

The Top 10 Terms in Private Equity NDAs

Below, we've outlined some of the most important terms in a private equity NDA, which draw nuance from changing business conditions. Are you managing NDAs with the speed and precision the market demands?

1. Confidential information

Confidential information is the foundation of NDAs. It is why they exist, and it is indispensable in the assessment of any company. It can include all information shared in connection with the proposed deal or transaction. Sellers often want to define confidential information as broadly as possible to reduce the chance that any of their sensitive information is compromised. Buyers, on the other hand, often want to limit the scope by excluding publicly available information or information that is already in their possession to reduce any chance of unintentionally breaking the agreement or restricting their other operations and investment decisions.

2. Duration

The length of time the NDA is enforced on all parties is critical, as, again, private equity firms have complex structures with different implications for different functions of the business. An NDA that is in effect for too long could risk the firm's ability to hire certain people, trade with certain companies, or pursue new acquisitions.

3. Non-solicit

People are the most important part of any organization. As such, companies that are for sale will often include in NDAs a non-solicit provision that prevents anyone evaluating the deal from seeking to hire or attract the target company's employees to either the firm or, sometimes, any of its portfolio companies. The length of time this restriction is in place is critical, as it can often affect multiple elements of an asset manager's operations and requires careful coordination with

internal human resource departments to ensure compliance with the agreement. Sellers may include their affiliated businesses and sometimes want to make a distinction between inducing and encouraging an employee to move, and the hiring of its employees that takes place without encouragement.

4. Definition of representatives

Due diligence is a team effort that requires both investment professionals and often outside advisers to analyze a seller's confidential information. While sellers often want to limit access to their private information, ensuring that it is available to the appropriately sized team, which is subject to confidentiality obligations, helps speed up the timeline of the assessment and initial offer. In this case, the company sharing its information will want to ensure that as many potential parties as necessary are bound by confidentiality obligations while also ensuring that the recipient of the confidential information is responsible for any breach by its representatives.

5. Joinder

It is common practice for buyers to have outside parties who are involved in a deal establish their rights and obligations under a joinder to the NDA. The joinder is used to explain that the third party is granted access to the information, whether the third party is bound by some or all elements of the NDA, and that it can meet the NDA's requirements. Buyers in this case seek to ensure that the joining party can indeed protect both the seller and its confidential information and that the agreement is enforceable.

Learn more about how InCloudCounsel helps some of the world's most sophisticated asset managers streamline their NDA processes so they can focus on their most important, highest value work.

Learn more >

InCloudCounsel.com

6. No contact

In this section of the NDA, sellers try to limit buyers' abilities to contact anyone other than those representing the company during the due diligence and sale process. This includes employees, officers, directors, customers, suppliers, contractors, representatives of, lenders to, or other business relations of the seller, its affiliates, or government agencies. While sellers often want the NDA to cast as wide a net as possible, buyers look to limit that in order to obtain as much information as they can. This section includes a handful of carve-outs, or exceptions, including contact that might take place during the regular course of business, contact as part of due diligence without revealing that a sale might be pending, legally required contact, and, of course, contact the seller has explicitly approved.

7. Standstill

This element of an NDA is most commonly included when the potential acquisition is a public company. The term of the standstill is generally one year, but can be shorter, and covers the buying and selling of a company's securities, any solicitation of proxies, any influence on board members, and any attempts to gain control of the company through a third-party. Exceptions are often made to permit an amount of securities trading that would not result in the gain or loss of a majority interest in the company, to permit third party managers from trading securities on behalf of the buyer, and to continue voting, dividend, and liquidation rights attached to any already owned securities. Buyers will often refuse to accept or include them in the case of a private company and argue that it is pointless when all of the company's securities are privately owned.

8. Non-circumvention/Non-interference

In the first instance, the buyer or private equity firm agrees not to enter into any sort of transaction to

acquire the target company with anyone other than the designated seller. This is usually the easier of the two for buyers to agree with. A concern arises for buyers in the second part, in which their use of the confidential information covered by the NDA cannot harm the seller's general business operations or the ongoing transaction.

9. Lock-up

More technically, this is a prohibition on exclusive financing agreements. It is often written into NDAs so that the seller knows the buyer cannot "lock-up" financing from any one lender and block out a potentially better deal. Firms are generally willing to accept lock-ups, but look for what is called a "tree" arrangement that allows them to have an exclusive agreement with a small, specific deal team at a financing source without locking up the entire institution.

10. Retained confidential information

While sellers can request the return or destruction of confidential information, buyers also agree not to use the confidential information after the execution of the acquisition or the end of the due diligence process. The right to retain confidential information in electronic archives or pursuant to bonafide retention policies has become ubiquitous given the ordinary practice of archiving email and documents on servers that are not easily accessed or eventually deleted. The third party is bound by some or all elements of the NDA and that it must meet the NDA's requirements. Buyers in this case seek to ensure that the joining party can indeed protect both the seller and its confidential information and that the agreement is enforceable. Sellers often agree so long as the information isn't broadly available to people in the business and often want a "tail" for confidentiality, non-disclosure, and use restrictions to extend beyond the larger NDA. Buyers typically try to shorten the tail, arguing that most of the information is quickly outdated.

The Importance of NDAs

A deep understanding of the handful of key terms in a private equity NDA can have a meaningful impact on the speed at which an agreement is reached and on the buyer's and seller's operations. When you improve the NDA process with experienced attorneys who turn contracts into data, you can truly achieve the speed and precision the market demands.

Learn more about how InCloudCounsel helps some of the world's most sophisticated asset managers streamline their NDA processes so they can focus on their most important, highest value work.

Learn more >

InCloudCounsel.com