



## Newsletter January 2015

*NDA's carry potential legal exposure and should never be signed without thorough review or negotiation. In this newsletter, learn the key things to consider when signing a NDA.*

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MobileSolve is a boutique investment bank providing M&A, capital raising and financial advisory services to companies in the wireless and semiconductor industries.\*

Each month we present a short article on an industry or transaction topic of current interest, and notable transactions in the mobile and semiconductor industries completed during the prior month.

This month's newsletter is on NDAs. We welcome any questions or comments you may have.

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### DON'T SIGN THAT NDA!

By [Steve Gaynor](#) and [Neeraj Baghel](#)

Yes, that's right, do *not* sign that NDA ("Non-Disclosure Agreement" also referred to as the "Confidentiality Agreement") until you have thoroughly reviewed and negotiated it. Too often parties contemplating a transactional or personal relationship perfunctorily sign an NDA thinking of it as a relatively harmless document that preserves everyone's confidentiality. Instead, the NDA should be treated for what it is; that is, an agreement as significant as any other giving you legal rights, but also creating legal obligations that carry potential legal exposure.

First, one should consider whether an NDA should be signed at all or not at the present time. Consider the example of a sell-side advisor in a large transaction who uses the NDA to shape the coalitions he desires among the potential buyers to form buying syndicates. Sell-side advisors will use buyer coalitions to reduce buyers' risks, and to pool their resources in certain combinations that may enhance the transaction value.

Once a buyer signs the NDA, the advisor's permission is required to discuss the transaction with other potential buyers, leaving that buyer's options wholly within the control of the seller's advisor. In this example, the buyer may be better off delaying signing the NDA so it is free to form its own syndicate, even at the expense of temporarily not receiving the seller's confidential information.

Second, one should consider whether the NDA should be mutual or unilateral. Mutual NDAs are routinely sent once again under the theory they are relatively innocuous documents, so let everyone sign and move on with it. But why be unnecessarily legally exposed to a party such as a financial buyer who will not be sharing confidential information? Sign a unilateral NDA instead.

Another way to think about this issue is to consider the nature of the counter-party. A financial investor such as a venture capitalist or buyer such as a private equity fund will most likely not be disclosing their confidential information, so a unilateral NDA is suitable. In contrast, a sale of securities to a strategic buyer such as another company in the industry or sale of the company to a competitor may very well involve a

two-way exchange of information, making the mutual NDA more appropriate.

When it comes to negotiating the NDA itself, pay careful attention to the approach of the other party. Much can be learned from this initial exchange of documentation with respect to their flexibility, negotiating style and internal legal process, which of course will be part of the subsequent investing or transaction process.

At the start of negotiations, one often hears "our NDA is standard," or "making changes will cause substantial delay." While such pronouncements may be true, especially for larger companies that attempt to reduce their risks by standardizing the large number of NDAs they sign, nevertheless, treat them as a ruse to limit your negotiating aggressiveness, and brush them aside.

Negotiation of the NDA typically is centered on a few significant clauses, though nothing should be ignored. Of course, "the devil is in the details" when it comes to legal documents, and the specific wording of each section must be reviewed. The following is an overview of certain key terms.

### The Definition of "Confidential Information"

Of course the disclosing party wants a broad definition of what is confidential and does not want to be obligated to mark as confidential every document supplied, and the receiving party wants the opposite. Usually the most productive way to proceed is to base the definition on the specific circumstances of the contemplated transaction. The defined scope usually includes the documents provided and oral conversations, and the materials derived from both such as notes, analysis and documents developed by the receiving party.

Some information is explicitly excluded from the definition so as to cause it to fall outside the scope of the NDA. The typical exclusions are publicly available information, information known prior to receiving it from the disclosing party or received from a third party on a non-confidential basis, and information that must be disclosed to comply with law or regulation.

On the last point, the disclosing party should require the receiving party to immediately notify it when the latter believes disclosure is required, to disclose only what is specifically required by the legal order, and to assist it in taking appropriate action to limit the disclosure in any legal or administrative proceeding.

### The Use of the Confidential Information

How the receiving party uses the confidential information should also be tailored to the specific circumstances of the situation. This is often referred to as the "Purpose" in many NDAs. For example, in an acquisition transaction, the use of confidential information should be limited to the evaluation of the subject of the transaction.

Amend an existing NDA if necessary to cover a new situation. Often a seller and a buyer in an acquisition have an existing commercial relationship, and a NDA that covers their commercial relationship, but not a potential transaction.

The disclosing party should ask to execute a new NDA or to amend the existing one to cover evaluation of a transaction, or else certain disclosures of a highly sensitive nature such as financial statements not normally disclosed in a commercial relationship but disclosed in due diligence related to a transaction may, a lawyer would argue, fall outside the scope of the existing "commercial" NDA.

### Term of Confidentiality

Not surprisingly, the term agreed in a NDA can differ greatly depending on the circumstances. Of course disclosing parties prefer relatively long time periods, as much as three to five years, and can often get it when the transaction is strategic rather than financial, so both sides are making disclosures, and a mutual NDA is being signed.

Relatively long terms are rare, however, in transactions involving investors or financial buyers such as private equity funds. If the deal does not occur, then they are left with legal exposure to a transaction that

did not happen, which may subtly or manifestly inhibit their ability to look at other transactions in that industry. Do not expect them to agree to a term of more than two years, and sometimes less. Of course, many professional investors will not sign a NDA at all because of the potential legal exposure from reviewing several companies with similar technologies.

A helpful benchmark to consider is the useful life of the information being disclosed. In our fast-paced technology based industry, few new technologies, processes or business models have a useful life of more than two years. A sober estimate of the life of the technology may yield a realistic number that can be defended and more easily agreed by the opposing party.

## Permitted Recipients of Confidential Information

The NDA should define - and limit - the persons with whom the confidential information may be shared. Obviously, the more people with access to the confidential information, the greater the likelihood an unauthorized disclosure will occur.

Employees are always included among those who may access confidential information, but sometimes they are restricted to a certain seniority level or a "need to know". Difficulties sometimes arise with financial parties who must involve a seemingly large number of outside parties such as lawyers, consultants, accountants and financiers to evaluate, conduct due diligence, complete and finance a transaction. They are usually collectively referred to as "Representatives" in the NDA. This understandably creates apprehension in a seller of a private company.

In these cases, it is necessary to make the receiving party obligated to inform the Representatives of the confidential nature of the information being disclosed to them and the limits of how such information may be used, and to require they sign the same or similar confidentiality agreement. A strongly worded clause will make the receiving party legally exposed to any unauthorized disclosures or use of information by its Representatives, and motivate it to transfer that risk to its respective Representatives through its own NDA with them. That will reinforce the highly confidential nature of the disclosures to the Representatives.

## Other Terms

Briefly, other important terms deserving special attention include:

- Governing law: Select a jurisdiction with favorable case law depending on whether you are the disclosing or the receiving party;
- No solicitation of employees: Each party agrees not to solicit the employees of the other, though an exception should be made for recruiters unaware of the NDA;
- No contacting employees not directly involved in the negotiations or due diligence related to the contemplated transaction: this should be a blanket prohibition without exception;
- Remedies in cases of breach: determine whether the disclosing party should be allowed to pursue injunctive relief in equity as an alternative to monetary damages, and under what terms such as not having to post a bond. An example is a breach that can cause immediate commercial or financial harm;
- Return or destruction of confidential information: this is standard, but an exception will often have to be made for regular archiving of materials received, which many companies and professional firms regularly do.

In conclusion, do not lightly treat the NDA, but consider it as you would other legal agreements that create legally binding rights and obligations. Do *not* sign that NDA until you have consulted your legal advisor, or are confident in your ability and experience to address these important issues.

***Disclaimer:*** This article is offered for informational purposes only, and the content should not be construed as legal or financial advice on any matter.

## More Articles

In case you missed any of our previous articles, below are the links to them.

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[Foreign Issuers in the US Capital Markets](#)

[Strategic Investments](#)

[Strategies to create value from IP](#)

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Comments and Questions on the above articles are welcome.

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## Transactions

The following are the most notable M&A transactions and Capital Financings announced or completed in the last month. We would love to hear your thoughts on the below transactions and the way you think they will shape the industry dynamics.

### Most Notable M&A Transactions

Target	Target Industry	Acquirer	Transaction Value (in \$ millions)	Transactions Highlights
Access A/S	Network Communications	Atea ASA	53	Atea ASA entered into agreement to acquire Access A/S which delivers network solutions to Danish enterprises.
Cibando	Mobile Apps	Zomato Media	-	Zomato Media agreed to acquire Cibando which develops applications for iPhone that enables users to find restaurants in Italy.
JiGrahak Mobility Solutions (P) Ltd.	Mobile Payments	Next Generation Payments	-	Next Generation Payments agreed to acquire JiGrahak Mobility Solutions from Flipkart. JiGrahak offers ngpay, a mobile application that enables users to buy and pay for items by using their mobile device.
MixRadio	Mobile Apps	LINE Corporation	-	LINE Corporation signed a definitive agreement to acquire MixRadio from Microsoft Corporation. MixRadio comprises a personal music streaming mobile application.
Mobile Commons	Mobile Marketing	Upland Software	10	Upland Software signed a definitive agreement to acquire Mobile Commons which operates as a mobile marketing platform.
Neohapsis	Mobile Security	Cisco Systems	-	Cisco Systems announced intent to acquire Neohapsis, Inc. which provides mobile and cloud security services.

Octoblu	M2M	Citrix Systems	-	Citrix Systems acquired Octoblu, which develops a machine-to-machine cloud-based platform for real-time connections and communications management.
RadioAccess	Network Communications	Koning & Hartman B.V.	-	Koning & Hartman signed a contract to acquire RadioAccess, which provides network products and services for mobile communication.
Shenzhen Daoxi Technology	Mobile Gaming	Xiamen 35.Com Technology	134	Xiamen 35.Com Technology agreed to acquire Shenzhen Daoxi Tech, which develops web and mobile games in China.
Spansion Inc.	Semiconductors	Cypress Semiconductor	2,182	Cypress Semiconductor acquired Spansion, which designs, manufactures, develops, and sells embedded systems semiconductors worldwide.
Utiba Mobility	Mobile Payments	Amdocs Limited	-	Amdocs Limited acquired Utiba Mobility, which provides integrated mobile financial services software solutions.
Wireless Maingate	M2M	Sierra Wireless	90	Sierra Wireless entered into a definitive agreement to acquire Wireless Maingate, provider of M2M communication solutions.
Zenverge, Inc.	Semiconductors	Freescale Semiconductor	-	Freescale Semiconductor acquired Zenverge which is a fabless semiconductor company developing content networking ICs for service operators.

### Most Notable Capital Financings

Company Name	Industry	Amount Raised (in \$ millions)	Total Amount Raised (in \$ millions)	Business Description
Adelphic, Inc.	Mobile Advertising	11	23	Adelphic, Inc. provides mobile and cross-channel programmatic advertising platform.
CellTrust	Mobile Secure Communications	11	11	CellTrust engages in the provision of mobile communication security and secure mobile information management solutions.
InVisage Technologies	Semiconductors	33	51	InVisage Technologies, Inc. operates as a fabless semiconductor company.
Jana Mobile	Mobile Top-up	13	37	Jana Mobile provides a mobile technology platform that connects market consumers with different brands using mobile airtime.
Kamcord	Mobile Gaming	15	28	Kamcord, Inc. develops mobile gameplay recording and sharing platform.
NowSecure	Mobile Security	13	13	NowSecure provides enterprise mobile security products and services
Open Garden, Inc.	Mobile Communications	11	13	Open Garden provides mobile app FireChat, which enables people to send and receive messages and photos even when no Internet connection or cellular phone coverage are available.
Playdots	Mobile Gaming	10	10	Playdots provides mobile game application
Prairie Cloudware	Mobile Payments	3	5	Prairie Cloudware, Inc. provides mobile payment technology.
Quantenna Communications	Semiconductors	22	197	Quantenna Communications, Inc. develops semiconductor solutions for the next generation of ultra-reliable, Wi-Fi networks.
Snapchat	Mobile Apps	486	634	Snapchat, Inc. engages in the development of a photo messaging application for mobiles.

Space Ape Games	Mobile Gaming	7	10	Space Ape Games develops mobile and tablet games
Triotech Solutions	Mobile Payments	3	3	Triotech provides Value Added Services, mobile commerce service delivery and software solutions
Uber Technologies	Mobile Apps	1,200	2,811	Uber Technologies engages in the development of a mobile application enabling users to request for-hire transportations.
Xiaomi	Mobile Device Manufacturer	1,100	1,450	Xiaomi manufactures smart phones.

**STAY CONNECTED**

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