

Confidentiality Agreement: General (Short Form, Unilateral, Pro-Discloser) (PA)

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A short-form unilateral confidentiality agreement for general use in connection with commercial transactions under Pennsylvania law, drafted with terms favorable to the party disclosing confidential information. This Standard Document has integrated notes with important explanatory drafting and negotiating tips.

DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

Parties to a potential commercial transaction often use a confidentiality agreement (also known as a nondisclosure agreement or NDA) to:

- Preserve the confidentiality of the disclosing party's sensitive information.
- Restrict the recipient's use of the disclosing party's confidential information except for limited purposes that are expressly permitted under the agreement.
- Protect the confidential nature of the potential transaction and the discussions they are holding.

Sometimes, both parties are disclosing and receiving confidential information. In other situations, only one party is disclosing confidential information (although both parties may be concerned about protecting the confidentiality of their discussions and any potential deal terms).

This Standard Document is a short-form unilateral confidentiality agreement under Pennsylvania law that is drafted in favor of the disclosing party. It can be used for many types of commercial transactions

that support the use of a short-form agreement.

For a sample of a more comprehensive pro-discloser, unilateral general confidentiality agreement, see Standard Document, Confidentiality Agreement: General (Unilateral, Pro-Discloser) ([9-501-6497](#)). For a sample of a short-form unilateral general confidentiality agreement drafted in favor of the recipient, see Standard Document, Confidentiality Agreement: General (Short Form, Unilateral, Pro-Recipient) ([3-532-3908](#)). For more information on confidentiality agreements and overall protection of confidential information, see Practice Note, Confidentiality and Nondisclosure Agreements (PA) ([w-007-8132](#)).

ASSUMPTIONS

This confidentiality agreement assumes that:

- **This agreement is governed by Pennsylvania law.** If the law of another state applies, this agreement may have

to be modified to comply with the laws of the applicable jurisdiction.

- **The parties to the agreement are US entities and the transaction takes place in the US.** If any party is organized or operates in a foreign jurisdiction, or if any part of the transaction takes place in a foreign jurisdiction, this agreement may need to be modified to comply with applicable laws in the relevant foreign jurisdiction. For examples of a confidentiality agreement that may be used when one or both of the parties are non-US entities or if the transaction takes place outside of the US, see Confidentiality Agreement (US-Style, Unilateral, Pro-Discloser): Cross-Border Commercial Transactions and Confidentiality Agreement (US-Style, Mutual): Cross-Border Commercial Transactions ([w-002-9375](#)).
- **There are a single disclosing party and single recipient and this agreement is being used in a business-to business transaction.** This Standard Document should not be used in a consumer contract, which may involve legal and regulatory requirements and practical considerations that are beyond the scope of this resource. This Standard Document also should not be used in the employment context, as that may involve other requirements and practical considerations that are beyond the scope of this resource. The parties should also revise this agreement if it involves more than one disclosing party or more than one recipient, for example, to determine whether the obligations between each recipient are joint, several, or joint and several (see Standard Clauses, General Contract Clauses: Joint and Several Liability (PA)) ([w-000-0418](#)).
- **This is a unilateral agreement, which assumes that only one party is disclosing confidential information.** This agreement should not be used if both parties are likely to be disclosing confidential information (see Standard Documents, Confidentiality Agreement: General (Mutual) ([1-501-7108](#)) and Confidentiality Agreement: General (Short Form, Mutual) (PA)) ([w-007-8135](#)).

- **This agreement is being used for a single discrete project, with all confidential information disclosed shortly after the execution of the confidentiality agreement.** This agreement must be revised if:

- the parties desire to enter into a confidentiality agreement that covers multiple projects; or
- confidential information is being disclosed over an extended period of time.

(See, for example, Section 7 and its related drafting note.)

- **This agreement is not industry- or deal-specific.** This Standard Document does not account for any industry- or deal-specific laws, rules, or regulations that may apply to certain transactions, products, or services. An employer seeking to address its employees' confidentiality and other work-related obligations should use Standard Document, Employee Confidentiality and Proprietary Rights Agreement (PA) ([6-607-8570](#)) instead of this document.
- **This is a short-form agreement that does not include certain types of pro-discloser provisions.** This short-form agreement does not include certain types of provisions that a party disclosing confidential information may try to include (for example, recipient representations and warranties, audit rights, or a recipient indemnification (or attorneys' fees provision)). For a sample of a more comprehensive pro-discloser unilateral general confidentiality agreement, see Standard Document, Confidentiality Agreement: General (Unilateral, Pro-Discloser) ([9-501-6497](#)).

BRACKETED ITEMS

Bracketed items in ALL CAPS should be completed with the facts of the transaction. Bracketed items in sentence case are either optional provisions or include alternative language choices, to be selected, added, or deleted at the drafter's discretion.

Confidentiality Agreement

This Confidentiality Agreement (the “**Agreement**”), dated as of [DATE] (“**Effective Date**”), is between [DISCLOSING PARTY NAME], a [STATE OF ORGANIZATION] [ENTITY TYPE] located at [ADDRESS] (“**Disclosing Party**”), and [RECIPIENT NAME], a [STATE OF ORGANIZATION] [ENTITY TYPE] located at [ADDRESS] (“**Recipient**”).

DRAFTING NOTE: PREAMBLE

The preamble should include the full name, business address, entity type, and applicable state of incorporation or organization of each party. Each party should include an accurate street address because, in this short-form agreement, Section 11 provides that notices are sent to the counterparty’s address stated in the

preamble (instead of specifying a separate notice address). The disclosing party should ensure that the effective date is correctly identified because the term of the recipient’s confidentiality obligations is defined as a specified period of time following the effective date (see Section 7).

1. In connection with [DESCRIPTION OF PURPOSE] (the “**Purpose**”), Disclosing Party may disclose to Recipient, or Recipient may otherwise receive access to, Confidential Information (as defined below). Recipient shall use the Confidential Information solely for the Purpose and, subject to Section 3, shall not disclose or permit access to Confidential Information other than to its [affiliates and its or their] employees[, / and] officers[, directors][, shareholders] [, partners] [, members][, agents][, consultants][, contractors][, managers][, attorneys][, accountants] [, and] [financial advisors] (collectively, “**Representatives**”) who: (a) need to know such Confidential Information for the Purpose; (b) know of the existence and terms of this Agreement; and (c) are bound by [written confidentiality agreements/confidentiality obligations] no less protective of the Confidential Information than the terms contained herein. Recipient shall safeguard the Confidential Information from unauthorized use, access, or disclosure using at least the degree of care it uses to protect its most sensitive information and no less than a reasonable degree of care. Recipient shall promptly notify Disclosing Party of any unauthorized use or disclosure of Confidential Information and [take all reasonable steps/use its best efforts/cooperate with Disclosing Party] to prevent further use or disclosure. Recipient will be responsible for any breach of this Agreement caused by its Representatives.

DRAFTING NOTE: DISCLOSURE AND USE OF CONFIDENTIAL INFORMATION

The recipient’s obligations regarding the use and protection of confidential information are central to any confidentiality agreement. Section 1 is a short-form pro-discloser provision that:

- Broadly prohibits disclosure of confidential information except to the recipient’s “Representatives” (see Defining Representatives) that satisfy certain conditions.

- Restricts use of the confidential information by the recipient and its representatives to the potential transaction.
- Requires the recipient to protect the confidential information from unauthorized disclosure using the same degree of care it uses to protect its own most sensitive information (and using no less than a reasonable degree of care).

- Requires the recipient to:
 - timely notify the disclosing party of any unauthorized use or disclosure of confidential information; and
 - take specified actions (selected from the bracketed alternatives) to prohibit further unauthorized use or disclosure (see Practice Note, Efforts Provisions in Commercial Contracts: Best Efforts, Reasonable Efforts, and Commercially Reasonable Efforts) ([7-518-0907](#)).
- Makes the recipient legally responsible for any breaches of the agreement by the recipient's representatives.

In addition to making the recipient liable for breaches caused by its representatives, some disclosing parties also require the recipient to:

- Secure each representative's agreement that the disclosing party may seek recourse directly against that representative for its breach of the confidentiality agreement.
- Cause its representatives to comply with the recipient's non-disclosure and use obligations.

Most recipients are unwilling to accept these obligations because:

- Recipients rarely have the ability to control the activities of all their representatives.
- The burden involved in obtaining signed agreements from each representative can be overwhelming.

For more information on drafting and negotiating provisions addressing the use and protection of confidential information, see Standard Document, Confidentiality Agreement: General (Unilateral, Pro-Discloser): Section 3 ([9-501-6497](#)) and its related drafting note and Practice Note, Confidentiality and Nondisclosure Agreements (PA): Nondisclosure Obligations ([w-007-8132](#)).

DEFINING REPRESENTATIVES

The definition of "Representatives" is a fundamental term under most confidentiality agreements because the recipient is typically prohibited from disclosing confidential information except to its representatives. The universe of persons and entities included in this definition should be customized to reflect the facts and circumstances of the recipient's legal, business, and operational structure, as well as the facts and circumstances of the potential transaction. To better protect its confidential information, the disclosing party desires to keep this definition as narrow as possible.

The second sentence of Section 1 includes certain categories of representatives that are consistently included in this definition, as well as additional categories that may be appropriate to include, depending on applicable legal-, business-, and transaction-related considerations. The disclosing party should draft this list narrowly and consider adding other categories only if requested by the recipient.

2. "**Confidential Information**" means all non-public, proprietary, or confidential information, including, but not limited to, any trade secrets [of Disclosing Party/relating to Disclosing Party's [DESCRIPTION OF CONFIDENTIAL INFORMATION]], in oral, visual, written, electronic, or other tangible or intangible form, whether or not marked or designated as "confidential," and all notes, analyses, summaries, and other materials prepared by Recipient or any of its Representatives that contain, are based on, or otherwise reflect, to any degree, any of the foregoing ("**Notes**"); provided, however, that Confidential Information does not include any information that: (a) is or becomes generally available to the public other than as a result of Recipient's or its Representatives' act or omission; (b) is obtained by Recipient or its Representatives on a non-confidential basis from a third party that was not legally or contractually restricted from disclosing such information; (c) was in Recipient's or its Representatives' possession, as established by documentary evidence, before Disclosing Party's disclosure hereunder; or (d) was or is independently developed by Recipient or its Representatives, as established by documentary evidence, without using any Confidential Information. Confidential Information also includes: (x) the facts that the parties are in discussions regarding the Purpose (or, without limitation, any termination of such discussions) and that Confidential Information has been disclosed; and (y) any terms, conditions or arrangements discussed.

DRAFTING NOTE: DEFINITION OF CONFIDENTIAL INFORMATION

The definition of “Confidential Information” is another essential component of a confidentiality agreement. The disclosing party generally wants to protect its confidential information with as broad a definition as possible, while the recipient seeks to include a narrower definition to minimize its burden under the agreement.

In this short-form pro-discloser agreement, the definition of confidential information:

- Covers information in all types of tangible and non-tangible forms:
 - whenever and however disclosed; and
 - whether or not it is marked or otherwise identified as confidential.
- Includes all notes, analyses, and summaries prepared by the recipient and its representatives that contain any confidential information.
- Extends to:
 - the fact that the parties are in discussions and that confidential information has been disclosed; and
 - any terms, conditions, or arrangements discussed.

Some confidential information may rise to the level of a trade secret and receive automatic protection under state or federal law (see Practice Note, Confidentiality and Nondisclosure Agreements (PA): Trade Secrets ([w-007-8132](#)) and State Q&A, Trade Secret Laws: Pennsylvania: Definition of a Trade Secret) ([9-508-2227](#)). Pennsylvania has adopted a slightly modified version of the Uniform Trade Secrets Act (PUTSA) (12 Pa. C.S.A. §§ 5301 to 5308). Best practices in Pennsylvania, however, include the incorporation of trade secrets in the definition of confidential information.

Congress also enacted the Defend Trade Secrets Act of 2016 (DTSA) (18 U.S.C. §§ 1831 to 1839), which creates a federal civil cause of action for trade secrets misappropriation (18 U.S.C. § 1836(b)). The DTSA substantially overlaps with various state versions of the Uniform Trade Secrets Act, including the PUTSA, in terms of elements and definitions, but it preempts no state laws (18 U.S.C. § 1838).

For further discussion of trade secrets under the PUTSA, see Standard Clauses, General Contract Clauses: Confidentiality (Long Form) (PA): Drafting Note: Trade Secrets ([w-000-0659](#)). For a standard clause incorporating DTSA language, see Standard Clauses, General Contract Clauses: Confidentiality Agreement Clauses After the Defend Trade Secrets Act ([w-002-9194](#)).

BROADER OR NARROWER SCOPE

A broader definition of confidential information may provide the disclosing party with greater protection. Although the parties may define the scope of confidential information in an agreement, Pennsylvania courts may disregard an overly broad definition where evidence is presented that the information is, in fact, publicly available (see, for example, *Iron Age Corp. v. Dvorak*, 880 A.2d 657, 664 (Pa. Super. 2005) (refusing to accord trade secret status to a customer list despite terms of a confidentiality agreement where evidence showed that identifies of customers in industry were widely known)).

Therefore, the disclosing party should consider whether it can feasibly limit this definition depending on the type and extent of information to be disclosed and other relevant facts and circumstances.

Section 2 includes optional and alternative language that permits the disclosing party to:

- Retain a broad definition of confidential information, which includes all non-public, proprietary, or confidential information of the disclosing party.
- Create a more limited definition, which allows for a description of the types and categories of information that is covered (for example business and marketing plans; financial budgets; employee, contractor, and vendor lists; business methods, production procedures; technical processes; formulas; and customer prospects).

Alternatively, the disclosing party can retain a broad definition and add a list of covered types and categories of information

(for example, information about business affairs, products/services, confidential intellectual property, third-party confidential information, and other sensitive or proprietary information), clarifying that the examples are illustrative and not exhaustive (see Standard Document, Confidentiality Agreement: General (Unilateral, Pro-Discloser): Section 1) ([9-501-6497](#)). This formulation is usually limited to long-form confidentiality agreements.

To minimize its own procedural burden, the recipient is likely to try and narrow the definition of confidential information, including by restricting it to information that:

- Is actually disclosed by the disclosing party to the recipient.
- Is disclosed after the parties have entered into the confidentiality agreement.
- If disclosed:
 - in writing or other tangible format, is conspicuously marked as “confidential”; and
 - orally, is confirmed as confidential by the disclosing party in writing within a fixed period of time from the date of initial disclosure (typically between ten and 30 days).

Before the disclosing party accepts any of these limitations, it should carefully consider the practical implications, especially if it agrees to take on the burden of marking all tangible materials confidential and sending notice confirming orally disclosed confidential information. A court may refuse to afford confidentiality protections where the disclosing party fails to follow the procedures set forth in a confidentiality agreement (see, for example, *GEICO v. Nealey*, 262 F. Supp.3d 153, 170-71

(E.D. Pa. 2017) (company’s failure to follow confidentiality order’s requirements for using confidentiality designations prior to making disclosures resulted in loss of any trade secret status)).

For more information on defining confidential information, see Standard Document, Confidentiality Agreement: General (Unilateral, Pro-Discloser): Section 1 ([9-501-6497](#)) and its related drafting note and Practice Note, Confidentiality and Nondisclosure Agreements (PA): Definition of Confidential Information ([w-007-8132](#)).

EXCLUSIONS FROM CONFIDENTIAL INFORMATION

Section 2 includes standard (but narrowly drafted) exclusions. The recipient may seek to broaden these exclusions to minimize its operational and administrative burden under the agreement. Common revisions include:

- Eliminating the requirement to provide documentary evidence of information:
 - in its possession before disclosure under the confidentiality agreement; or
 - that is independently developed.
- Adding one or more knowledge qualifiers (such as “...was obtained on a non-confidential basis from a third party that, **to the knowledge of Recipient**, was not legally or contractually restricted from disclosing such information”).

For more information on exclusions from confidential information, see Standard Document, Confidentiality Agreement: General (Short Form, Unilateral, Pro-Recipient): Section 2 ([3-532-3908](#)) and its related drafting note.

3. If Recipient or any of its Representatives is required by [applicable law or] a valid legal order to disclose any Confidential Information, Recipient shall, before such disclosure, notify Disclosing Party of such requirements so that Disclosing Party may seek a protective order or other remedy, and Recipient shall reasonably assist Disclosing Party therewith. If Recipient remains legally compelled to make such disclosure, it shall: (a) only disclose that portion of the Confidential Information that, in the written opinion of its [outside] legal counsel, Recipient is required to disclose; and (b) use reasonable efforts to ensure that such Confidential Information is afforded confidential treatment.

DRAFTING NOTE: REQUIRED DISCLOSURE

Section 3 is a standard provision that addresses the conditions under which the recipient may disclose the disclosing party's confidential information if it is legally compelled to do so, such as pursuant to a subpoena or other legal process (for example, CPA firms often receive record requests from civil and criminal investigators). In Pennsylvania, courts have discretion regarding whether to quash a subpoena that calls for documents protected by a confidentiality agreement or whether to require production subject to an appropriate protective order (see, for example, *Red Vision Systems, Inc. v. National Real Estate Information Services, L.P.*, 108 A.3d 54, 59 (Pa. Super. 2015) (affirming denial of motion to quash subpoena and overruling objection based on terms of confidentiality agreement where subpoena proponent had agreed to a protective order)).

This short-form, pro-discloser provision:

- Can be drafted narrowly for disclosure required by "a valid legal order" or more broadly to also include disclosure required by applicable law generally (which also permits disclosures required under statutory or regulatory requirements).

- Obligates the recipient to:
 - notify the disclosing party of a required disclosure to give the disclosing party time to seek a protective order or other remedy; and
 - reasonably assist the disclosing party in its efforts to do so.
- Requires the recipient to:
 - limit disclosure to that information which, in the written opinion of its counsel, it is required to disclose; and
 - use reasonable efforts to obtain confidential treatment for required disclosure.

The recipient usually tries to soften these obligations, including, for example, by eliminating the requirement to obtain a legal opinion or that the opinion be in writing (see Standard Document, Confidentiality Agreement: General (Short Form, Unilateral, Pro-Recipient): Section 4 ([3-532-3908](#)) and its related drafting note).

For more information on drafting and negotiating required disclosure provisions, see Standard Document, Confidentiality Agreement: General (Unilateral, Pro-Discloser): Section 6 ([9-501-6497](#)).

4. On the expiration of this Agreement or otherwise at Disclosing Party's request, Recipient shall [within [NUMBER] days/promptly][, at Disclosing Party's option, either] return to Disclosing Party or destroy all Confidential Information in its and its Representatives' possession other than Notes, and destroy all Notes, and certify in writing to Disclosing Party the destruction of such Confidential Information.

DRAFTING NOTE: RETURN OR DESTRUCTION OF CONFIDENTIAL INFORMATION

Confidentiality agreements typically address when and how the recipient loses its access to the confidential information. In this short-form, pro-discloser agreement:

- The recipient is automatically obligated to return or destroy confidential information at the expiration of the agreement.
- If the bracketed optional language is used, the disclosing party determines whether confidential information is returned or destroyed.
- The disclosing party is not required to otherwise send formal notice to request return or destruction.

The recipient may negotiate for the right to:

- Itself determine whether to return or destroy the confidential information (by revising the bracketed optional language). Often, recipients combine their own confidential information with that of the disclosing party. In those situations, recipients usually prefer to destroy the information rather than return it and risk disclosing their own confidential information.
- Redact confidential information contained in notes and other internal work product created by it or its representatives, instead of being required to destroy it.
- Have the right to retain:
 - back-up and archival copies;
 - copies required to be retained for legal compliance (for example, a party may be required to retain certain internal records that may contain another party's confidential information, such as accounting records or board minutes

(see, for example, 15 Pa. C.S.A. § 1508(a) (requiring that all corporations must maintain, among other records, "complete and accurate books and records of account . . . [and] minutes of the proceedings of incorporators and shareholders and directors")); and

- a copy of any board submission.

If the disclosing party accepts these revisions, it should:

- Require the recipient to provide the disclosing party a certificate of destruction (and, if applicable, redaction).
- Confirm that any retained copies remain subject to the recipient's confidentiality and use obligations.

For more information on return or destruction of confidential information, see Standard Document, Confidentiality Agreement: General (Unilateral, Pro-Discloser): Section 7 ([9-501-6497](#)) and its related drafting note.

5. Disclosing Party has no obligation under this Agreement to (a) disclose any Confidential Information or (b) negotiate for, enter into, or otherwise pursue the Purpose. Disclosing Party provides all Confidential Information without any representation or warranty, expressed or implied, as to the accuracy or completeness thereof, and Disclosing Party will have no liability to Recipient or any other person relating to Recipient's use of any of the Confidential Information or any errors therein or omissions therefrom.

DRAFTING NOTE: NO OBLIGATION TO DISCLOSE OR NEGOTIATE; NO REPRESENTATIONS OR WARRANTIES

Section 5 protects the disclosing party against potential claims that:

- By entering into the confidentiality agreement, the disclosing party has accepted an implied obligation to:
 - disclose some or all relevant confidential information; and
 - pursue the potential transaction.

- The recipient may rely on the accuracy and completeness of the confidential information for purposes of negotiating and entering into the potential transaction.

While these provisions are commonly used and should not be controversial, recipients often seek to make subclause (b) mutual.

6. Disclosing Party retains its entire right, title, and interest in and to all Confidential Information, and no disclosure of Confidential Information hereunder will be construed as a license, assignment, or other transfer of any such right, title, and interest to Recipient or any other person.

DRAFTING NOTE: NO TRANSFER OF RIGHTS, TITLE, OR INTEREST

Section 6 is included in many confidentiality agreements to protect the disclosing party against any claims that the recipient was implicitly granted a license or other right

to use the confidential information for any purposes outside the confidentiality agreement.

7. The rights and obligations of the parties under this Agreement expire [NUMBER] year[s] after the Effective Date[; provided that with respect to Confidential Information that is a trade secret under the laws of any jurisdiction, such rights and obligations will survive such expiration until, if ever, such Confidential Information loses its trade secret protection other than due to an act or omission of Recipient or its Representatives].

DRAFTING NOTE: TERM

This short-form agreement includes a simple term provision, which assumes that:

- All confidential information will be disclosed shortly after the execution of the confidentiality agreement.
- The recipient's use restrictions and confidentiality obligations (and all other related obligations) expire after a stated period of time following the effective date of the agreement (commonly, from one to five years), regardless of when it is actually disclosed.

The optional language at the end of the sentence can be included if the disclosing party is concerned about protecting any trade secrets contained in the confidential information throughout the time that the information qualifies for protection under applicable law.

Otherwise, the disclosing party should select a term length that is appropriate under the circumstances. While disclosing parties usually seek longer terms, recipients are likely to object to any period that is longer than is reasonably necessary to protect the type of information that is being disclosed.

The disclosing party must be careful when including term limits in confidentiality agreements involving trade secrets to avoid undermining efforts to maintain trade secret status because:

- Courts only protect a party's trade secrets from unauthorized use or disclosure if that party has taken reasonable efforts to maintain the information in confidence (12 Pa. C.S.A. § 5302 (defining "trade secret" under the PUTSA and requiring a trade secret to be "the subject of efforts reasonable under the circumstances to maintain its secrecy")). For example:
 - an employer's use of confidentiality agreements with research and sales personnel supported trade secret finding (see *Den-Tal-Ez, Inc. v. Siemens Capital Corp.*, 566 A.2d 1214, 1230 (Pa. Super. 1989); and
 - contested information was not a trade secret because, among other reasons, owner failed to follow reasonable measures established to protect secrecy (see *GEICO*, 262 F. Supp.3d at 170-71).
- Some courts have indicated that having an expiration period surrounding a confidentiality provision that includes

trade secrets may be evidence that the trade secret owner is not exercising reasonable efforts to maintain the secrecy of the information (see, for example, *Structured Capital Sols., LLC v. Commerzbank AG*, 177 F. Supp.3d 816, 835 (S.D.N.Y. 2016); *Silicon Image, Inc. v. Analogix Semiconductor, Inc.*, 2008 WL 166950 at *17 (N.D. Cal. Jan. 17, 2008); and *DB Riley, Inc. v. AB Eng'g Corp.*, 977 F. Supp. 84, 90 (D. Mass. 1997)). Although no Pennsylvania court has ruled on this specific matter, the principles underlying these cases are generally in line with Pennsylvania law.

Alternative term structures include:

- A set agreement term, often from one to three years, during which it is expected that confidential information will or may be disclosed (either continuously or from time to time) and a discrete survival period for the recipient's confidentiality obligations, often for an additional one- to three-year period, which may begin on:
 - the expiration or termination of the term; or
 - the date on which the particular confidential information is disclosed.
- An indefinite term without a stated survival period.
- An indefinite or stated term with a perpetual survival period.
- A term that ends on a specified date or on the occurrence of certain events or conditions, such as the conclusion of the defined business purpose or the signing of a principal agreement.

Some confidentiality agreements also permit one or both parties to terminate the term of the agreement before its contractual expiration date under certain circumstances.

For more information on term and termination, see Standard Document, Confidentiality Agreement: General (Unilateral, Pro-Discloser): Section 8 ([9-501-6497](#)).

8. Recipient acknowledges and agrees that any breach of this Agreement will cause irreparable harm and injury to Disclosing Party for which money damages would be an inadequate remedy and that, in addition to remedies at law, Disclosing Party is entitled to equitable relief as a remedy for any such breach or threatened breach.

DRAFTING NOTE: EQUITABLE RELIEF

Because of the potentially serious consequences of an unauthorized disclosure by a recipient and the difficulty of ascertaining monetary damages in that event, confidentiality agreements usually include a provision acknowledging the parties' agreement that the disclosing party should be entitled to obtain injunctive (or more broadly, equitable) relief, in addition to other available remedies, for a breach or threatened breach of the recipient's confidentiality obligations. Pennsylvania courts recognize that the potential disclosure of confidential information creates a risk of injury that would be difficult to measure or remedy by a damages award,

making injunctive relief appropriate (see, for example, *Den-Tal-Ez*, 566 A.2d at 1232-33 and *Ecolaire Inc. v. Crissman*, 542 F. Supp. 196, 205 (E.D. Pa. 1982)).

Absent a specific statutory right to the contrary, the granting of equitable relief is solely in the court's discretion. Because of this judicial discretion, an equitable remedies clause cannot compel a court's decision, but should carry evidentiary weight as an expression of the parties' intentions. For more information on equitable remedies provisions, see Standard Clauses, General Contract Clauses: Equitable Remedies ([6-518-8602](#)).

In some confidentiality agreements, the disclosing party also tries to include a provision permitting recovery of attorneys' fees and court costs by the prevailing party to any litigation. Because the disclosing party is more likely to sue the recipient for breach of the confidentiality agreement, recipients often resist including these provisions. However, for trade secret

violations, both the PUTSA and the DTSA provide for the recovery of attorneys' fees in certain circumstances (12 Pa. C.S.A. § 5305 and 18 U.S.C. § 1836(b)(3)(D)).

For a sample attorneys' fees provision, see Standard Document, Confidentiality Agreement: General (Unilateral, Pro-Discloser): Section 14 ([9-501-6497](#)).

9. This Agreement and all related documents [including all exhibits attached hereto][, and all matters arising out of or relating to this Agreement, whether sounding in contract, tort, or statute] are governed by, and construed in accordance with, the laws of the Commonwealth of Pennsylvania, United States of America [(including its statutes of limitations)][, without giving effect to the conflict of laws provisions thereof to the extent such principles or rules would require or permit the application of the laws of any jurisdiction other than those of the Commonwealth of Pennsylvania].

DRAFTING NOTE: CHOICE OF LAW

This section allows parties to choose the substantive law of Pennsylvania to apply to the contract, which Pennsylvania courts generally honor (see Standard Clause, General Contracts Clauses: Choice of Law (PA): Enforceability of Choice of Law Provisions in Pennsylvania) ([w-000-0227](#)).

For more information on the optional language in brackets, see Standard Clause,

General Contract Clauses: Choice of Law (PA): Drafting Notes ([w-000-0227](#)):

- Extra-Contractual Matters ([w-000-0227](#)).
- Statutes of Limitations ([w-000-0227](#)).
- Choice of Law Rules ([w-000-0227](#)).

For more information on drafting and negotiating choice of law clauses, see Practice Note, Choice of Law and Choice of Forum: Key Issues ([7-509-6876](#)).

10. Each Party irrevocably and unconditionally agrees that it will not commence any action, litigation, or proceeding of any kind whatsoever against the other Party in any way arising from or relating to this Agreement, including all exhibits, schedules, attachments, and appendices attached to this Agreement, and all contemplated transactions[, including, but not limited to, contract, equity, tort, fraud, and statutory claims], in any forum other than the US DISTRICT COURT for the [Eastern/Middle/Western] District of Pennsylvania or[, if such court does not have subject matter jurisdiction,] the courts of the Commonwealth of Pennsylvania sitting in [POLITICAL SUBDIVISION], and any appellate court from any thereof. Each Party irrevocably and unconditionally submits to the exclusive jurisdiction of such courts and agrees to bring any such action, litigation, or proceeding only in the US DISTRICT COURT for the [Eastern/Middle/Western] District of Pennsylvania or[, if such court does not have subject matter jurisdiction,] the courts of the Commonwealth of Pennsylvania sitting in [POLITICAL SUBDIVISION]. Each Party agrees that a final judgment in any such action, litigation, or proceeding is conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

DRAFTING NOTE: CHOICE OF FORUM

In this section, the parties confer personal jurisdiction on the courts of a selected state and agree that the selected forum is the exclusive forum for bringing any claims under (and sometimes, more broadly relating to) the agreement. For more information on drafting and negotiating choice of forum clauses, including enforceability, see Standard Clauses, General Contract Clauses: Choice of Forum (PA) ([w-000-0225](#)) and Practice Note, Choice of Law and Choice of Forum: Key Issues ([7-509-6876](#)).

To settle or avoid protracted forum selection negotiations, the parties sometimes elect to include a floating forum selection clause that forces a party initiating litigation to do so in the home jurisdiction of the counterparty being sued. For a sample floating forum selection clause, see Standard Clauses, General Contract Clauses: Choice of Forum (Floating: Reciprocal) (PA) ([w-000-0226](#)).

If the parties prefer to resolve disputes by arbitrating rather than litigating them, then they must replace this provision with an

arbitration clause. For more information on arbitration and other alternative dispute resolution agreements, including sample clauses, see:

- Practice Note, Drafting Arbitration Agreements calling for Arbitration in the US ([2-500-4624](#)).
- Practice Note, Standard recommended arbitration clauses ([1-381-8470](#)).
- Standard Clauses, Clauses for the AAA, ICDR, ICC, and UNCITRAL Arbitration ([6-502-3569](#)).
- Drafting Contractual Dispute Provisions Toolkit (PA) ([w-009-1964](#)).

This Standard Document does not contain a dispute resolution escalation provision. Escalation provisions first require the parties to resolve their disputes by alternative dispute resolution (ADR), including a period of negotiation and then mediation before submitting the dispute to litigation or ad hoc arbitration. For more information on drafting and negotiating escalation clauses, see Standard Clauses, General Contract Clauses, Alternative Dispute Resolution (Multi-Tiered) (PA) ([w-007-8531](#)).

11. All notices must be in writing and addressed to the relevant party at its address set out in the preamble (or to such other address such party specifies in accordance with this Section 11). All notices must be personally delivered or sent prepaid by nationally recognized courier or certified or registered mail, return receipt requested, and are effective on actual receipt.

DRAFTING NOTE: NOTICES

Under a confidentiality agreement, notices are used for significant communications (such as requesting the return or destruction of confidential information or notifying the disclosing party of a required disclosure). This notice provision does not permit email and fax notices because:

- It is not always possible to track with certainty when an email has been received.
- There may be a greater risk of an email being intercepted by a third party, arriving late or not at all, or being inadvertently deleted or overlooked by the intended recipient.
- Even when the sender receives a fax confirmation, the recipient may not have actually received and read the fax.

12. This Agreement is the entire agreement of the parties regarding its subject matter, and supersedes all prior and contemporaneous understandings, agreements, representations, and warranties, whether written or oral, regarding such subject matter. This Agreement may only be amended, modified, waived, or supplemented by an agreement in writing signed by both parties.

DRAFTING NOTE: ENTIRE AGREEMENT AND OTHER MISCELLANEOUS CLAUSES

An entire agreement clause (also referred to as a merger or integration clause) protects against liability from representations or warranties other than those included in the agreement. For more information, see Standard Clauses, General Contract Clauses: Entire Agreement (PA) ([w-009-1913](#)).

Although this is a short form agreement, the parties should consider including additional clauses. For example, Standard Clauses, General Contract Clauses:

- Severability (PA) ([w-000-0646](#)).
- Waivers (PA) ([w-000-0505](#)).
- Successors and Assigns (PA) ([w-002-4389](#)).

In executing the agreement, the parties may also want to include:

- A counterparts clause.
- Restrictions on assignment by either party.
- Authority that the person signing the agreement has the authority to bind the corporation or other entity to the terms of the agreement.

For more information, see Standard Clauses, General Contract Clauses:

- Counterparts ([5-564-9425](#)).
- Assignment and Delegation (PA) ([w-000-0880](#)).
- Representations and Warranties: Sections 1.1(d) and 1.2(d) ([2-519-9438](#)).

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the Effective Date.

[RECIPIENT NAME]

[DISCLOSING PARTY NAME]

By _____

By _____

Name:

Name:

Title:

Title:

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