

Protecting Your Company's Confidential Information

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- **Protecting Proprietary Information**
- **What to Guard Against**
- **Restrictions on Disseminating Information**
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- **Ownership, Warranties, and Disclaimers**

Includes Sample Confidentiality and Nondisclosure Agreement

Proprietary Information to Protect

- Business Records and Plans
- Financial Statements and Tax Returns
- Accounting Systems, Controls, and Budgets
- Customer, Supplier, and Mailing Lists
- Marketing Plans and Sales Information
- Employee and Independent Contractor Agreements
- Production and Operating Procedures
- Trade Secrets, Trade Names, Trademarks, Copyrights, and Patents
- Products, Designs, and Inventions
- Intellectual Property and Technical Information
- Any Confidential Information

Protecting Your Company's Privileged Information

The situation: A business owner was negotiating the sale of his company to another company, a competitor in the same industry, which wanted to expand its sales geographically to the states covered by the seller. The deal never closed.

The problem: The potential buyer never signed a Confidentiality Agreement nor did the seller request the return of or even keep track of the sensitive information provided to the potential buyer in contemplation of the sale.

The result: The prospective buyer is now in direct competition with the prospective seller, using the seller's own customer list and the detailed knowledge, gained during the failed negotiations, of the seller's sales by product line, its marketing plan, facilities, officers, salespeople, etc.

How to Avoid This Problem

When distributing sensitive information on your company, such as financial statements, customer lists, tax returns, marketing or business plans, etc., have each recipient sign a Confidentiality Agreement. This precaution applies to potential executives and investors, consultants, advisers, lenders, and buyers of the company, particularly those who currently are competitors or sell within the same industry. You don't want sensitive, proprietary, or confidential company information getting wide circulation or being used against you.

If a formal Confidentiality Agreement seems excessive, at least put each recipient of the information on *written notice* by including the following provisions in a cover letter accompanying the information.

- All information is confidential and cannot be disclosed, copied, summarized, or distributed to any individual or entity *without* prior written permission.
- All information must be returned within 15 days of a written notice.
- All information is proprietary and owned exclusively by the company.

- Any company projections are only estimates; the actual results could differ substantially.

If you do decide to go the Confidentiality Agreement route, review the sample agreement starting on the next page. Use it to educate yourself on the general outline and terms of such agreements, but don't use it as a substitute for drafting your own agreement. You need to consult with your lawyer in adapting this sample to fit your company's special needs and circumstances. *Note:* **ABC** is the potential buyer; **Porter** is the potential seller.

Please also note that this sample Confidentiality and Nondisclosure Agreement covers all *individual* recipients and users of the confidential information, not just the company represented by those individuals. That's very important to include in the agreement since individuals violate contracts as easily and as often as business entities.

Some lawyers and owners consider confidentiality agreements pointless because it's difficult legally to stop the use of information — however sensitive — once it has been accessed. That may be so, but a formal agreement does at least put individuals and companies on *written* notice that they have agreed to the restrictions and are expected to refrain from using confidential information except for the purposes outlined in the agreement. A formal agreement also holds out the threat of possible future legal action against those who improperly use the confidential information.

Sample Confidentiality and Nondisclosure Agreement — please see the following pages.

You don't want sensitive company information getting wide circulation or being used against you.

Confidentiality and Nondisclosure Agreement

ABC Corporation of Houston, Texas (“ABC”) and Porter Electronics, Inc. of Hackensack, New Jersey (“Porter”) intend to engage in discussions to explore the possible acquisition of Porter by ABC for its assets or stock or sale, exchange, or other business combination (collectively, ABC and Porter are referred to as the “Participants”). In the course of these discussions Porter may provide ABC with access to, or ABC may become acquainted with, Confidential Information, which knowledge will be essential to any proposed consummation of a business transaction between the Participants.

In connection with such Confidential Information, ABC and Porter agree as follows. *Note:* The introductory heads were added to facilitate your understanding and future reference.

1. Definition: “Confidential Information” means any information relating to Porter’s business, finances, or operations, which is not already in ABC’s possession or is not public knowledge at the time of disclosure, including, but not limited to, all financial information, statements, schedules and reports, except that Confidential Information shall not include information which subsequently becomes public knowledge through no action attributable to ABC.

2. Dissemination: ABC agrees not to use, reproduce, divulge, disclose, disseminate, publish, reveal, or otherwise communicate, directly or indirectly, in whole or in part, at any time or in any manner, whether during or after involvement with Porter, any Confidential Information without the prior *written consent* of Porter, nor shall ABC permit any of its representatives, or any third person acting for or on its behalf to any of the foregoing. If, at any time, either Participant becomes aware of any such unauthorized use, disclosure, dissemination, or communication, or any threat thereof, it shall immediately notify the other Participant, which notice shall specify the person(s) and circumstances relating to such unauthorized use, disclosure, dissemination, communication, or threat.

3. Ownership: All Confidential Information is the exclusive property of Porter and may not be reproduced, copied, summarized, or used by ABC except in connection with evaluating the contemplated business transaction between the Participants. Any such Confidential Information received from Porter shall be

immediately returned to Porter within 10 business days of written notice, which demand may be made at any time or times.

4. *Limitation on Use:* ABC shall not use any of the Confidential Information disclosed to it for any other purpose whatsoever except for the purpose of acquiring Porter.

5. *Coverage:* ABC shall inform its employees and representatives who have or may have access to knowledge of the Confidential Information of the provisions of this Agreement, and shall require each such person to comply with the terms of this Confidentiality and Nondisclosure Agreement.

6. *Printed Notice:* For review and distribution of the Confidential Information to ABC's employees, executives, board members, and all others, ABC agrees to mark or label the Confidential Information in compliance with Porter's instructions, if any, and to maintain and comply with any marks or labels placed upon the Confidential Information.

7. *Admission to Facilities:* Prior to admitting any of ABC's employees or other representatives onto Porter's premises, Porter shall have the right to require any such person to execute and deliver to Porter a copy of this Agreement. If such person fails, neglects, or refuses to execute and deliver such Agreement to Porter, Porter shall have no obligation or duty to admit such person onto its premises.

8. *Transfer of Rights:* Nothing contained in this Agreement shall be construed as granting or conferring any rights by license or otherwise, expressly, implied, or otherwise for any invention, discovery or improvement made, conceived, or acquired prior to, on or after the date of this Agreement.

9. *Warranties:* ABC acknowledges and agrees that the Confidential Information is provided on an *as is* basis. Porter makes no representations and warranties, expressed or implied, with respect to the Confidential Information.

10. *Disclaimer:* ABC acknowledges that Porter shall not be liable for any direct, indirect, or consequential damages in connection with or arising out of the performance or use of any portion of the Confidential Information.

11. *Relationship of Parties:* This Agreement does not create any agency, partnership, joint venture, or any other relationship.

12. All Inclusive: This Agreement sets forth the entire understanding and agreement between the parties hereto as to the subject matter of this Agreement and merges and supersedes all previous communications, negotiations, warranties, representations and agreements, either oral or written, with respect to obligations of confidentiality of the subject matter hereof.

13. State Law: This Agreement shall be construed in accordance with the laws of the State of New Jersey. If any action is brought for the enforcement of, or to declare either Participant's rights or obligations under this Agreement, the successful or prevailing party shall be entitled to recover its attorney's fees and other costs incurred in connection with any such action in addition to any other relief to which such party may be entitled.

14. Future Changes: Any amendments, additions, or modifications to this Agreement must be in writing and signed by each Participant.

15. Legality: This Agreement shall be deemed legally binding when signed and delivered by each Participant.

ACCEPTED AND AGREED:

ABC Corporation

Porter Electronics, Inc.

By: _____

By: _____

Date: _____

Date: _____

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