

STRAIGHT TALK ABOUT CONFIDENTIALITY PROVISIONS

Confidentiality provisions can be tricky. As a CEO, you may find yourself resisting a client's attempt to impose restrictions on you in the morning and then requesting the same restrictions yourself from one of your clients in the afternoon.

Such restrictions surface not only in formal "confidentiality agreements," but in executive employment contracts, letters of intent, private placement circulars and intellectual property documents. Whenever possible, negotiate these agreements with the advice of legal counsel.

Position is Everything

Your level of protection or freedom depends upon your position in the negotiation. As more U.S. companies conduct business globally, your understanding of the dynamics of a well-crafted confidentiality document becomes even more critical.

If you are the subject of a confidentiality agreement, you will be arguing for:

- An express and explicit identification of the confidential information.
- A narrow list of people and entities subject to the confidentiality provisions.
- A definite and limited period of time for which the restrictions apply.
- Broad exclusions from confidential treatment.
- Limited restrictions for use of the confidential information transmitted to the receiving party.

Conversely, if you are the party providing the confidential information, you will be negotiating:

- A broad scope of information that is considered confidential.
- A broad category of persons and entities deemed to be recipients of the confidential information.
- An almost unlimited period of time for which the restrictions apply.
- Narrow exclusions from confidential treatment.
- Absolute restrictions on the use of the confidential information.

More Questions

For example, does the definition of "confidential information" require that the information be labeled "confidential"? Or does it merely require the receiving person to understand from the facts and circumstances surrounding the disclosure that this information should be considered confidential?

Do the provisions bind only the entity executing the agreement, or all of the executive officers, directors, employees and affiliates of the entity? Does the agreement require, for example, any of those individuals to enter into parallel agreements binding them by the same confidentiality provisions as the entity executing the initial agreement?

Going Public

Do the restrictions exclude information made public after the parties enter into the confidentiality agreement? How does the agreement treat information made public by the receiving party's bad actions? Does that invalidate the exclusion?

Do the restrictions apply not only to disclosure but also to the use of the confidential information in a way that is detrimental to or in direct competition with the interests of the disclosing party?

Most importantly, confidentiality provisions should be tailored to fit the circumstances. Never accept "boilerplate" provisions. Instead, carefully examine the scope and limits of all restrictions and negotiate any changes accordingly.