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Avoid Three Common Pitfalls in Your Next NDA

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If you run a company, you have probably had many requests from a potential business partner to sign a non-disclosure agreement (NDA). The NDA may be a short document, containing what appears to be just a few pages of legal boilerplate, and the other party may assure you that this is their “standard” form. While a typical NDA may look innocuous enough, you shouldn’t assume that it will give complete protection to the sensitive information you may be revealing, and the NDA may restrict you in ways you didn’t expect. This article describes some terms that companies should be on the lookout for when asked to sign an NDA.

- **“Residuals” clauses.** While NDAs typically contain a broad restriction on use of the other side’s confidential information, an NDA will sometimes contain a “residuals” clause that allows a party to use information that its personnel retain in their unaided memory. By allowing the use of data retained in this manner, a “residuals” clause can undermine the basic protections of the NDA.
- **Is the existence of the NDA itself a secret?** Sometimes an NDA will provide that the existence of the NDA itself constitutes confidential information that cannot be disclosed. For example, a high-profile company may not want an early-stage company broadcasting that the two companies are exploring a possible partnership. This restriction can place a company in an awkward “catch-22” if it is required to disclose its NDAs to a potential investor or acquirer as part of a diligence process or in a disclosure schedule; the company may have to choose between breaching the NDA in order to disclose it, or failing to comply with the diligence requests or disclosure obligations with respect to a potential investor or acquirer.
- **The “mutual” NDA that really isn’t.** A potential business partner may ask you to sign its standard form of NDA, which will be titled as a “mutual” NDA. While most of the provisions may in fact apply to both sides equally, a close read often reveals some one-sided provisions in favor of the company that drafted the NDA. For example, they may allow themselves to retain a copy of your confidential information for their records, or impose asymmetrical restrictions on your use of their confidential information. A company should not assume that a “mutual” NDA is completely even-handed, and should be alert for terms that just apply to one party.

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