

THE OKLAHOMAN

Confidential agreements typically valid 2 to 5 years

by [PAULA BURKES](#) Fri, November 30, 2018



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Q: Why are confidentiality agreements used?

A: Confidentiality agreements (CAs) provide that certain information is confidential and how that information may be used (e.g., the evaluation of a proposed transaction). CAs may be entered for many reasons, including the protection of trade secrets, compliance with prior agreements, the avoidance of confusion over what is considered to be confidential, or compliance with applicable laws in many types of transactions, including the sale of a company. While CAs are a helpful tool to protect information, they are not foolproof. If confidential information is wrongfully disclosed, it cannot be “undisclosed” and monetary damages may not be adequate, although injunctive relief is often a remedy.

Q: When should CAs be entered?

A: A disclosing party should ensure that a CA is in place before disclosing any confidential information to another. If that is not possible, the disclosing party should ensure that the CA covers all prior disclosures. If a term sheet for an acquisition is negotiated after the execution of a CA, the term sheet should provide that nothing in the term sheet supersedes the terms of the CA.

Q: Is the CA limited to its parties?

A: The recipient will often want its representatives (attorneys, accountants, business advisers and financing sources) to have access to this information during due diligence and negotiation of a definitive agreement. The disclosing party should try to limit the sharing of confidential information on a “need to know” basis. Typically, the disclosing party asks the recipient to be responsible for unauthorized disclosures by its representatives.

Q: What constitutes confidential information?

A: Disclosing parties typically seek the broadest definition of confidential information, including information shared in all formats and information not expressly labeled “confidential” when

produced. Confidential information includes: information relating to the disclosing party's business; reports, summaries and other materials derived from such information; and the existence of the negotiations between the parties. However, confidential information usually excludes information which is generally available to the public, from an unrelated source, independently developed by or was already in the hands of the recipient or required by law to be disclosed. Disclosing parties must be careful not to disclose information that is restricted by its other agreements.

Q: What is the typical term for CAs?

A: The term should be specified, depending on the sensitivity of the information. For instance, the recipient's obligations as to trade secrets may remain in effect indefinitely or for as long as they remain trade secrets under applicable state law. Other information may be subject to confidentiality anywhere from two years to five years generally. CAs should require the recipient to return or destroy the information once the process has ended (or at some other specified time).

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