A Practical Approach to Negotiating Confidentiality Agreements in the Corporate Acquisition Context

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This article discusses the use of Confidentiality Agreements in connection with the exchange of confidential information as a first step in a possible corporate combination and addresses the negotiation of such an Agreement from the perspective of the target company’s legal counsel.

In negotiating a transaction for a change of control, or in which a significant minority investment will be made by a third party, the target company (the “Company”) may face conflicting objectives. Once the Company has decided to entertain offers to acquire or invest in the Company, it will be requested to provide potential acquirors or investors (“Bidders”) and their representatives with sufficient information regarding the Company to enable the Bidders to make their best offers. However, the release of confidential information to Bidders, many of whom may be direct competitors of the Company, poses obvious dangers to the Company. The Company will seek to minimize these business risks. The Company must also recognize the danger that, after having had the cooperation of the Company in receiving confidential information, the Bidder may be tempted to end-run the Board of Directors of the Company in the negotiating process by either making a public unsolicited proposal (in an attempt to cause stockholders to pressure the Board) or making an unsolicited tender offer directly to the stockholders. The Bidder might thereby attempt to consummate the transaction on terms that would be unobtainable through direct negotiations with the Company’s Board.

The “Confidentiality Agreement” is a contractual device used to reconcile these objectives by permitting the Company to provide confidential information to a Bidder while protecting it from the risks of misuse of such information by the Bidder. The Confidentiality Agreement typically contains confidentiality provisions to protect the Company against the business risks of disclosure or misuse of information by competitors, as well as provisions that govern a Bidder’s conduct to ensure a competitive sale process. The Confidentiality Agreement may also contain (in the public company context) standstill provisions to protect the Company against unsolicited takeover attempts by Bidders and provide for an orderly marketing process.
A Word of Caution

This article describes various approaches to the negotiation of a hypothetical Confidentiality Agreement by the Company. Although Confidentiality Agreements have become relatively standardized, there are still variations between forms. In addition, there are always a multitude of specific facts and circumstances that makes each negotiation unique. Therefore, any of the arguments described herein may be made either more or less relevant by the circumstances of the particular negotiation and the relative significance attached to individual bargaining points by the specific parties. There are also an infinite number of other points that may be appropriate to any particular negotiation.

General Practice Pointers

The process of negotiating the terms of a Confidentiality Agreement on behalf of the Company can be complex, particularly when, as is common, negotiations with multiple interested Bidders are occurring simultaneously. In this regard, it is very helpful to establish ground rules at the outset, and to make sure that the Company and its financial advisors are aware of and in agreement with these ground rules.

A first rule of thumb is that the negotiations should be conducted by a small number of people (one individual, if possible) in order to ensure uniformity in the extent and types of concessions granted to Bidders. The initial form of agreement, which is disseminated by the financial advisors to potential Bidders, is typically prepared by the Company’s outside counsel, who conducts the negotiations of the agreement with the Bidders. Generally, the Company must approve all substantive variations on the form of agreement.

A frequent question is the extent to which the Company is required to grant a particular concession to all Bidders once it has been granted to one Bidder. Generally, unless a Bidder has negotiated “most-favored nation” status (see “Most-Favored Nation Status,” below)—something that a Company will strongly resist—the Company has no obligation to go back to Bidders who have already signed agreements and offer to amend their terms.

On the other hand, the Company may have trouble justifying its refusal to grant a concession to future Bidders who demand it, once the Company has agreed to the concession for another Bidder. Generally, if the Company can justify such discrimination on the grounds of special facts or circumstances that made the concession more appropriate for one Bidder than the others, then the Company should be entitled to discriminate. Also, as a negotiating tactic, Company’s counsel may resist making the concession until a Bidder indicates (credibly) that without it Bidder will not sign the agreement. However, if the negotiations do reach that point, the Board must be able to justify to shareholders a negotiating position that excluded a potential Bidder when the Board was willing to make the same concession to another Bidder. If the Company ultimately enters into an acquisition agreement, then the Board’s actions may be scrutinized by a court to determine whether the Board acted in good faith to maximize shareholder value in the sale of the Company. This has been interpreted to include an obligation that the board maintain a “level playing field” when entertaining bids from more than one Bidder. Although some departures from the concept of “level playing field” may be supportable by the Board (e.g., withholding pricing information from a competitor due to anti-trust concerns) such departures should be avoided whenever possible.

Limited Purpose

The Confidentiality Agreement should specify its limited purpose: that is, to assist the Bidder and its “Representatives” (as defined below) in connection with the evaluation of a “possible negotiated transaction” (or “acquisition,” if the form of transaction is limited to that) with the Company. The transaction is often described as a “possible” transaction in order to avoid implying that there is an agreement in principle for such a transaction created by reason of the Confidentiality Agreement itself or that the Company is committed to engaging in any transaction. The transaction is
also often described as a “negotiated” transaction in order to reinforce the concepts that (i) it would be a breach of the Confidentiality Agreement if, after receipt of confidential information, a Bidder made a hostile bid and (ii) the Company’s purpose in entering into the Agreement, is to facilitate a process which it controls.

The Confidentiality Agreement often specifies that the confidential material furnished to the Bidder will not be used in any way that is detrimental to the Company. The Bidder may object that this language is overly broad, since the Bidder should be entitled to use negative confidential information it receives to reduce its bid, seek additional legal protections or withdraw from the process, all of which may be “detrimental” to the Company. One way for the Company to address this issue is to provide an express and limited exception that would allow the Bidder to use confidential information for these types of “detrimental” purposes, but not others.

The Delaware Court of Chancery’s recent decision in *Martin Marietta Materials, Inc. v. Vulcan Materials Co.* demonstrates that a failure to clearly define the permitted use of confidential information could create an implied standstill, effectively prohibiting the Bidder from pursuing a hostile deal while the Confidentiality Agreement is in effect. The Court determined that Martin Marietta, the bidder, breached its confidentiality agreement with Vulcan, the target company when it initiated a hostile bid for Vulcan using confidential information. The agreement permitted Martin Marietta to use confidential information “solely for the purpose of evaluating the Transaction,” which was defined as “a possible business combination transaction” between the parties. The Court ruled that the language of the confidentiality agreement was not clear, and that, based on extrinsic evidence, the parties intended the confidential information to be used solely for a consensual transaction. To remedy the breach, Martin Marietta was enjoined from taking any actions to advance its hostile takeover for a period of four months.

**Representatives**

In the process of negotiating a possible transaction with the Company, the Bidder and its financial and legal advisors need access to various types of information. The Confidentiality Agreement typically imposes confidentiality obligations on the Bidder and on its directors, officers, employees, agents and advisors (including attorneys, accountants, consultants, bankers and financial advisors, collectively referred to as “Representatives”) who have a “need to know” and are provided with such information. In addition, certain Bidders may wish to share the confidential information with their potential sources of debt or equity financing (or potential acquirors of a portion of the Company’s business from the Bidder in connection with or after the completion of an acquisition by a Bidder), and therefore include such financing sources (or potential acquirors of a portion of the Company’s business from the Bidder) in the definition of “Representatives.” The definition of “Representatives” may also be expanded to include the Representatives of a Bidder’s affiliates and potential financial sources (and potential acquirors).

The Company will ask that the Bidder agree that it will be liable for any breach of the Confidentiality Agreement by any of its Representatives. However, Bidders may desire to avoid the applicability of certain provisions of the Confidentiality Agreement (such as non-solicit and standstill provisions) to Representatives that are its third party advisors (such as investment banks, attorneys and accountants) and financing sources.

If there is a possibility that any Representative (such as an investment banker) may also or alternatively act as a principal in the transaction, or if the Bidder will not take responsibility for any breach of the Agreement by its Representatives, the Company may seek separate execution of Confidentiality Agreements by the Representatives (or make it an obligation of the Bidder that such Representatives agree in writing to be bound by the Confidentiality Agreement on the same terms as the Bidder (with the Company as an express third-party beneficiary) before the Bidder provides confidential information to such Representatives).
Protecting Confidential Information

Types of Information

The types of information in which a Bidder will be interested may include financial, technical, and “human resource” information. Each type of information has differing characteristics and the relative importance of each type of information to the Company and Bidder will shape the context of the negotiations. For example, financial information such as projections typically has a short “shelf life” of usefulness. On the other hand, technical information, such as manufacturing techniques, may have an indefinite shelf life and may be easily exploitable by competitors.

Financial Information

The Bidder and its Representatives generally need confidential financial information regarding the Company, including both historical financial information (particularly for non-public companies) and financial projections. In addition, the Bidder may want detailed business information, including pricing information and information on individual units (e.g., stores, factories or divisions) of the Company. The Company and its advisors must be sensitive to anti-trust concerns if it intends to provide pricing and market information to any competitors of the Company.

While U.S. and international antitrust laws recognize that companies contemplating a transaction have a legitimate need to exchange information, the exchange of “competitively sensitive” information among parties that are competitors of the Company raises antitrust sensitivities (and potentially concerns) under such laws. What constitutes competitively sensitive information will vary from case to case, but customer pricing and bidding information are often among the most sensitive materials. Accordingly, in transactions involving competitors, pre-merger information exchanges should be conducted subject to appropriate anti-trust guidelines. The parties should consult with antitrust counsel before exchanging any confidential business information, and antitrust counsel should review potentially competitively sensitive materials before the parties exchange them. Upon advice of counsel, some materials may need to be withheld, redacted, and/or distributed to only a limited group of individuals (e.g., “clean team”). Failure to comply with the antitrust obligations concerning due diligence activities could result in the imposition of significant penalties and potential delay in obtaining antitrust approvals of a transaction.

Technical Information

In the category of technical information, issues may arise with regard to the scope of detailed information to be provided to Bidders that are competitors of the Company. A competitor may request that confidential technical information be excluded from the information being provided, and may seek to have access only to information deemed “non-confidential” in order to avoid any possible future claim of misuse of the Company’s proprietary information. While theoretically this solves the problem of giving a competitor access to sensitive information, in reality it is difficult to implement, particularly if the Bidder is permitted to conduct interviews with Company employees. It is therefore preferable from the Company’s point of view to bind the competitor under a more restrictive Confidentiality Agreement (which could limit the competitor’s ability to actually receive sensitive information, but instead require that such information be shared only with an outside third party). Similarly, the Bidder will sometimes request that the Company identify, by marking as “confidential,” the written documents it seeks to protect. The Bidder may also request that oral discussions be reduced to writing in order to be protectable. This obviously shifts the burden to the Company. The Company may point out in response that these provisions would inhibit full and frank discussions between Bidder and the Company’s employees. For example, the Company would need to have witnesses (and possibly recordings) for each interview with its employees in order to monitor and transcribe the information given to Bidder. The Company may be prohibited from disclosing confidential technical information by restrictions under existing contractual relationships of the Company (such as classified government
contracts or contracts governing joint research and development ventures or other collaborative efforts). The Company’s investment advisors should be sensitive to the existence of any such restrictions in preparing “selling books” or other documents containing Company information.

Access to Employees

The Bidder may seek access to the Company’s “human resources” through interviews with management and other key personnel. Although the Confidentiality Agreement may attempt to limit the information which may be given to the Bidder, employees of the Company may respond to the Bidder’s questions and unintentionally disclose restricted information. It is therefore good practice to require that all contacts be made through one source (usually, the Company’s investment banker) in order to ensure that only certain employees are interviewed and that those employees are properly briefed, if necessary. This approach also limits operational disruptions during the acquisition process.

Additionally, the Company may have concerns about “raiding” by the Bidder of its important employees, particularly at a time when the employees are likely to be concerned about corporate stability. To address this concern, the Confidentiality Agreement typically will contain a provision prohibiting the Bidder from soliciting or employing the Company’s key employees.

Definition of Confidential Information and Exceptions

The materials furnished to the Bidder should be defined in a manner appropriate to the nature of the Company’s business, as well as to the type of transaction being contemplated. The “Evaluation Material” or “Confidential Information” may be broadly defined as any information, written or oral, provided by the Company to the Bidder, or may be defined in greater detail. The definition should also be broad enough to cover summaries and abstracts of the information prepared by Bidder and its Representatives.

Note that the definition of confidential information is typically a subtractive process, i.e., all information is defined as “Evaluation Material” and then specific exceptions are added to exclude information which is not, in fact, proprietary to the Company.

Required Disclosures of Confidential Information

The Confidentiality Agreement will not protect the Company from disclosures which are mandated by legal proceedings. Therefore, it is usual for the Confidentiality Agreement to provide that in the event the Bidder and/or its Representatives must disclose confidential information of the Company, prior notice must be given to the Company so that it can, if appropriate, attempt to protect itself from such disclosure. Further, the Bidder should be asked to agree that it will provide only the minimum amount of information necessary to satisfy the legal mandate (preferably, as determined by its legal counsel in a written opinion).

Record Keeping

The Confidentiality Agreement will typically include a provision requiring the Bidder and its Representatives to return all materials upon the Company’s request, and to return the materials immediately if the Bidder decides not to proceed with a transaction with the Company. In lieu of returning the materials, the Bidder may be permitted to destroy such materials if the Bidder furnishes an officer’s certificate or other written confirmation of such destruction. Bidders will also be required to destroy all electronic copies of confidential information. A Bidder may attempt to limit its obligation to return or destroy confidential information to circumstances where it received instruction from the Company to do so. In such a case, the Company (or its investment bank) should send written notices to each Bidder instructing them to return or destroy confidential information at the appropriate time in the sale process (and requesting that each Bidder confirm that it has done so).

A Bidder will frequently want to keep copies of the materials for its and its Representatives’ record keeping and internal compliance purpos-
es. In addition, a Bidder may seek an exception to the obligation to destroy electronic copies of confidential information for information that is contained in automated back-up tapes or other media. In such cases, the Company may seek to provide for proper controls to be established (e.g., by requiring that such copies shall be maintained in the Bidder’s legal department for compliance purposes only, or, in the case of electronic back-ups, not be readily accessible by the Bidder’s employees) and that any retained information remains subject to the confidentiality obligations for as long as such information is retained.

Disclosure of Negotiations

The Confidentiality Agreement may prohibit, absent the prior written consent of the Company, disclosure by the Bidder of the fact that the confidential information has been provided or made available, or that discussions or negotiations are taking place concerning a possible transaction. This provision protects the Company’s employees, customers, competitors or other potential Bidders from having knowledge of the transaction, which could cause a potential disruption to the business of the Company and the deal process. In addition, if the Company is public, such a disclosure by a Bidder could trigger a request by the exchange upon which the Company’s securities trade to make disclosure regarding the process being conducted by the Company. The Bidder may seek a reciprocal provision prohibiting disclosure of negotiations by the Company.

Absent a Company or its insiders selling, or trading in, the Company’s securities and absent a tender offer for the Company securities, the existence of active merger negotiations will generally not trigger a public disclosure obligation on the part of the Company. That said, the securities exchange upon which the Company’s securities are trading may require to the Company to issue a press release responding to marketplace rumors. In drafting an agreement that will provide the Company with the ability to control the flow of information to the market, the Company must be sensitive to its and the Bidder’s disclosure obligations under securities laws and exchange rules.

The Confidentiality Agreement often refers to the fact that confidential information has been provided or made available, or that discussions or negotiations are taking place concerning a possible transaction as “Transaction Information” and subjects such information to disclosure restrictions.

Discussions Among Bidders

The Company will also seek to control the Bidder’s ability to discuss the possible transaction with other potential Bidders. Absent this prohibition, a Bidder could reach a secret agreement with another potential Bidder to submit a joint bid. Alternatively, a Bidder may reach an agreement with a third party (who otherwise might itself have been the Bidder) to sell certain assets of the Company after its acquisition by Bidder. Such scenarios could result in the Company's achievement of less than the best possible price, since the Company has lost much of the benefits of competitive bidding.

The likelihood of consummation of a transaction may be affected by the identities of the parties, as particular parties may raise anti-trust issues, financing concerns, and other factors that the Company is entitled to (or even obligated to) consider in evaluating a proposal for a transaction. Likewise, the Company needs to know with whom it is dealing in order to decide what information is appropriate to deliver. The Company may also insist that the Bidder inform the Company if it is approached by another potential Bidder inquiring about the Company.

Accuracy of Confidential Information

Both the Company and its Representatives are likely to insist upon a disclaimer as to any representation or warranty of the “accuracy or completeness” of the confidential information being provided, and limiting any representations and warranties to those made in a final definitive agreement regarding a transaction, when and if such an agreement is entered into. The Delaware Supreme Court’s decision in RAA Management, LLC v. Savage Sports Holdings, Inc., highlights the importance of such language in the context...
of a broken deal where no definitive agreement is ever executed. Relying on the non-reliance disclaimer in the confidentiality agreement executed by the parties, the Court affirmed the dismissal of the plaintiff/bidder’s complaint that the defendant/seller committed fraud by misrepresenting and concealing certain liabilities. The Court explained that the purpose of a confidentiality agreement is to facilitate precontractual negotiations and that non-reliance disclaimers are intended to limit or eliminate liability for misrepresentations during the due diligence process.

Standstill Provisions

Background

In the case of a public company (or, although unusual, potentially in the case of a private company that has a broad shareholder base), the Confidentiality Agreement typically contains “standstill” provisions setting forth the terms under which the Bidder may acquire, vote or dispose of stock of the Company. A standstill facilitates the Company’s control of the deal process. Most importantly, the standstill can prevent the Bidder from making a hostile takeover attempt after the parties fail to complete a negotiated deal when the Bidder has had access to the Company’s confidential information. The variety and combination of standstill provisions are infinite, depending upon the special circumstances of the parties and their relative bargaining strengths.

Stock Acquisitions and Dispositions

The starting point of negotiations from the point of view of the Company is usually to seek to prohibit all acquisitions of the Company’s securities by the Bidder. Sometimes the Bidder may request a “basket” that would permit the Bidder to acquire up to a specified percentage of the Company’s stock. The appropriateness of this request depends upon the facts of each case.

For example, a Bidder with separate trading and investment functions may request that other divisions of the Bidder be able to continue trading in Company stock without violating the standstill. For instance, a broker-dealer, mutual fund, pension fund, or other Bidder with ongoing market trading activities may have a separate investment division separated by a so-called “Ethical Wall” to prevent leaks of confidential information. Such “Ethical Wall” exceptions are not unusual, provided the Company can be assured that the Bidder has an effective means to police and enforce the “Ethical Wall.”

In any event, the Company will not want the Bidder to acquire more than 5% of the Company’s stock, since that would normally trigger the filing of a Schedule 13D with the Securities and Exchange Commission, which in turn would require disclosure of the Bidder’s plans and purposes with respect to the Company and the Bidder’s contracts with respect to the Company’s shares (including the Confidentiality Agreement). This disclosure may put the Company “in play,” i.e., create public anticipation of a pending transaction and cause a run-up in the Company’s stock.

Note that the Bidder will, in any event, need to be sensitive to the requirements of federal securities laws restricting trading while in the possession of material inside information. Broker-dealers use “restricted lists” in order to avoid having trading personnel soliciting orders while investment banking personnel are in possession of inside information. If the Bidder already owns a substantial block of the Company’s securities, the Company may wish to restrict the disposition of that block since dispositions to a party not covered by a standstill agreement with the Company could destabilize the process through which the Company is soliciting bids.

Proxy Solicitations

The Company will typically also seek to prevent Bidders from attempting to acquire control of the Company through a proxy contest. Since the law concerning proxy solicitation is extremely fact specific, the Confidentiality Agreement may attempt to approach the subject in several ways: (i) by prohibiting “solicitations” of “proxies”; (ii) by prohibiting participation in a “group” or ; (iii) by prohibiting other action seeking to control or influence the management of the Company.
Timing of Proposals

The Company will typically seek to restrict the ability of the Bidder to make proposals concerning the types of transactions discussed above, as well as concerning transactions that by their nature could only be effected with the cooperation of the Company, such as mergers, recapitalizations and asset sales. Although the Bidder may question what interests of the Company are advanced by prohibiting the making of proposals without the Company’s consent, this is, in fact, one of the most critical aspects of a standstill in the context of an auction process for a public company. A variety of factors could force the Company to make a public disclosure of any proposal it receives concerning a change-in-control transaction (e.g., (i) previous disclosures of the Company may become misleading without such disclosure if the Company has not followed a strict “no comment” policy in the past or (ii) the Company may feel obligated to make an announcement if there is a sudden increase in market activity based on rumors).

Moreover, control over proposals gives the Company control over the auction process itself. The Company, through its financial advisors, will often circulate bidding guidelines governing the substance, timing and manner of submission of proposals. These guidelines enable the Company to maximize the competition among Bidders and thereby, hopefully, maximize the value of the bids. For example, setting a fixed deadline for bids may help neutralize any timing advantage enjoyed by one Bidder over another. These guidelines also can help ensure that the Company receives sufficient information with the bids to allow for their evaluation. The bidding guidelines can then provide that only bids which are submitted in accordance with the guidelines are deemed to be approved for purposes of compliance with the Confidentiality Agreement.

Restrictions on Requests for Waivers

The restrictions on proposals are most effective when coupled with a provision in which the Bidder agrees not to request any waivers or amendments of the standstill. These “don’t ask, don’t waive” provisions are intended to prevent a Bid-

der from getting around the purpose of the standstill by requesting the ability to “make a compelling offer.” A waiver request framed in those terms may put a board in a position where it feels compelled to grant the waiver in order to satisfy its fiduciary duties regarding maximization of shareholder value. Two recent bench rulings from the Delaware Court of Chancery confirm that care should be taken when employing “don’t ask, don’t waive” provisions and the importance that the board of directors be fully informed regarding the power of a “don’t ask, don’t waive” provision and the potential consequences of its use. In a November 2012 ruling on a motion to enjoin the acquisition of Complete Genomics, Inc. by BGI-Shenzhen, the Court ruled that the standstill agreement executed between the bidder and the target impermissibly limited the target board’s statutory and fiduciary obligations. Two weeks later, the Court clarified that “don’t ask, don’t waive” provisions are not per se illegal in Delaware and, accordingly, may continue to be used under the right circumstances and with the right process checks. If these provisions are included in the Confidentiality Agreement, the target board should revisit the appropriateness of maintaining them (and the desirability of waiving them) during the various stages of the sale process.

Including an exception to the standstill that allows a Bidder to make a confidential proposal to the Company’s Board once a change of control transaction has been publicly announced by the Company should address the concerns of the court with respect to “don’t ask, don’t waive” provisions.

Most-Favored Nation Clauses

A Bidder may sometimes request “most favored nation” status, that is, the right to get any preferential concessions granted to any other Bidder, with respect to, in particular, standstill provisions. The Company, on the other hand, can assert its need to respond flexibly to Bidders depending upon their individual circumstances. For example, if a Bidder already has commenced a tender offer for the Company, or the Bidder already has a significant block of the Company’s
securities, the Bidder may argue that it is entitled to special considerations in the negotiation of the standstill provisions. Additionally, if the Company agrees with one Bidder to a Confidentiality Agreement that contains an exception to the standstill for that Bidder’s existing tender offer, the Company arguably should not have to agree to waive its standstill with another Bidder merely because that other Bidder had obtained a most favored nation clause. For this reason, the Company will typically strongly resist all requests for most-favored nation status.

Miscellaneous Other Provisions

Acknowledgment of Prohibition Against Insider Trading

The Company may ask the Bidder to acknowledge its responsibilities in connection with federal and state securities laws prohibiting insider trading.

Note that the federal securities laws are not a substitute for a standstill provision in the Confidentiality Agreement. Under the federal securities laws, a Bidder could purchase or sell securities of the Company so long as the Bidder disclosed the material non-public information in its possession as part of the transaction. Also, not all confidential information that is obtained by Bidder will be material to the public. For example, Company projections may well be considered material to the public and, indeed, it is increasingly common for Bidder, if its bid is accepted, to include a summary of the projections in its disclosure to the Company’s shareholders. On the other hand, technical information, or financial information about individual units of the Company, may or may not be considered material (see “Disclosure of Negotiations” above).

No Definitive Agreement/Freedom to Change Process

Bidders are often requested to acknowledge that no obligations are incurred in connection with the possible transaction with the Company unless and until the parties sign a final definitive agreement and to waive, in advance, any claims in connection with such transaction until a definitive agreement is executed. In addition, the Company may seek from the outset to put Bidders on notice that any procedures established by the Company for submission of proposals for consideration by the Company may be terminated or changed without notice.

Data Site Provision

The Confidentiality Agreement may also provide that the terms of the Agreement supersede any of the boilerplate language that is customarily included in offering memoranda and when logging on to an electronic data room. This provision may also specify how the Bidder and its Representatives may access the data room, i.e., only during the normal course of business and only while complying with the terms of such data site. Additionally, the Company may insist that the Bidder maintain a list of those persons with access to the data site in order to monitor who may have access to the Company’s confidential information.

Enforcement of the Confidentiality Agreement

Equitable Relief/Specific Performance

The amount of monetary damages resulting from the public disclosure or use by a competitor of confidential information may be extremely difficult to ascertain. Further, monetary damages to the Company resulting from the violation of standstill provisions would be expected to be inadequate since these provisions are intended to prevent transactions that may be difficult to reverse once consummated. Accordingly, Confidentiality Agreements typically contain a paragraph stating that the parties agree that equitable relief (including specific performance) is an appropriate remedy for breach of the Agreement by the Bidder. On the other hand, specific performance is always at the discretion of the court. The principal effect of this clause, if any, is therefore to attempt to estop Bidder from arguing to the court that specific perfor-
mance is inappropriate. Note that Bidders sometimes object on the ground that the matter should be left to the equitable discretion of the courts.

**Jurisdiction**

The Company may wish to designate a particular jurisdiction for convenience in the event of any actions or other proceedings arising out of the Agreement. This may be particularly important when dealing with foreign Bidders. The Company may also seek to provide for indemnification in the event of any litigation regarding or arising from the Agreement. In addition, the Company may seek to clarify that a broad variety of persons (e.g., directors, officers, stockholders and, especially, the Company’s financial advisors) may have interests in the enforcement of the Confidentiality Agreement (particularly the exculpation clauses), and therefore the Company may seek to make such persons explicit third party beneficiaries.

**Survival of the Confidentiality Agreement**

There are a variety of approaches to the issue of whether the Confidentiality Agreement should set forth a specific term of its duration, should be silent as to its term, or should specify that some provisions survive negotiations while others do not. As discussed above, the standstill and nonsolicitation provisions will typically specify a term for which the Bidder will be subject to restrictions. Other provisions, such as the obligation to keep records of confidential information, may be perpetual or may expire after a stated number of years or upon a stated event.

The Company may be able to make a persuasive argument that certain proprietary information, e.g., “know-how” or “trade secrets,” has an indefinite life and remains proprietary until it is disclosed. So long as the information is proprietary, the Company may argue that Bidder should be prevented from disclosing or misusing it. Alternatively stated, it does not make sense to pick an arbitrary period of time after which the Bidder is permitted to disclose the Company’s proprietary information if, in fact, the information is still proprietary and valuable to the Company at that time. However, the Bidder may counter that such proprietary information is subject to rapid supercessions particularly in a “high-tech” industry. In such a case, Bidders may request that the Company notify them before providing such proprietary information, and that such proprietary information be labeled as such.

In attempting to limit the duration of the entire Agreement, the Bidder may argue that the Agreement should expire if the Company enters into an Agreement for a transaction with another Bidder or with itself. The Company can point out in response that if a transaction is consummated with another Bidder, that Bidder (i.e., the Company’s new owner) will want other Bidders to be prohibited from misuse of the Company’s confidential information. If the transaction is with the Bidder who is seeking a limited duration of the Confidentiality Agreement, the Company can point out that the definitive agreement between the Company and that Bidder can supersede restrictions in the Confidentiality Agreement, to the extent appropriate.

**Negotiations in the Context of Hostile Offers**

The process of negotiating Confidentiality Agreements in the context of an auction for a public company is complicated when there is an existing hostile tender offer by a Bidder who is not participating in the auction. The Bidder will typically litigate against the Company’s rejection of its offer. In addition, the Company’s stockholders often bring derivative suits against the Company’s board of directors challenging its actions. Both the hostile Bidder and the shareholders may argue in court that the board has a duty to make available to the Bidder the same information that is made available to the other auction participants, in order to enable the hostile Bidder to present its best price. Both the hostile Bidder and the shareholders may also argue that it is inappropriate for the Company to impose restrictions on the hostile Bidder that are more onerous than those imposed upon other auction participants. In this context, the Company must remember that any concession it makes when negotiating a Confidentiality Agreement with a friendly Bidder
may ultimately be required to be made in the Confidentiality Agreement with the hostile Bidder. The hostile Bidder therefore effectively may have most favored nation status.

Moreover, both the hostile Bidder and shareholders may argue that the Company should impose extremely limited, if any, standstill restrictions on the Bidder as a condition of receiving the information. The hostile Bidder can differentiate itself from the others in that it has already expended considerable time and money in putting an offer on the table for the shareholders to accept. The Company may have difficulty arguing that the Bidder should be forced to withdraw that offer in order to see if it can better it.

NOTES
6. For sample bidding guidelines, see Takeover Defense, Exhibits 82, 82A, 82 B, 82C and 82D.
9. See generally Takeover Defense, Ch. 14 for a discussion of the “level playing field doctrine” when selling a company.