

CLEAN TEAM AGREEMENTS: THE ANSWER BEHIND SAFEGUARDING CONFIDENTIALITY IN AN INCREASINGLY COMPETITIVE WORLD?

In the world of mergers and acquisitions (“**M&A**”), where sensitive information can make or break a deal, confidentiality is key. Clean Team Agreements, though perhaps less familiar to the public eye, play a crucial role in safeguarding this confidentiality. These agreements establish a framework for the exchange of competitively sensitive information between parties involved in a transaction, ensuring that proprietary data remains protected throughout the transaction. In this article, we delve into the significance of Clean Team Agreements and their role in the M&A landscape.

What is a Clean Team Agreement (“CTA”)?

In general, a CTA is an agreement which is typically executed upon the commencement of negotiations in an M&A transaction between competitors, or other transactions which may involve divulging competitively sensitive information. A CTA allows the seller to disclose competitively sensitive information during the transaction while minimising the risk of the misuse of such information.

What is the Purpose of the CTA?

Prior to the disclosure of any confidential information for the purpose of a due diligence exercise, the parties to a proposed M&A transaction will typically sign a non-disclosure agreement (“**NDA**”). The NDA serves as a first layer of protection which safeguards the confidential information disclosed by one party to the other for the purpose of the transaction. An NDA usually governs the following matters:

- (a) the scope of confidential information;
- (b) the obligations of the receiving party in respect of the usage of the confidential

information;

(c) the prohibitions against the disclosure, publication or misuse of the confidential information; and

(d) the legal remedies for breach of the confidentiality obligation.

A CTA serves as a second layer of protection which provides an additional safeguard to ensure that any competitively sensitive information disclosed during the due diligence exercise preceding a transaction is not misused or taken advantage of by a competitor who is also a party to the M&A transaction.

It is also important to note that the CTA is not a substitute for the NDA. The parties to a transaction would usually enter into an NDA at the very outset of the negotiation process prior to the disclosure of any confidential information and documents. In addition to the NDA, the parties may also consider entering into a CTA if the parties wish to exchange competitively sensitive information for the purpose of the negotiation of the transaction.

By clearly outlining the obligations and liabilities of each party regarding the handling of competitively sensitive information, CTAs provide a framework for resolving disputes and enforcing accountability in the event of a breach.

A CTA helps to protect the interests of the parties involved in the transaction and also enhances the overall credibility and integrity of the transaction process.

Unlike an NDA which may allow confidential information to be accessed by the receiving party's employees, officers, and directors, a CTA normally allows competitively sensitive information to be disclosed to a small group known as a 'Clean Team' only. The members of the Clean Team typically comprise external advisors, consultants and individuals who are not involved in the day-to-day operation of the buyer.

In essence, the CTA limits and protects the disclosure of competitively sensitive information especially if the M&A transaction does not materialise. The components of a CTA are further discussed below.

Assembling the 'Clean Team'

Generally, it is preferable to have an impartial third party such as external legal counsels and financial advisers to be a part of the Clean Team. In addition, the Clean Team may also include a small number of the buyer's employees who do not perform the day-to-day operational tasks. The external advisers may be useful as they may have the experience and expertise in examining and evaluating business operations who would then be able to report their analysis of the competitively sensitive information.

Each Clean Team member shall be identified and be bound by the duty to maintain the confidentiality of any information released under the CTA. The details of the Clean Team members shall be listed in the CTA. The Clean Team members are also bound to not share any competitively sensitive information with anyone who is not a Clean Team member.

Role of the Clean Team

The Clean Team members' main role is to assess, filter, and remove any competitively sensitive information from the stream of information flowing from the seller to the buyer. One possible method is by redacting certain information which is considered competitively sensitive from the documents that the seller discloses to the buyer for the purpose of the due diligence exercise. Another way would be for the Clean Team to examine, analyse and evaluate the competitively sensitive information and present a summary report to the buyer's boards and/or management without revealing the competitively sensitive information.

Establishing a 'Clean Room'

In order to avoid a mixture between the competitively sensitive information and other confidential information disclosed by the seller to the buyer, it is advisable for a separate virtual data room dubbed as a 'Clean Room' to be created.

The Clean Room should only be accessed by the Clean Team, and no other employees and individuals from the buyer's side shall have access to the information released into the Clean Room.

What Amounts to Competitively Sensitive Information?

There is no one-size-fits-all definition for the phrase 'competitively sensitive information' as it varies from industry to industry. The key consideration would be that information is highly likely to be competitively sensitive information if the disclosure of such information would reduce uncertainty about the future market behaviour of a competitor in a relevant market.

Depending on the industry concerned, some examples of competitively sensitive information would include the number of sales, production costs, marketing plans, investments, technologies, employees' salaries, prices of the products, sales strategies, customers and suppliers including the details of the contracts with customers and suppliers, and the prices and volumes.

Conclusion

In the fast-paced world of M&A, where sensitive information is currency, CTAs serve as

indispensable tools for preserving confidentiality, facilitating due diligence, building trust, and mitigating risks. By establishing clear guidelines and safeguards for the exchange of confidential information, these agreements contribute to the smooth and efficient execution of M&A transactions while safeguarding the interests of all parties involved.

As the M&A landscape continues to evolve, CTAs will likely remain as essential components of a successful and secure deal-making process.

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