**Commercial Contracts Playbook**

**Non-Disclosure Agreement (NDA) (United States) v2.0**

**September 5, 2017**

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**How to Use this Playbook:**

* The Playbook is intended to be a tool, not a substitute for judgment.
* Any positions going beyond what is permitted or discussed in this Playbook must be coordinated with the relevant stakeholders and required approvers.
* Entity designation:
  + Dell = provisions for the heritage Dell business
  + EMC = provisions for the heritage EMC business
  + Dell EMC = provisions where there is a unified or integrated position across both heritage companies
* L Levels:
  + L5 – Directors/SMEs
  + L4 - VPs
  + L3 – Sr. VPs
  + L2 – ELT Members/Corporate Executive VPs (General Counsel, Chief Financial Officer, etc.)

NOTES ON TERMINOLOGY:

The Standard Non-Disclosure Agreement (16MAY2017 edition) and subsequent editions are collectively referred to herein as the “Standard NDA”.

The Standard NDA refers to Dell EMC parties and SecureWorks as “Dell”. For consistency, this playbook uses “Dell” in sample and fallback provisions.

**Dell Standard Position**

**Non-Disclosure Agreements with U.S. Customers**

**Principles:**

Non-Disclosure Agreements (NDAs) are contracts that govern the exchange and management of confidential information between the contract parties. Customer relationships usually involve disclosures of each party’s confidential information to the other: the customer frequently discloses non-public information about its networks, data centers, and other IT needs, and Dell EMC often provides its own confidential information, such as pricing and product development roadmap information to customers.

**Use of Dell’s form of NDA:**

The company’s general policy is to use the Standard NDA when entering into a customer relationship that may involve disclosure of Dell EMC’s confidential information and/or receipt of the customer’s confidential information. Use of our standardized form presents many advantages to Dell EMC, including, driving consistency, balancing risk, controlling costs to support the thousands of non-disclosure relationships the company enters into each year, and reducing cycle time required to enter into those relationships. Use the NDA Direct tool to research whether we have an existing NDA with a customer, and if needed, to generate an NDA for a customer. Go to the NDA Direct home page at <http://intranet.dell.com/dept/legal/NDAs/Pages/Default.aspx> for instructions on how to use the tool, including a Quick Reference Guide. NDA Direct is a self-service tool and Contract Managers should direct Sales team members to use the tool when requesting an NDA.

The Standard NDA is an important tool for managing our business, operational, financial and legal risk. The NDA identifies each party’s obligations with respect to the information that may be revealed in the course of evaluating a potential business relationship or continuing an actual business transaction. The NDA manages our business risk by preventing the disclosure of our confidential information to the public, especially including disclosures of confidential information to our competitors. The Standard NDA addresses our operational risk by defining the parameters of what we can do with, and how we have to handle a customer’s confidential information. The Standard NDA also manages our legal risk by defining the rights and legal remedies of both parties to the NDA in the event of unauthorized disclosure of confidential information. The terms in our Standard NDA template provide a commercially reasonable and fair allocation of risk between both parties and reflect terms commonly found in NDAs in the United States.

**Use of this Playbook:**

The issues covered in this playbook may arise in one of two ways: (1) the customer may request revision to the Standard NDA or (2) Dell EMC may be required to negotiate the customer’s form of NDA. If, after the sales team has provided the customer with an NDA generated using the NDA Direct tool, the customer insists on using the customer’s own form of NDA, the customer’s form must be submitted by sales to the [US\_NDA\_Support mailbox](mailto:US_NDA_Support@Dell.com) for review.

This Playbook and the [Negotiations Checklist](#Appendix) should be used to negotiate terms and conditions of the Standard NDA or the customer’s form of NDA. Follow the below framework for negotiation:

* Attempt to use the Standard NDA.
* Revise a customer’s form of NDA to the positions set forth in the Checklist.
* Use this Playbook for fallback language that does not require approvals, except where noted.
* When redlining a customer’s form of NDA, confirm that the customer’s form contains the required positions (the “MUST HAVE”s) under the Checklist.
* Accept any terms in the customer’s form of NDA, or requested revisions to the Standard NDA, that are approved fallback positions in this Playbook or the Checklist.
* If neither the Checklist nor the Playbook provides a fallback for removal or negotiation of a term, then that term should be escalated to L5 Legal.

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**Issue #1: Unilateral/One-Way Confidentiality Obligations**

**Customer’s request:** The customer requests that Dell EMC sign a one-way NDA in favor of the customer.

**Principles:** Confidential disclosures by one party are often accompanied or followed by confidential disclosures by the other party, particularly in the RFP context. With a mutual agreement, both parties have the same obligation to keep the other party’s information confidential.

If the customer refuses to work from the Standard NDA and presents us with their form of one-way NDA, you should first request that the customer provide a mutual NDA for Dell EMC’s review. If the customer refuses to send Dell EMC their form of mutual NDA, first revise their form of one-way NDA to be a mutual NDA in accordance with Fallback #1 below.

**Sample Language:** If the customer insists on a one-way NDA, then, in addition to reviewing and making any necessary revisions to the terms of the customer’s form of NDA, insert the sample language below at the end of the NDA.

“In connection with the purpose of this Agreement, Dell may make available to Customer information that would fall within the definition of "Confidential Information” if it had been provided to Dell by Customer. Customer shall undertake to Dell the same obligations of confidentiality with regard to Dell’s confidential information as Dell has undertaken toward Customer's confidential information. All provisions regarding the treatment of Customer's confidential information and the rights, duties, and obligations of Customer shall apply mutually to Dell and to Dell's confidential information.”

**Approval: No approval is required for the use of the sample language above.**

**Fallback:** If the customer refuses a mutual NDA and rejects the sample language above, we may accept a one-way NDA, after making any necessary revisions to its other terms, with Contract Manager approval and confirmation of the following by the Regional Sales Director or sales team equivalent: (1) no information will be provided to the customer other than pricing and standard product and service descriptions already readily available to the public; (2) the pricing information to be provided to the customer does not need to remain confidential and could be shared with competitors without an adverse impact to Dell EMC. Escalate to L5 Legal for any other information to be provided to customer under a one-way NDA (including but not limited to roadmaps, confidential product and service information, etc.).

**Approval: Contract Manager or L5 Legal as noted, is required for the use of the Fallback above.**

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**Issue #2: Parties to the Agreement**

**Issue #2A – Customer’s Request: Customer’s Affiliates as Parties to the Agreement.** The customer requests that its parent or affiliates (other than subsidiaries, which are included in the Standard NDA) be included as parties to the NDA.

**Principles:** If the customer also wants to include customer's parent and affiliates as parties to the NDA, work with the account team to verify that there are no customer-specific concerns. For example, are any of those customer entities competitors of Dell EMC? Or are there any specific business concerns with providing Dell EMC confidential information to such related companies? Do not include a customer’s parent or affiliate as parties to the agreement if there are competitive or business concerns. Also see [Issue #4](#Issue4) below when a customer proposes similar changes to the definition of “Representatives” to whom Confidential Information may be disclosed.

Affiliates allowed to be parties to the NDA should be limited to those under the "control" of the entity signing the NDA. "Control" means the possession, directly or indirectly, of the power to direct the management and policies of affiliate, whether through the ownership of voting securities, assets, by contract, or otherwise. If customer wants other affiliates, including its parent, to receive confidential information under the NDA, use Fallback #1 or #2 below.

**Fallback #1:** Require affiliates not controlled by customer to agree to be bound by the NDA.

“For affiliates not under the control of Participant, but who wish to receive Confidential Information under this Agreement, Participant will secure each such affiliate’s agreement in writing to the obligations and duties imposed by this Agreement with respect to any Confidential Information. Participant shall provide Dell with a copy of such writing if so requested by Dell.”

**Approval: No approval is required for the use of Fallback #1 above.**

**Fallback #2:** If the customer refuses to require its affiliates to agree in writing, require customer to acknowledge that all terms of the NDA are binding on its affiliates.

“The obligations and duties imposed by this Agreement with respect to any Confidential Information may be enforced by the Discloser of such Confidential Information against any and all Recipients of such Confidential Information. All terms and provisions of this Agreement will be binding upon Participant and its affiliates receiving Confidential Information and upontheir **respective successors** and permitted assigns.**” [Note: The highlighted portion of the preceding sentence is not necessary when using the Standard NDA (successors are addressed in the NDA Section 17), however it is required when editing a customer’s NDA template.]**

**Approval: No approval is required for the use of Fallback #2 above.**

**Issue #2B – Customer’s Request: Dell Subsidiaries and Affiliates as Parties to the Agreement.** The customer requests that Dell’s subsidiaries or affiliates be included as parties to the NDA.

**Principles:** Customers often request that Dell Inc. bind its subsidiaries and affiliates to the NDA. Dell Inc. has the authority to bind its direct and indirect subsidiaries, i.e. those entities over which it has “control,” (including Dell Marketing L.P.). We should only include Dell Inc.’s wholly-owned or wholly-controlled subsidiaries and SecureWorks, Inc. (and its subsidiaries) as parties to the NDA. Dell Inc. should never bind entities upstream, i.e. entities that have an ownership interest in Dell Inc., such as SilverLake or MSD Capital. With the exception of SecureWorks, Inc., which is a party to the Standard NDA template, Dell Inc. should never bind its non-wholly-owned subsidiaries, such as VMware Inc., and Pivotal Software, Inc., without prior approval by those subsidiaries.

**Sample Language (provided the scope for Participant’s parent and its affiliates are consistent with Issue #2A [note: the definition for participant includes its parent and all of parent’s affiliates] and Fallbacks #1 or #2 of Issue #2A were used for Customer affiliates as set forth above):**

“Affiliate” means, with respect to Dell, Dell Inc., its wholly-owned or wholly-controlled subsidiaries, and SecureWorks, Inc. (and its subsidiaries)\* and with respect to Participant, any other entity that directly or indirectly controls, is owned by, controlled by or under common ownership or control with Participant.”

*\*Underline is for emphasis only.*

**Approval: No approval is required for the use of the sample language above.**

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**Issue #3: Definition of Confidential Information**

**Principles:** It is important that the definition of confidential information under the NDA is consistent with the Dell EMC standard principles outlined below.

**Information Accessed:** Customer may want to define confidential information as *all* information that the receiving party may access (regardless if marked or identified as confidential by the disclosing party). This broad definition should be avoided because it obligates the receiving party to expend the same efforts to keep harmless information confidential to the same degree as information that would be reasonably understood to be confidential in nature.

**Written Information:** Written or tangible information should be considered confidential if marked or identified as confidential, or if a reasonable person under the circumstances would know that the information is confidential.

**Dell EMC Confidential Information:** Dell EMC may provide information to customers, such as pricing, roadmap information, facilities tour (e.g. Executive Business Center) and response to RFP’s. Be sure the term “Confidential Information” is suitably defined to cover such information.

**Disclosure Prior to Effective Date:** If the NDA states that it covers confidential information disclosed prior to the effective date of the NDA, be sure such information has been identified and limited to no greater than 60 days prior to the NDA effective date.

**Dell EMC Standard Language:**

“Confidential Information” disclosed under this Agreement is any information, technical data or know how furnished, whether in written, oral, electronic, website-based, or other form by the Discloser to the Recipient that (a) is marked, accompanied or supported by documents clearly and conspicuously designating such documents as "confidential", “internal use” or the equivalent; (b) is identified by the Discloser as confidential before, during or promptly after the presentation or communication; or (c) should reasonably be known by Recipient to be confidential.”

**Issue #3A – Customer’s request: Summarizing Oral Disclosures.** The customer may request that oral disclosures be put into writing in order to be protected as confidential information.

**Principles:** Avoid requirements to document oral disclosures within a specified timeframe in order to be treated as confidential information. The reality is that our sales teams and other employees throughout the organization may not be able to manage documenting every phone call, discussion, and meeting. If they fail to document the disclosure, then Dell EMC's confidential information will have no protection.

Oral disclosures should be considered confidential information if the disclosing party tells the receiving party that the information disclosed, or about to be disclosed, is confidential, or a reasonable person receiving the information should know the information is confidential in nature.

**Sample Language:** If the customer insists on requiring that confidential information provided orally be summarized in writing, then add the following language:

“In the event that Confidential Information provided orally is not summarized in writing, such information shall nonetheless be considered Confidential Information provided a reasonable person receiving the information should know it is of a confidential nature.”

**Approval: No approval is required for the use of the sample language above.**

**Issue #3B – Customer’s request: Limitation to Marked as Confidential.** Customer wants to limit the definition of confidential information to *only* that which is marked confidential and in writing (i.e. unmarked and verbal disclosures are not covered).

**Principles:** We do not want to require the parties to specifically designate material as confidential in order for it to be afforded confidential treatment.  The Dell EMC standard definition of confidential information protects sensitive information that both parties should know is confidential without having to designate it as such. At the bare minimum, Dell EMC confidential information should include technical data, roadmaps, and pricing.

**Sample Language:** If the customer does not agree to the Dell EMC standard language above for the definition of confidential information, include the following language:

“Notwithstanding anything to the contrary herein, all pricing, roadmap information, information provided by Dell pursuant to a Request for Proposal, and information acquired during any Dell facilities tours shall constitute Confidential Information.”

**Approval: No approval is required for the use of the sample language above.**

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**Issue #4: Definition of Representatives**

**Customer’s Request:** Customer wants to clarify that it can share information with its subsidiaries or affiliates and their directors, officers, etc. who have a “need to know.”

**Principle:** Customer should be able to disclose Confidential Information to its subsidiaries and other approved affiliates, if any (see Issue #2A), that are also included in the definition of “Participant.” See Sample Language below to include in NDA Section 6 to address customer’s request. The language also clarifies that members of the Dell defined group can share customer confidential information with each other. If the customer wants to share information with its affiliates that have not been requested to be party to the NDA, work with the account team to verify that there are no competitive or business concerns with sharing information with such customer’s affiliates, including customer’s parent. If the account team says that there are no issues with sharing with customer’s affiliates, customer affiliates should be added to the definition of “Participant” as parties to the NDA. See Issue #2A above.

**Sample Language:** Recipient may disclose Confidential Information to directors, officers, employees, contractors, advisors, and agents of itself and of Discloser that are parties to this Agreement, so long as such individuals have a need to know in their work for Recipient in furtherance of the potential or continued business transaction or relationship, and are bound by obligations of confidentiality at least as restrictive as those imposed on Recipient in this Agreement (collectively, “Representatives”).

**Approval: No approval is required for use of the Sample Language above.**

**Issue #5: Confidentiality Protection Period**

**Issue #5A: Customer’s request: Perpetual Protection.** Customer requests that the duty to protect confidential information does not expire.

**Principle:** Dell EMC should not agree to a perpetual term for confidentiality obligations. Except for trade secrets, the period of confidentiality should not go on indefinitely. The period of confidentiality should be appropriate for the useful life of the confidential information. In the IT industry, information changes very quickly, so a 3-5 year period is reasonable. Include a confidentiality term of 3 years after the date of disclosure. *See also Issue #5B, below.*

**Dell EMC Standard Language: “**Unless the Parties otherwise agree in writing, a Recipient's duty to protect Confidential Information expires three (3) years from the date of disclosure. Notwithstanding anything to the contrary herein and subject to Section 8, protection of technical information about a Discloser’s current products and services and all information about possible unreleased products or services shall never expire.”

**Fallback:** We can accept up to 10 years from date of disclosure if the Regional Sales Director (“RSD”) or sales team equivalent confirms that the number of years is manageable.

**Approval: No approval is required for the use of the fallback above.**

**Issue #5B: Customer’s request: Protection Term Tied to NDA.** Customer requests that the term of the obligation to keep confidential information confidential is tied to the termination or expiration date *of the NDA* instead of the date of disclosure of the confidential information.

**Principle:** Dell EMC can agree to protect confidential information from the date of expiration or termination of the NDA, provided that the NDA is not evergreen and instead contains a definite and reasonable date of termination.

**Fallback:**

If protection of confidential information survives for more than 3 years from date of expiration, confirm with the RSD or sales team equivalent that the proposed number of years is manageable. We can accept up to 10 years from a known date of expiration or termination, if the sales team confirms it can be managed.

**Approval: No approval is required for the use of the fallback above.**

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**Issue #6: Returning Confidential Information**

**Customer’s request:** Customer requests that Dell EMC return or destroy all confidential information provided by customer outside of Dell EMC’s standard process.

**Principles:** It is important that Dell EMC’s obligations with respect to the return or destruction of confidential information are in line with our internal processes.

**Return or Destroy:** The customer's NDA might state that the receiving party has a duty to return or destroy all confidential information upon the expiration or termination of the business relationship or transaction. Dell EMC does not have internal processes to automatically "return or destroy” information when a contract expires or a project is completed. Instead, propose to return information only upon written request. Include an option for Dell EMC to destroy the information, which may be more cost effective than returns.

**Certification:** The customer's NDA might state that the receiving party has a duty to certify as to the return or destruction of all confidential information upon the expiration or termination of the business relationship or transaction. Dell EMC does not have internal processes to automatically certify when the information is destroyed. We should propose to certify the information has been destroyed only upon written request.

**Notes & Memos:** The customer's NDA might require that notes, memos, documentation and other work product of the receiving party be returned if they contain the disclosing party's confidential information. This is a concern, because the receiving party's work product may also contain its own ideas, confidential information, etc., which are not appropriate for the disclosing party's review. If customer insists, you can propose that such work product will be covered by the nondisclosure and use restrictions but that it is excluded from any return requirements.

**Retention Required by Law:** Be sure the receiving party is exempt from return requirements if information is required by law (e.g. litigation legal holds) to be retained.

**Dell EMC Standard Language:**

“Upon the Discloser's written request, Recipient will promptly return or destroy all Confidential Information received from the Discloser, together with all copies. Notwithstanding the foregoing, Recipient’s professional advisors (e.g., lawyers and accountants) may retain in confidence one file copy of their respective work papers and final reports in accordance with their professional and ethical obligations.”

**Approval: No approval is required for the use of the Dell EMC standard language above.**

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**Issue #7: Remedies**

**Issue #7A – Customer’s request: Injunctive relief for ALL breaches of the NDA.** Customer requests that they be entitled to seek\* injunctive relief for *any and all* breaches of the NDA.

**Principles:** Limit injunctive relief for actual or threatened unauthorized disclosures or unauthorized uses of confidential information, instead of “any and all” breaches of the NDA. A party should not be entitled to receive injunctive relief unless and until it satisfies the court that it will be irreparably harmed if it does not receive it, therefore it is important to restrict this provision to entitlement to ***seek*** injunctive relief.

**Dell EMC Standard Language:**

“The obligations and duties imposed by this Agreement with respect to any Confidential Information may be enforced by Discloser against any and all Recipients. Each Party acknowledges that damages for improper disclosure of Confidential Information may be irreparable; therefore, the injured Party may be entitled to seek equitable relief, including injunction and preliminary injunction, in addition to all other remedies available at law or in equity.”

**Approval: No approval is required for the use of the Dell EMC standard language above.**

**Issue #7B – Customer’s request: Specific performance.** Customer requests that they be entitled to seek specific performance in the event of a breach of the NDA.

**Principle:** Customer may also request the right to seek specific performance - even if injunction is the more appropriate remedy.  Injunction and specific performance are conceptually the same as they relate to their purpose and effect on the disclosing party.

**Fallback:** Upon the customer’s request, we may agree to add entitlement to seek specific performance:

“The obligations and duties imposed by this Agreement with respect to any Confidential Information may be enforced by the Discloser of such Confidential Information against any and all Recipients of such Confidential Information. Each Party acknowledges that damages for improper disclosure of Confidential Information may be irreparable; therefore, the injured Party may be entitled to seek equitable relief, including injunction and preliminary injunction and specific performance,\* in addition to all other remedies available at law or in equity.”

*\*Underline is for emphasis only.*

**Approval: No approval is required for the use of the fallback language above.**

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**Issue #8: Venue**

**Customer’s request:** The customer requests the addition of a provision specifying a state for venue in the event of litigation.

**Principle:** We do not want to specify venue in an NDA, but if so requested by the customer, we will agree to Texas venue. First, delete the venue provision added by the customer altogether. If the customer continues to insist on a venue provision, insert the sample language, and then Fallback #1.

**Sample Language:**

“**Venue.** The Parties agree that any dispute shall be brought exclusively in the state or federal courts located in Travis or Williamson County, Texas. The Parties agree to submit to the personal jurisdiction of the state and federal courts located within Travis or Williamson County, Texas, and agree to waive any and all objections to the exercise of jurisdiction over the Parties by such courts and to venue in such courts.”

**Approval: No approval is required for the use of the sample language above.**

**Fallback #1:** Use the sample language above, but accept Delaware or New York venue.

“**Venue.** The Parties agree that any dispute shall be brought exclusively in the state or federal courts located in [the State of New York or the State of Delaware]\*. The Parties agree to submit to the personal jurisdiction of the state and federal courts located within [the State of New York or the State of Delaware]\* and agree to waive any and all objections to the exercise of jurisdiction over the Parties by such courts and to venue in such courts.”

*\*Underline is for emphasis only.*

**Approval: No approval is required for the use of Fallback #1.**

**Fallback #2 for Public Customers Only:** If the customer is a government entity (e.g. state or local government or public university), we can accept the state and county where the government entity is located for venue.

Use the sample language above, but accept the government entity’s state for venue.

**Approval: No approval is required for the use of Fallback #2.**

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**Issue #9: Governing Law**

**Customer’s request:** The customer requests that the NDA’s governing law be the law of a state other than Texas.

**Principle:** Texas, Delaware and New York are the preferred states for governing law. California, Louisiana, and Nevada governing law should be avoided; CA courts are unpredictable, Louisiana state law is based on a civil law tradition rather than common law like the rest of the country, and NV courts are virtually unknown for commercial disputes. If the customer is a government entity (e.g. state or local government or public university), we can accept the governing law of the government entity’s state.

**Dell EMC Standard Language:**

“GOVERNING LAW. THIS AGREEMENT IS MADE UNDER, AND WILL BE CONSTRUED ACCORDING TO, THE LAWS OF THE STATE OF TEXAS, EXCLUDING ITS CONFLICTS OF LAW RULES.”

**Fallback #1:** Substitute either New York or Delaware law in place of Texas law in the standard language above.

**Approval: No approval is required for the use of Fallback #1**

**Fallback #2:** Substitute the laws of any state other than CA, LA, or NV law in place of Texas law in the standard language above.

**Approval: Contract Manager approval is required for the use of Fallback #2**

**Fallback #3 for Public Customers Only:** If the customer is a government entity (e.g. state or local government or public university), we can accept the state where the government entity is located for governing law.

Use the standard language above, but accept the government entity’s state for governing law.

**Approval: No approval is required for the use of Fallback #3.**

**If the customer insists upon the application of CA, LA, or NV law to the NDA, escalate to L5 Legal for review and approval except where the customer is a government entity and Fallback #2 applies.**

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**Issue #10: Public Disclosures (For Public Customers Only)**

**Customer’s request:** Customer is a public entity and requests an exception for mandatory public disclosure requirements under their local law.

**Principle:** Because public entities are subject to mandatory disclosure laws under their open records acts, these laws can be taken into account.

**Sample Language:** The suggested language for public customers who are constrained by public disclosure laws is as follows:

“Dell agrees and acknowledges that public entities are subject to mandatory public disclosure requirements.  Dell agrees that public customers may make all legally required disclosures; however, to the fullest extent contemplated by the law, public customers agree to only release information in accordance with a proper request under their governing law, to withhold any information legally excluded from disclosure, and to provide Dell the opportunity to first review any Dell documents that must be disclosed under such public disclosure laws so that Dell may redact any sensitive information or have an opportunity to challenge any disclosure through the appropriate methods.”

**Fallback #1:** We can include language that allows them to make disclosures when required to do so under a public disclosure (Freedom of Information Act)-like requirement.

“Dell agrees and acknowledges that public entities are subject to mandatory public disclosure requirements.  Dell agrees that public customers may make all legally required disclosures; however, to the fullest extent contemplated by the law, public customers agree to only release information in accordance with a proper request under their governing law, to withhold any information legally excluded from disclosure, and to provide Dell with reasonable notice and the opportunity to review prior to disclosure any Dell documents that must be disclosed under such public disclosure laws.”

**Approval: No approval is required for the use of Fallback #1.**

**Fallback #2:** If the customer complains that it cannot, by law, allow the proposed limitations, explain that, the language “to the fullest extent contemplated by the law” protects the customer because the prohibition prohibits the contract obligation from arising.

“Dell agrees and acknowledges that public entities are subject to mandatory public disclosure requirements.  Dell agrees that public customers may make all legally required disclosures, however, customer agrees to provide Dell reasonable notice prior to any disclosure.”

**Approval: No approval is required for the use of Fallback #2.**

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**Issue #11: Data Subject to Heightened Security Obligations**

**Issue #11A - Customer’s request: Data Included in Definition.** Customer requests that personally identifiable information (PII), or any other information subject to heightened security obligations be included in the definition of confidential information.

**Principles:**

**Excluded Data Excluded from Confidential Information:** Under Dell’s Customer Purchase Agreement (CPA), the customer is responsible for reviewing data that it provides to Dell EMC to make sure that it does not include the following kinds of data: “(i) data that is classified and/or used on the U.S. Munitions list, including software and technical data; (ii) articles, services and related technical data designated as defense articles and defense services; (iii) ITAR (International Traffic in Arms Regulations) related data; and (iv) other personally identifiable information that is subject to heightened security requirements as a result of Customer’s internal policies or practices or by law (collectively referred to as “Excluded Data”). Customer is solely responsible for reviewing data that will be provided to or accessed by Dell to ensure that it does not contain Excluded Data.” Under the CPA, to the extent that the customer gives us Excluded Data, they have to indemnify Dell EMC for any 3rd party claims arising from it.

We must negotiate our NDAs consistent with the CPA: Excluded Data should not be included in the definition of confidential information under the NDA. References to personally identifiable information (PII) or other Excluded Data as confidential information must be removed. **Escalate to L5 Legal if these references cannot be removed.**

**Personal Health Information:** The treatment of personal health information is governed by the Health Insurance Portability and Accountability Act (HIPAA). See the HIPAA Playbook for further information regarding Dell EMC’s handling of personal health information. Moreover, it is unlikely that Dell EMC would be a Business Associate prior to executing a CPA, MOA, MSA or other agreement for the transaction, and at that time the parties can determine whether a BAA is appropriate and if so, negotiate a BAA. The HIPAA Playbook provides the framework for putting a Business Associate Agreement (BAA) in place to handle such personal health information, where necessary. References to personal health information as confidential information must be removed from the NDA. **Escalate to L5 Legal if these references cannot be removed.**

**Sample Language:** If after a customer’s proposed ITAR related data language is rejected, the customer insists that the data it provides to Dell EMC may contain ITAR related data, add the following language after the ITAR provisions:

“Notwithstanding the forgoing, prior to supplying any information which may be subject to ITAR (“ITAR Controlled Information”), the Disclosing Party shall provide at least five (5) business days prior written notification to the Receiving Party that such information is subject to ITAR, and the Receiving Party shall have an option, at its sole discretion, to refuse to accept the ITAR Controlled Information.”

**Issue #11B - Customer’s request: Data Security Obligations.** Customer requests that Dell EMC have heighted security obligations with respect to certain information customer provides under the NDA.

**Principles:**

**Treatment Obligations:** Treatment of informational data subject to a heightened security obligation by law should be governed by the definitive purchase and/or service agreement between the parties, where Dell EMC is aware of the type of information it is receiving and has scoped its service and pricing accordingly.Remove any additional security obligations with respect to confidential information/data or any requirements to comply with customer’s security protocols and policies, including any requirements to maintain the data in a certain location, including, for example, any requirement to keep data within the United States. **Escalate to L5 Legal if these requirements cannot be removed.**

**Compliance with Laws:** Remove any obligations for Dell EMC to comply with industry-specific laws with respect to confidential information, such as ITAR, the Gramm-Leach-Bliley Act (GLB), FERPA or HIPAA. These types of industry-specific laws may not apply to Dell EMC or to the confidential information exchanged under the NDA. **Escalate to L5 Legal if these requirements cannot be removed.**

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**Issue #12: Residuals Clause**

**Customer’s request:** Customer’s NDA form has a residuals clause or customer requests that a residuals clause be added to our standard NDA template and carves out certain information from the definition of Confidential Information.

**Principles:**

**What is a Residuals Clause?** A residuals clause carves-out certain information learned by a receiving party during an exchange of Confidential Information subject to an NDA. The idea is that there is lingering information a receiving party learned that was not memorized for the purpose of using it beyond the scope of rights granted in the NDA and that cannot simply be tossed out of their brains. The receiving party may not recall how they learned the information or from whom they learned it. Often this “residual” information is knowledge of a topic or general skills that can be applied in many situations. The residuals clause excludes this information from the definition of “Confidential Information” within an NDA so a person is free to use that information in the future without violating the NDA.

**Dell EMC’s Residuals Clause Position:**

A residuals clause favors the recipient in the exchange of confidential information to the detriment of the disclosing party. Therefore, as a default position, we do NOT accept residuals clauses in any agreements (with certain department specific exceptions). Requests to include residuals clauses should be rejected because of their potential to negate the customer’s obligations to protect important Dell EMC confidential information. Should a customer require a residuals clause in an agreement, use the below points and Fallback #1 to ensure a narrowly tailored clause.

1. Who is providing the majority of confidential information?

Avoid providing a residuals clauses where Dell EMC is providing, or may be providing, the majority of confidential information. If we will be providing technical engineering information, then you must receive approval from L4 IP Legal prior to the inclusion of a residuals clause.

1. Required topics of a proposed residuals clause.
   1. No intellectual property license – We should never accept language that grants a right to Dell EMC intellectual property inherent in any residual information. If the customer believes it needs a patent or copyright license, engage with IP Legal immediately.
   2. Unaided memory – Any information covered by the residuals clause must be subject to recall through unaided memory. This prevents the receiving party from bypassing the confidential information definition by using information that they document in notes, presentations or recordings. Remember, the point of the residuals clause is to allow a receiving party to use information that they remember and cannot segment out, such as general knowledge about a topic or a skill.
   3. Unintentional – Adding language that requires any memorization to be unintentional prevents employees from actively trying to remember exchanged information to get around the terms of the NDA.
   4. General information – Information covered under the residuals clause should only be general information, such as knowledge about a topic or a skill. The typical example is if a person learned how to use a software application in order to do a specific job for a customer, then that person is free to use the knowledge of how to use that software application with other customers. Residuals should not include all information exchanged and should exclude certain specific information, such as customer lists, personally identifiable information, and product architectures.

**Fallback:**

Residuals – Recipient may use Residuals for any purpose. “Residuals” means general concepts and ideas that are unintentionally retained in the unaided memory of persons employed by the Recipient who had access to the Confidential Information. Notwithstanding the foregoing, Residuals cannot include computer source code, business plans, product roadmaps, personally identifiable information, or customer information. This subsection does not grant any rights under Discloser’s intellectual property rights in Residuals.

**Approval: L5 Legal approval is required for the use of Fallback #1.**

**Approval: L IP Legal Approval is required for any Residual Clause other than the use of the Sample Language.**

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**Issue #13: Application for Credit**

**Customer’s request:** The customer requests the removal of the provision specifying Dell EMC’s right to provide credit information to Dell EMC’s potential funding sources.

**Principle:** The inclusion of this language is important to Dell Financial Services and its ability to engage with funding sources. This section does not remove the confidential nature of the information, it only allows Dell EMC to disclose the credit information, when a customer requests an extension of credit, to certain recipients that have a duty of confidentiality. This section should be retained if possible. However, the language can be removed if necessary to finalize the agreement. When working from a customer template, attempt to include this language. However, the exclusion of the language should not prevent finalizing the document if the Dell EMC business team confirms that the customer is not going to use or apply for Dell EMC credit.

**Sample Language:**

“Application for Credit. Solely in the event that Participant requests an extension of credit from Dell, Participant represents and warrants that any Confidential Information it provides to Dell in connection with an extension of credit ("Credit Information") is true, correct, and complete in all material respects. Dell may provide Credit Information and related information in Dell’s possession to potential funding sources and their agents, advisors and consultants who are bound by obligations of confidentiality at least as restrictive as those imposed by this Agreement. Notwithstanding anything in this Agreement to the contrary, Dell may keep Credit Information in accordance with applicable document retention requirements and the confidentiality obligations imposed by this Agreement.”

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**Playbook History**

|  |  |
| --- | --- |
| **Name** | **U.S. Non-Disclosure Agreement Playbook** |
| **Organization** | Dell Legal |
| **Playbook Owner** | Nicole Gewinner |
| **Effective Date** | October 29, 2014 |

**Document Review History**

The revision history shows the modifications made to this Playbook.

|  |  |  |  |
| --- | --- | --- | --- |
| **Date** | **Version** | **Modified By** | **Reason for Change** |
| August 2017 | 2.0 | Donna Killmon, Rob Julien | Updated NDA template |
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|  |  |  |  |

**Document Approval**

The document approval history is section provides a means of tracking the review and approval of this Playbook.

|  |  |  |
| --- | --- | --- |
| **Date** | **Name** | **Title** |
| Aug/Sept 2017 | Playbook Council |  |
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[**APPENDIX A**](#Appendix)

**Negotiations Checklist - U.S. Sales NDA**

Version 4.0 July \_\_\_, 2017

Use this Checklist, together with the Playbook, when reviewing or negotiating from Customer’s NDA form. This checklist is divided into three sections:

**Section I: “MUST HAVE” provisions: negotiate to include these provisions in the NDA.**

Confidential Information/Marking Disclosures required by law Severability/Waiver

Exclusions Disclaimers Subsidiaries

Standard of Care Termination Governing law

Use restriction Survival Electronic signatures

Permitted disclosures Protection Period

**Section II: “RECOMMENDED” provisions: these provisions may remain in the NDA, provided they are consistent with the applicable principles.**

Parties to the Agreement Ownership Entirety

Independent Development No commitment Amendment

Returning confidential information Remedies Independent contractor

No Use of Name Export Compliance\* Application for Credit\*\* Mutuality/One-Way

\* Add our standard Export Compliance clause when using the other party’s NDA form. If the Customer refuses to include it, consult the Trade Compliance team if there is any question of the customer receiving export controlled Dell EMC confidential information.

\*\*Add the Application for Credit provision when using the other party’s NDA form. If the other party deletes the Application for Credit language, confirm with the Dell EMC requestor that the other party is not going to use or apply for Dell EMC credit before accepting the deletion.

**Section III: “WATCH OUT” provisions: Negotiate to remove these provisions from the NDA. Escalate to the contract manager or other point of escalation if necessary.**

Dell Inc. “and its affiliates” Personally identifiable information (PII) Indemnification

Limitation of Liability Non-Solicitation or no hire Exclusivity

Liquidated Damages or Limitation of Liability Publicity or other rights to mention Dell EMC publicly Software or Patent Licenses

Non-compete No suit provisions Residuals clause

**Section I: “MUST HAVE” provisions: negotiate to include these provisions in the NDA.**

| **Issue** | **Checklist** | **Principle** | **Sample language** |
| --- | --- | --- | --- |
| [Confidential Information/Marking](#Issue3) | What information is considered confidential? | It is important that the definition of confidential information under the NDA is consistent with the Dell EMC standard principles outlined below.  **Information Accessed**: Customer may want to define confidential information as *all* written information the receiving party may access (regardless if marked or identified as confidential by the disclosing party). This broad definition should be avoided because it obligates the receiving party to expend the same efforts to keep harmless information confidential to the same degree that would be reasonably understood to be confidential in nature.  **Written Information**: Written or tangible information should be considered confidential if (i) marked or identified as confidential, or (ii) the recipient of the information should reasonably know that the information is confidential.  **Dell EMC Confidential Information**: Dell EMC may provide information to customers, such as pricing, facilities tour (e.g. Executive Business Center) and responses to RFPs. Be sure the term “Confidential Information” is suitably defined to cover such information without the need to expressly specify the foregoing information with a particular label or marking.  **Disclosure Prior to Effective Date**: If the NDA states that it covers confidential information disclosed prior to the Effective Date of the NDA, be sure such information has been identified and limited to no greater than 60 days prior to the NDA effective date | “Confidential Information” disclosed under this Agreement is defined as any information, technical data or know how furnished, whether in written, oral, electronic, website-based, or other form by the Discloser to the Recipient that (a) is marked, accompanied or supported by documents clearly and conspicuously designating such documents as “confidential”, “internal use”, or the equivalent; (b) is identified by the Discloser as confidential before, during, or promptly after the presentation or communication; or (c) should reasonably be known by Recipient to be confidential information. |
| [Exclusions](#Issue3) | Are these five items excluded from the definition of Confidential Information? | Certain information should not be subject to the NDA, such as the types of information listed in the model language in the adjacent column. It would be unreasonable and unfair to the recipient if any of the listed 1-5 types of information had to be safeguarded by the Recipient against disclosure because such information is already available to others without such burdens and obligations.  If information is required to be disclosed by law or regulation, or court order it does not necessary follow that such information is no longer confidential. Instead, any such disclosure should be treated as an exception to the disclosing party’s obligation not to disclose the information to third parties. | Confidential Information does not include information which:  1. the Recipient can demonstrate was already in its possession before receipt from the Discloser;  2. is or becomes publicly available through no fault of the Recipient or its Representative;  3. is rightfully received by the Recipient from a third party who has no duty of confidentiality;  4. is disclosed by the Discloser to a third party without a duty of confidentiality on the third party; or  5. is independently developed by the Recipient without a breach of this Agreement. |
| Standard of Care | What standard of care should the recipient be required to use to protect the discloser’s confidential information?  ? | Dell EMC has internal classifications of its confidential information and guidelines as to how each class of information should be handled. The more sensitive information the information, the higher level of care. Therefore, it should be clarified that Dell EMC will use the same level of care with respect to Customer’s information of a “similar” nature. Higher standards of care should be rejected, such as requiring Customer’s information be kept in separate facilities/equipment from where Dell EMC keeps its or other customer’s information.  See Section 6 of the Standard NDA. | Recipient will use the same degree of care, but no less than a reasonable degree of care, as the Recipient uses to protect its own similar Confidential Information. |
| Use Restriction | Is the use of information restricted to an express permitted purpose?  Can the recipient make copies of the information? | Identify the limited purpose underlying the exchange of confidential information and stipulate that the confidential information may not be used for any other purpose. Be careful if the purpose is limited to “evaluating potential business relationship” it may be too narrow and require a new NDA if the parties go beyond the evaluation/RFP phase.  For Multi-Party NDAs, disclosures permitted among all of the parties should be limited to a specific and narrow agreed upon purpose. Dell EMC wants to avoid giving other companies unlimited rights to share Dell EMC confidential information among themselves (without Dell EMC’s knowledge) outside of the intended scope of the contemplated multi-party discussions.  The Customer’s NDA might state that the receiving party cannot make any copies of the confidential information except with prior written permission. It would be difficult for Dell EMC (and the other party) to manage this requirement. The parties should be permitted to make and distribute copies reasonably necessary to effectuate the purpose of the Agreement. Delete or replace with the Sample Language.  See Section 6 of the Standard NDA. | Recipient will use the Discloser’s Confidential Information only for the purpose of and in connection with the evaluation of a potential, or continuation of a business transaction or relationship between the Parties. Recipient may only disclose Confidential Information as authorized by this Agreement.  The Recipient may make copies of Confidential Information as reasonably necessary to effectuate the purpose of the Agreement. |
| [Permitted Disclosures](#Issue4) | May the receiving party disclose to its employees and contractors? | Dell EMC uses contractors and third party service providers to help fulfill some of Dell EMC’s performance obligations. Dell EMC must be permitted to share information with such third parties.  Limit the disclosure of confidential information to those with a need to know in furtherance of the permitted purpose. This limitation helps to minimize risks of unauthorized disclosure and use of confidential information within the receiving party's organization.  The Customer's NDA might require Dell EMC's representatives each to sign the terms of the Customer's NDA or require Dell EMC to inform its representatives of the obligations in the Customer's NDA. Both are not practicable. Instead, propose that such representatives be subject to legally binding obligations of confidentiality no less restrictive than those imposed by the agreement. This is easier to meet because such confidentiality obligations should already be a part of all company employment, consulting, and independent contractor agreements signed by the receiving party's representatives.  If the Customer's NDA states that confidential information may be shared with the receiving party's parent and affiliates that are not subsidiaries, verify that they are not competitors to the disclosing party or that there are no other concerns with disclosing confidential information to such entities | Recipient may disclose Confidential Information to directors, officers, employees, contractors, advisors, and agents of itself and of Discloser that are parties to this Agreement, so long as such individuals have a need to know in their work for Recipient in furtherance of the potential or continued business transaction or relationship, and are bound by obligations of confidentiality at least as restrictive as those imposed on Recipient in this Agreement (collectively, “Representatives”). |
| Disclosures required by law | Is the receiving party permitted to disclose information if required by law? | The NDA should permit the receiving party to disclose information if such disclosure is required by law. Otherwise, the receiving party may be caught in a dilemma of violating the law or breaching the agreement.  Notice to the disclosing party of the requirement may be provided to the extent the receiving party is permitted by law to do so. | If a Recipient is required by government body or court of law to disclose Confidential Information, to the extent permitted by law, the Recipient agrees to give the Discloser reasonable advance notice so that Discloser may contest the disclosure or seek a protective order |
| Disclaimers | Is there a disclaimer of warranties as to non-infringement accuracy and completeness? | No representations or warranties should be given for the confidential information. Until a definitive agreement is signed following a more developed relationship, confidential information is provided only for the NDA’s permitted purpose and the receiving party relies on the confidential information at its own risk.  See Section 9 of the Standard NDA | Discloser warrants that it has the right to disclose its Confidential Information. No other warranties are made under this Agreement whether express, implied, or statutory, including warranties of merchantability, fitness for a particular purpose, and non-infringement. Discloser has no responsibility or liability under this Agreement as to the accuracy or completeness of the Confidential Information. Except as otherwise provided herein, all Confidential Information is provided “AS IS”. |
| [Termination](#Issue5) | Is there a termination for convenience provision? | This permits either party to terminate the Agreement for any reason. | Either party may terminate this agreement at any time by giving thirty (30) days prior written notice to the other party; provided, however, that no Party shall terminate this Agreement if the Parties have a direct agreement still in effect.  However, if the parties have entered into a separate direct agreement (such as a product or services purchase agreement), any notice of termination of this NDA shall be ineffective until the expiration of that separate agreement. |
| [Survival](#Issue5) | Do the parties’ obligations survive termination of the agreement? | The period of confidentiality may be longer than the term of the agreement. The purpose of this clause is to require each party to continue to comply with its confidentiality obligations and restrictions until the end of the confidentiality period. | The terms and conditions of this Agreement shall survive any such termination with respect to Confidential Information that is disclosed prior to the effective date of termination. |
| [Protection Period](#Issue5) | Customer requests that the duty to protect confidential information does not expire.  Customer requests that the term of the obligation to keep confidential information confidential is tied to the termination or expiration date of the NDA instead of the date of disclosure of the confidential information | Dell EMC should not agree to a perpetual term for confidential obligations. Except with respect to technical information about a Discloser’s current products and services and all information about possible unreleased products or services, the period of confidentiality should not continue indefinitely. The period of confidentiality should be appropriate for the useful life of the confidential information and should start from the date of disclosure of such information. In the IT industry, information changes very quickly, so a 3-5 year period is reasonable. Include a confidentiality term of 3 years after the date of disclosure.  **Fallback**: We can accept up to 10 years from the date of disclosure if the Regional Sales Director or sales team equivalent confirms that the number of years is manageable.  Dell EMC can also agree to protect confidential information from the date of expiration or termination of the agreement, provided that the NDA is not evergreen and instead contains a definite date of termination.  **Fallback**: If protection of confidential information survives for more than 3 years from date of expiration, confirm with the RSD or sales team equivalent that the proposed number of years is manageable. We can accept up to 10 years from a known date of expiration or termination if the sales team confirms it can be managed | Unless the Parties otherwise agree in writing, a Recipient's duty to protect Confidential Information expires three (3) years from the date of disclosure. Notwithstanding anything to the contrary herein, protection of technical information about a Discloser’s current products and services and all information about possible unreleased products or services shall never expire. |
| Severability/Waiver | Is there a savings (severability) clause? | A severability clause is intended to ensure that the contract remains enforceable even if part of the contract is later held invalid. Without this clause, it is possible that if a single clause is held invalid, the entire contract will also be rendered invalid.  See Section 16 of the Standard NDA | If any provision of this Agreement is found to be invalid or unenforceable in whole or in part, the Parties agree the remaining provisions of this Agreement shall remain valid and enforceable to the maximum extent compatible to existing law. Discloser’s failure to enforce Recipient’s performance of any term herein will not constitute a waiver of Discloser’s right to subsequently enforce such term or any other term of this Agreement. |
| [Governing Law](#Issue9) | The customer requests that the NDA’s governing law be the law of a state other than Texas | TX, NY, or DE governing law are the only state laws that should govern the NDA, except if otherwise approved by a Contract Manager or L5 Legal.  California, Louisiana, and Nevada governing law should be avoided; CA courts are unpredictable; NV courts are virtually unknown for commercial disputes; and LA law derives from the Civil Code established in France in 1804. If the customer is a government entity (e.g., a state or local government or public university), we can accept the governing law of the government entity’s state. | THIS AGREEMENT IS MADE UNDER, AND WILL BE CONSTRUED ACCORDING TO, THE LAWS OF THE STATE OF TEXAS, EXCLUDING THE CONFLICTS OF LAW RULES. |
| Electronic signatures | Does NDA allow the use of electronic signatures? | This provision expressly allows a party to add their electronic signature to an NDA.  See Section 17 of the Standard NDA. | This Agreement may be signed in separate counterparts. Electronic or facsimile signatures will have the same legal effect as original signatures and may be used as evidence of execution. |

**Section II: "RECOMMENDED" provisions: these provisions may remain in the NDA, provided they are consistent with the stated principles.**

| **Issue** | **Checklist** | **Principle** | **Sample language** |
| --- | --- | --- | --- |
| [Mutuality/One-Way](#Issue1) | The customer requests that Dell sign a one-way NDA in favor of the customer.  Are both parties equally protected and obligated? | Confidential disclosures by one party are often accompanied or followed by confidential disclosures by the other party, particularly in the RFP context. With a mutual agreement, both parties have the same obligation to keep the other party’s information confidential.  If the customer refuses to work from Dell’s form of NDA and presents us with their form of one-way NDA, you should first request that the customer provide a mutual NDA for Dell’s review. If the customer refuses to send Dell their form of mutual NDA, first revise their form of one-way NDA to be a mutual NDA in accordance with Fallback #1 in the NDA Playbook.  If the customer insists on a one-way NDA, then insert the sample language at the end of the customer’s form of NDA.  Substitute "Dell" and customer" with the capitalized terms used in the NDA -for example, Dell could be defined as Supplier, Vendor, etc and customer could be defined by its company name, Buyer, Purchaser,  etc. | In connection with the purpose of this Agreement, Dell may make available to Customer information that would fall within the definition of "Confidential Information if it had been provided to Dell by Customer. Customer shall undertake to Dell the same obligations of confidentiality with regard to Dell's confidential information as Dell has undertaken toward Customer's confidential information. All provisions regarding the treatment of Customer's confidential information and the rights, duties, and obligations of Customer shall apply mutually to Dell and to Dell's confidential information. |
| [Parties to the Agreement](#Issue2) | The customer requests that its parent, subsidiaries or affiliates other than subsidiaries be included as parties to the NDA | If the customer wants to include Customer's parent, subsidiaries and affiliates, other than subsidiaries that are parties to the Standard NDA template, as parties to the NDA, work with the account team to verify that there are no customer specific concerns. For example, are any of those customer entities competitors to of Dell? Or if there are any other specific business concerns with providing Dell confidential information to such related companies. Do not include a customer’s parent, subsidiary, or affiliates, other than subsidiaries, as parties to the agreement if there are competitive or business concerns.  Affiliates allowed to be parties to the NDA should be limited to those under the "control" of the entity signing the NDA. "Control" means the possession, directly or indirectly, of the power to direct the management and policies of affiliate, whether through the ownership of voting securities, assets, by contract, or otherwise. If Customer wants other affiliates, including its parent, to receive confidential information under the NDA, use Fallback #1 or #2 below.  **Fallback #1**: Require affiliates not controlled by customer to agree to be bound by the NDA.  **Fallback #2**: If the customer refuses to require its affiliates to agree in writing, require customer to acknowledge that all terms of the NDA are binding on its affiliates and that Dell can enforce the NDA terms against such affiliates.  **See the Playbook for additional discussion of affiliates, subsidiaries, etc.** | Fallback #1:  For affiliates, not under the control of Recipient, but who wish to receive Confidential Information under this Agreement (and who have been approved by the business to receive such information), such affiliates will agree in writing to the obligations and duties imposed by this Agreement with respect to any Confidential Information. Recipient shall provide Discloser with a copy of such writing if so requested by Discloser.  Fallback 2:  The obligations and duties imposed by this Agreement with respect to any Confidential Information may be enforced by the Discloser of such Confidential Information against any and all Recipients of such Confidential Information. All terms and provisions of this Agreement will be binding upon the Parties and each of their respective affiliates receiving Confidential Information and upon their respective successors and permitted assigns.  Sample Language (provided that Fallbacks #1 or #2 were used for Customer affiliates):  ”Affiliate” means, with respect to Dell, Dell Inc., and its direct and indirect wholly-owned or wholly controlled subsidiaries, and SecureWorks, Inc. (and its subsidiaries)\* and with respect to Customer, any other entity that directly or indirectly controls, is owned by, controlled by or under common ownership or control with Customer. |
| [Returning Confidential Information](#Issue6) | Customer requests that Dell return or destroy all confidential information provided by Customer outside of Dell’s standard processes.  Does Customer's NDA address how the return or destruction of confidential information is to be handled?  Are legal retentions carved out? | **Return or Destroy**: The Customer's NDA might state that the receiving party has a duty to return/destroy all confidential information upon the expiration or termination of the business relationship or transaction. Dell does not have internal processes to ·automatically “return or destroy” information when a contract expires or a project is completed. Instead, propose to return information upon written request. Include an option for Dell to destroy the information, which may be more cost effective than returns.  **Certification**: The customer’s NDA might state that the receiving party has a duty to certify as to the return or destruction of all confidential information upon the expiration or termination of the business relationship or transaction. Dell does not have internal processes to automatically certify when the information is destroyed. We should propose to confirm that the information has been destroyed only upon written request.  **Notes & Memos**: The Customer's NDA might require that notes, memos, documentation and other work product of the receiving party be returned if they contain the disclosing party's confidential information. This is a concern because the receiving party's work product may also contain its own ideas, confidential information, etc., which are not appropriate for the disclosing party's review. If Customer insists, you can propose that such work product be covered by the nondisclosure provisions and use restrictions, but be excluded from any return requirements. | Upon Discloser's written request, Recipient will promptly return or destroy all Confidential Information received from the Discloser, together with all copies. Notwithstanding the foregoing, Recipient’s professional advisors (e.g. lawyers and accountants) may retain in confidence one file copy of their respective work papers and final reports in accordance with their professional and ethical obligations. |
| Ownership | Does the disclosing party retain its ownership and other rights to its IP contained within the confidential information? | This provision prevents the receiving party from later claiming that, by virtue of exchange of confidential information, that it received a license to use the confidential information for purposes outside of the scope of the NDA.  Be sure the clause includes an exception for the receiving party’s limited right to use the confidential information for the purpose specified in the NDA. Otherwise, this clause could create a conflict with the “Use Restriction” clause in Section I above.  See Section 13 of the Standard NDA | All Confidential Information disclosed hereunder will remain property of the Discloser. No Party grants to the other any rights under any patent, copyright, trade secret, trademark or any other intellectual property right except the limited rights necessary to carry out the purpose as set forth in this Agreement. |
| Independent Development | Is the receiving party prohibited from independently developing similar technology? | The NDA should not restrict either party from independently developing any kinds of products, services, and technology so long as such development does not involve breach of the NDA (e.g., unauthorized use of the confidential information).  Do not accept a non-compete provision. See Section III.  See Section 6 of the Standard NDA | The restrictions on disclosures and use set forth in this Agreement do not restrict the right of Recipient to independently design, develop, acquire, market, service or otherwise deal in, directly, products or services competitive with those of the Discloser; provided that the Recipient does not use any of the Discloser’s Confidential Information for such activities. |
| No commitment | Does the NDA commit either party to other obligations? | The NDA should not obligate or commit either party to enter into another agreement, transaction or relationship with the other party. | This Agreement imposes no obligation on any Party to exchange Confidential Information; to purchase, sell, license, transfer, or otherwise make use of any technology, services or products, or to enter into or negotiate toward, any transaction, relationship or other agreement with any Party. |
| [Remedies](#Issue7) | Customer requests that they be entitled to seek injunctive relief for *any and all* breaches of the NDA.  Customer requests that they be entitled to seek specific performance in the event of a breach of the NDA | Ensure that the customer is not entitled to injunctive relief; customer should only be entitled to *seek* injunctive relief. And, limit the right to seek injunctive relief only for actual or threatened unauthorized disclosures or unauthorized uses of confidential information, instead of “any and all” breaches of the NDA.  Customer may also request the right to seek specific performance - even if injunction is the more appropriate remedy.  Injunction and specific performance are conceptually the same as it relates to their purpose and effect on the disclosing party.  Upon the customer’s request, we may agree to add entitlement to *seek* specific performance. See Fallback language in Issue #7B of Playbook. | The obligations and duties imposed by this Agreement with respect to any Confidential Information may be enforced by Discloser against any and all Recipients. Each Party acknowledges that damages for improper disclosure of Confidential Information may be irreparable; therefore, the injured Party may be entitled to seek equitable relief, including injunction and preliminary injunction in addition to all other remedies available at law or in equity. |
| Binding Agreement | Is the agreement binding on the parties’ respective successors? | The purpose is to ensure that the NDA is binding on the parties and their respective successors in the event a party is acquired by a third party. | This Agreement is binding upon the Parties and upon their respective successors. |
| Amendment | Are NDA modifications to be made only in writing? | The purpose is to prevent a party from claiming the NDA was modified by subsequent oral agreements. | All additions or modifications to this Agreement must be made in writing and must be signed by the Parties. |
| Independent contractor | Is there an "independent contractor" clause? | The purpose is to prevent a party from claiming that, by entering into the agreement, it has authority to make commitments on behalf of the other party as its agent or legal partner | This Agreement does not create a joint venture, partnership or other similar arrangement or relationship. |
| Export Compliance | Is export compliance addressed? | Dell must inform customers of their obligation to comply with U.S. export regulations  See Section 11 of the Standard NDA | Recipient will adhere to all applicable United States and foreign export control laws and will not export or re-export any technical data or products to any proscribed country listed in the U.S. Export Administration regulations, unless properly authorized by the U.S. government. |
| No Use of Name | Does the Customer’s NDA include no use of name or publicity language? | A Party should not issue or release any articles, advertising, publicity or other material relating to any other Party's Confidential Information or mention or imply the name of any other Party without the other Party’s prior written consent.  See Section 4 of the Standard NDA | Each Party agrees not to issue or release any articles, advertising, publicity or other material relating to any other Party's Confidential Information or mentioning or implying the name of any other Party without the prior written consent of such other Party. |

**Section III: “WATCH OUT” provisions: Negotiate to remove these provisions from the NDA. Escalate to the assigned contract manager or other point of escalation if necessary.**

| **Issue** | **Checklist** | **Principle** | **Sample language** |
| --- | --- | --- | --- |
| Limitation of Liability | Customer seeks to disclaim liability for consequential, incidental and other indirect damages. | The NDA would lose its "bite” if consequential and indirect damages are excluded because the injured party is likely to incur significant losses from unauthorized disclosure or use of confidential information(e.g., loss of commercial advantage, increased competition, lower profits)  This request should be rejected. If it cannot be resolved, please escalate to the contract manager or L5 Legal. |  |
| Subsidiaries | The customer requests that all of Dell’s subsidiaries and other affiliates be included as parties to the NDA. | Customers often request that Dell Inc. bind all of its subsidiaries and other affiliates to the NDA. Dell Inc. only has the authority to bind its direct and indirect subsidiaries, i.e. those entities over which it has “control,” (including Dell Marketing L.P.). Dell Inc. and Dell Inc.’s wholly-owned or wholly-controlled subsidiaries and SecureWorks, Inc. (and its subsidiaries) are parties to Dell’s NDA template as they will be the primary entities receiving confidential information. Dell Inc. should never bind entities upstream, i.e. entities that have an ownership interest in Dell Inc., such as SilverLake or MSD Capital. With the exception of SecureWorks, Inc., which is a party to the Standard NDA template, Dell Inc. should never bind its non-wholly-owned subsidiaries, such as VMware Inc., and Pivotal Software, Inc., without prior approval of those subsidiaries. | This Agreement is made by Dell Inc., for itself, its wholly-owned or wholly controlled subsidiaries, and SecureWorks, Inc. (and its subsidiaries) (collectively "Dell") |
| Liquidated Damages or Limitation of Liability | Customer seeks a finite cap on its liability under this agreement. | Damages (e.g., loss of commercial advantage, lower profits) from a breach of the NDA can be substantial and hard to quantify, so placing a dollar cap on liability is not appropriate.  This request should be rejected. If it cannot be resolved, please escalate to the contract manager or L5 Legal. |  |
| [Personally Identifiable/ Heightened Security Obligation](#Issue11) | Customer proposes that Dell is required to comply with Gramm-Leach-Bliley (GLB), other statute or regulations, or a heightened standard of care with respect to personally identifiable information.  Customer requests that personally identifiable information (PII) or any other information subject to heightened security obligations be included in the definition of confidential information.  Customer requests that Dell have certain obligations with respect to information subject to heightened security obligations under the NDA | This request should be rejected. In an early stage of a business relationship, Pll will not be disclosed so these restrictions are usually unnecessary. If a relationship later develops and Customer wishes to engage Dell to provide services, and such services require Customer to disclose Pll to Dell, then such disclosure should be addressed in the services contract or SOW, but not in the NDA. Please refer to the GLB Playbook page if necessary.  **Excluded Data Excluded from Confidential Information**: Under Dell’s Customer Purchase Agreement for Products and Services (“CPA”) and EMC’s Master Ordering Agreement (“MOA”) if stated below, the customer is responsible for reviewing data that it provides to Dell to make sure that it does not include the following kinds of data: “(1) data that is classified and/or used on the U.S. Munitions list, including software and technical data; (2) articles, services and related technical data designated as defense articles and defense services; (3) ITAR (International Traffic in Arms Regulations) related data (restriction on providing this information in EMC MOA); and (4) personally identifiable information that is subject to heightened security requirements as a result of customer’s internal policies or practices, industry-specific standards or by law” (“Excluded Data”). Under the CPA, to the extent that the customer gives us Excluded Data, they have to indemnify us for any 3rd party claims arising from it.  We must negotiate our NDAs consistent with the CPA and MOA: Excluded Data should not be included in the definition of confidential information under the NDA. References to PII or other Excluded Data as confidential information must be removed. **Escalate to L5 Counsel if these references cannot be removed**.  **Personal Health Information**: The treatment of personal health information is governed by the Health Insurance Portability and Accountability Act (HIPAA). See the HIPAA Playbook for further information regarding Dell’s handling of personal health information. References to personal health information (PHI) as confidential information must be removed from the NDA. **Escalate to L5 Legal if these references cannot be removed**.  **Treatment Obligations**: Treatment of informational data subject to a heightened security obligation by law should be governed by the definitive agreement, where Dell is aware of the type of information it is receiving and has scoped its service and pricing accordingly. Remove any additional security obligations with respect to confidential information/data or any requirements to comply with customer’s security protocols and policies. **Escalate to L5 Legal if these requirements cannot be removed**.  **Compliance with Laws**: Remove any obligations for Dell to comply with industry-specific laws with respect to confidential information, such as ITAR, the Gramm-Leach-Bliley Act (GLB), FERPA or HIPAA. These types of industry-specific laws may not apply to Dell or to the confidential information exchanged under the NDA**. Escalate to L5 Legal if these requirements cannot be removed** |  |
| Non solicitation | Dell may not solicit or hire any of Customer's employees and/or contractors. | In an early stage of a business relationship, and particularly in a context that does not include merger and acquisition, these restrictions are usually inappropriate and unnecessary. Additionally, Dell is a large, worldwide entity and uses several recruiting methods and partners. Dell and its partners would have difficulty managing compliance with such provision.  This request should be rejected. If it cannot be resolved, please escalate to the contract manager or L5 Legal. |  |
| Exclusivity | Customer wants to include an exclusive dealing provision with respect to any confidential information | This request should be rejected. If it cannot be resolved, please escalate to the contract manager or L5 Legal. |  |
| Non-compete | Customer wants to include a non-compete covenant with respect to any confidential information, product or services | This request should be rejected. If it cannot be resolved, please escalate to the contract manager or L5 Legal. |  |
| Publicity or other rights to mention Dell publicly | Customer wants to mention Dell as a “partner” or otherwise in any public statement. | This request should be rejected. If it cannot be resolved, please escalate to the contract manager or L5 Legal. |  |
| Indemnification | Customer wants Dell to indemnify against any claims arising from Dell's breach of the NDA | This request should be rejected. If it cannot be resolved, please escalate to the contract manager or L5 Legal |  |
| No suit provision | Customer wants to include a provision preventing suing under the NDA or other agreements. | This request should be rejected. If it cannot be resolved, please escalate to L5 Legal. |  |
| [Residual Clause](#Issue12) | Customer wants to use residuals for any purpose | "Residuals" is often defined as information in non-tangible form that may be retained in the (aided or unaided) memory of people who have had access to confidential information and that includes ideas, concepts, know-how or techniques. This provision would undermine the protection of the NDA because it gives the receiving party license to use the confidential information fortuitously committed to memory or fortuitously recalled.  This request should be rejected. If it cannot be resolved, please see Fallback and approval requirements in Issue #12 in playbook |  |

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