what cannot be revealed. Normally none should be revealed other than what is already known to the business buyer or what is public knowledge.

Also consider the duration of the confidentiality agreement, which is also referred to in mergers and acquisitions as a business sale “non-disclosure agreement”. Your agreement must be 100% clear as to how long the agreement is in effect. If possible, your confidentiality agreement should be permanently binding, on the concept that confidential information should remain so – why would it expire? Often permanent is hard to negotiate, and a practical compromise is often two to three years.

The nondisclosure agreement, or NDA, outlines the procedure to be taken in the event that a breach does occur. Having a confidentiality agreement that spells out these steps and options will help to enhance the effectiveness of your company sale NDA. You must expect and insist that prospective business buyers respect your M&A process and take the document very seriously. This is an important step in your success when selling a business.

A section covering “special considerations” may relate to unique aspects of the firm you are selling. Patents and trade secrets are good examples. A company buyer could learn about inventions while “kicking the tires,” and you’ll want to be quite certain that any prospective buyer realizes that he or she must maintain confidentiality regarding any patent or trade secret related information. Again, handling these issues is often best accomplished as a part of the engagement with your M&A specialist. They will know when and how to release appropriate information, to the appropriate parties, at the appropriate time for maximum effectiveness.

Of course, do not forget to include any applicable state laws. If the prospective buyer is located outside of your state, the issues of choice of law and prevailing venue are very important and must be adequately addressed.

A confidentiality agreement needs to be a legally binding agreement. It is important that all parties involved understand this critical fact. Investing the effort to put in place a quality confidentiality agreement is well spent. An experienced M&A broker or advisor, investment banker, or even a highly experienced business broker, will prove invaluable in helping you navigate the process to protect your confidentiality, and provide the multifaceted aspects of buying and selling a business.

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