

TATE Compendium™ starter draft (long form)
Confidentiality Agreement
with “down the middle” pre-sets

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This **Agreement** is between [PARTY NAME], a [STATE] [CORPORATION], whose initial address for notice is [ADDRESS]; and [PARTY NAME], a [STATE] [CORPORATION], whose initial address for notice is [ADDRESS]. This Agreement is effective as of the last date signed as written in the signature blocks below. Unless the parties expressly agree otherwise:

- **An article, section, or subsection below that has ‘typewritten’ checkbox at the beginning is not included in this Agreement unless the checkbox has an “x” in it**, for example, (x).
- If a section is part of an article having a checkbox, the section is not included unless the article is included; if a subsection is part of a section having a checkbox, the subsection is not included unless the section is included.
- Unless otherwise clear from the context, text in all caps surrounded by square brackets indicates the default value of a fill-in-the-blank provision. EXAMPLE 1: In the phrase “at least [30 DAYS] notice,” the required notice period is 30 days if not replaced by another time period. EXAMPLE 2: The text [PARTY NAME] should be replaced with a party’s name, and does not have a value otherwise.

1. Definitions & usages

The terms below have the stated meanings. Other definitions may be set forth “in line” in the provisions in which they appear.

Affiliate: *Affiliate* status exists (i) when one individual or organization is in a *control relationship* with another, and (ii) in any other circumstance expressly stated by this Agreement.

PURPOSE OF PROVISION: Sometimes when a company negotiates a contract, it wants the benefits of the contract to extend also to other companies with which the first company considers itself to be “affiliated.” This definition puts fences around the concept of affiliation.

WILL IT BE CONTENTIOUS? This definition is very common and seldom objected to. It's based on definitions used in a number of SEC regulations (see the commentary in the definition of *control* below).

NOTE: Conceivably, one of the other side’s existing- or future affiliates could turn out to be one of your competitors, or some other person or organization you’d just

as soon not do business with. Ask yourself whether it would cause you any heartburn if such an affiliate were to have the rights (and/or obligations) of an *affiliate* under the Agreement.

NOTE: It might be appropriate to specify in the Agreement what happens in case of loss of affiliate status. An orderly phase-out of particular rights and obligations might be appropriate. For example, suppose (1) that a software license agreement permitted the licensee's affiliate to use the software, and (2) that a particular affiliate were later to lose its status as such because of a corporate divestiture. It could be quite disruptive if the affiliate were required immediately to stop using the licensed software.

[] For purposes of this Agreement, [PARTY NAME] is deemed an affiliate of [PARTY NAME] regardless whether they have a *control relationship*.

PURPOSE OF PROVISION: This section can be useful in the situation in which, let's say, Company A is a partner in a joint venture, and doesn't have a *control relationship* with the joint venture, but it still wants the joint venture to have *affiliate* benefits under the agreement.

WILL IT BE CONTENTIOUS? I haven't often seen the substance of this subparagraph in other peoples' contracts. When I've proposed it on behalf of clients, the other side generally hasn't had a problem with it.

Best efforts refers to 'leaving no stone unturned' in making *reasonable efforts* to achieve the stated objective. For the avoidance of doubt, unless expressly agreed otherwise as to one or more specific actions, a party required to make *best efforts* (i) need not take every conceivable action to achieve the stated objective, and (ii) need not take any action that would not qualify as a *reasonable effort*.

PURPOSE OF PROVISION: This section attempts to give some predictability to the term "best efforts." Different courts, left to their own devices, might define the term in very different ways — sometimes requiring all efforts short of bankruptcy, while other times requiring only reasonable efforts.

WILL IT BE CONTENTIOUS? Very few contracts try to define "best efforts," so it's not clear how acceptable this definition will be in the market. The "leaving no stone unturned" phrase is from a Canadian court decision, *Atmospheric Diving Systems Inc. v. International Hard Suits Inc.*, 89 B.C.L.R. (2d) 356 (1994), excerpted by Ken Adams at <http://bit.ly/8AdIXf>.

COMMENT: See also the definition of *reasonable efforts*, as well as a useful 2007 [Jones Day memo](http://bit.ly/4noETJ) by Shawn C. Helms, David Harding, and John R. Phillips at <http://bit.ly/4noETJ>.

Business discretion: IF: This Agreement commits a decision, determination, or action to a person's business discretion; THEN: That decision, determination, or action may be taken in the person's sole and unfettered discretion, for any lawful reason or no reason, with a mind solely to the

person's own lawful interests and not those of any other person, and without reference to any putative standard of reasonableness, good faith, or fair dealing.

PURPOSE OF PROVISION: This section is intended to provide a less-harsh substitute for the traditional phrase "sole and unfettered discretion" that is often seen in contracts. (It says more or less the same thing, but in a way that should have less of a chance of disconcerting the other side.) It favors whichever party the Agreement says is entitled to do something "in its business discretion."

WILL IT BE CONTENTIOUS? The acceptability of this definition will depend on the context in which it is used.

COMMENT: This section is intended to forestall attacks in litigation by 'creative' lawyers, claiming that the other side had some sort of implied duty to exercise its discretion in a particular way.

NOTE: A party exercising business discretion can do pretty much anything it wants in that exercise, as long as it's legal, of course. This contrasts with the abuse-of-discretion standard that restricts what lower-court judges can do when they have discretion.

Confidential information: See section 201.

Control: For purposes of determining *affiliate* status, *control* of an organization refers to voting control of at least 50% of the securities of the organization that are entitled to vote for the election of directors or, for non-corporate organizations, of comparable ownership interests.

PURPOSE OF PROVISION: See the discussion in the definition of affiliate.

WILL IT BE CONTENTIOUS? The 50% language is very commonly seen; likewise the definition of *control*, which has roots in the definition of *affiliate* found in U.S. securities laws such as [Rule 501\(b\)](#) of SEC Regulation D, 17 CFR § 230.501(b).

NOTE: Requests to go below 50% ownership should be examined carefully. Some contracting parties may ask for a lower percentage than 50% because they have subsidiaries in which they own less than a majority of the stock, but they feel they still have de facto control. Counterparties, however, might not be comfortable with a blanket rule allowing less than 50% control; for those situations, consider specifying that particular non-controlled organizations are also to be deemed *affiliates*.

[] *Control* of an organization also includes the power to direct its management and policies, by contract or otherwise.

PURPOSE OF PROVISION: See the discussion in the definition of affiliate.

WILL IT BE CONTENTIOUS? The "management power" language in this subparagraph not common, for reasons discussed in the "alert" paragraph below.

ALERT: It's usually a bad idea (in my view) to state that control can arise solely through management power.

Granted, some contracting parties want their “affiliates” to include companies over which they have some sort of *de facto* real-world control. Such language is found in definitions used in the U.S. securities laws (for example, in [Rule 1-02\(g\)](#) of SEC Regulation S-X).

The securities-law language may be all well and good for government-regulatory purposes. But for contract purposes, it’s not hard to imagine how, in litigation, the parties might have to engage in extensive — and expensive — discovery about who has what management power.

ALTERNATIVE: In many circumstances, it likely will be enough to state instead that certain specified companies will be deemed “affiliates,” even though the specific legal relationships in question don’t qualify as “control.” This is a checkbox option in the definition of *affiliate*.

A *control relationship* exists between two persons when one person controls, is controlled by, or is under common control with, the other, either directly or indirectly via one or more intermediaries.

PURPOSE OF PROVISION: See the discussion in the definitions of *affiliate* and *control*.

Disclosing party: See section 201.

Examples (and terms such as for example) and *include* and similar terms (e.g., *including*), are used in this Agreement for purposes of illustration, not of limitation, unless another meaning is clear from the context.

PURPOSE OF PROVISION: This section eliminates the need to repeatedly write (and read), for example, “by way of example but not of limitation.”

WILL IT BE CONTENTIOUS? This type of provision is not uncommon in contracts; it’s generally uncontroversial when used.

Include, etc. — see *Examples*.

Indemnify: IF: A provision of this Agreement obligates a party to indemnify another individual or organization against one or more events— such as, for example, a third-party claim — but is not specific as to the types of harm to be indemnified; THEN: The obligated party will indemnify the individual or organization against all claims, liabilities, losses, damages, obligations, penalties, actions, judgments, execution, costs, expenses, and disbursements, of any kind or nature, arising out of the specified event(s). *Expenses* for this purpose includes, for example, reasonable attorneys’ fees, expert witness fees, and other expenses of litigation or arbitration.

PURPOSE OF PROVISION: This section eliminates the need to repeatedly write (and read), the laundry list of things to be defended- and indemnified against.

WILL IT BE CONTENTIOUS? Many indemnity provisions include laundry lists of this nature.

COMMENT: Note that this definition does NOT include a “hold harmless” clause, in which the indemnifying party, in essence, gives the protected party a get-out-of-jail-free card, that is, the indemnifying party will be responsible for the damage in question even if the protected party bears some responsibility for it.

COMMENT: For a very understandable introduction to indemnities, see [The Manager’s Guide to Understanding Indemnity Clauses](#), by attorney Frank Adoranti – a Google Books preview is at <http://bit.ly/Indemnity>.

Knowledge refers to actual knowledge; *knows* has a corresponding meaning.

COMMENT: This definition is excerpted from UCC § 1-202(b) — note that there is no duty of inquiry. Other subparagraphs of that particular UCC section are not incorporated into this Agreement: some of those other subparagraphs define “notice” and specify default rules for when an organization has knowledge or notice of a fact, which might conflict with the notice provisions of the Agreement.

Organization refers to a corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

COMMENT: This language is adapted from UCC § 1-201(25) and (27).

Otherwise agreed and its variations, for example, *agreed otherwise*, requires a writing. (*Exception*: The parties may agree in writing that, for a particular matter or a particular class of matters, their agreement otherwise need not be in writing.) Any decision whether or not to agree otherwise is within the *business discretion* of the relevant person unless expressly stated otherwise in this Agreement.

COMMENT: The exception allows the parties to vary specific terms by oral agreement.

Party refers to an individual or organization entering into this Agreement unless otherwise clear from the context.

COMMENT: This definition may well be superfluous; see the [AdamsDrafting](#) blog for details.

Person refers to an individual or organization.

COMMENT: Adapted from UCC § 1-201(27).

Protected party, unless otherwise specified, refers to: (i) in connection with a third-party claim, a signatory party that is entitled to indemnity and/or defense by another signatory party; (ii) in connection with a limitation of remedies or other liability, the signatory party whose liability is so limited. **Protected person** refers to (i) a *protected party* itself and (ii) the protected party's employees, officers, directors, shareholders, general- and limited partners, members, and managers.

COMMENT: This definition helps reduce the verbosity of indemnity provisions.

Reasonable efforts refers to one or more reasonable actions reasonably calculated to achieve the stated objective.

Any determination of what constitutes *reasonable efforts* shall give due regard to the information about the circumstances that is available to the acting party at the relevant time, including for example (i) the likelihood of success of the specific action(s) taken or contemplated; (ii) the likely cost of other or additional actions; (iii) the parties' other legitimate business interests, (iv) the safety of individuals and property, and (v) where applicable, the public interest.

For the avoidance of doubt, unless expressly agreed otherwise as to one or more specific actions, a party required to make reasonable efforts need not take (i) every conceivable action to achieve the stated objective, nor (ii) any extreme- or extraordinary action, nor (iii) any action that would subject the party to undue hardship.

PURPOSE OF PROVISION: This section attempts to give some predictability to the term "reasonable efforts."

WILL IT BE CONTENTIOUS? This definition is my own coinage. Whether this definition will be acceptable to a given drafter or reviewer will likely depend on the context in which the defined term *reasonable efforts* is used.

COMMENT: Chapter 7 of Ken Adams's [A Manual of Style for Contract Drafting](#), 2d Ed., contains useful research. See also a useful 2007 [Jones Day memo](#) by Shawn C. Helms, David Harding, and John R. Phillips at <http://bit.ly/4noETJ>.

Responsible efforts refers to such *reasonable efforts* as a prudent person would make in the course of a conscientious attempt to achieve the stated objective.

PURPOSE OF PROVISION: This section attempts to define a level of effort that requires more than just "reasonable efforts," without drifting into the vagueness of the term "best efforts."

WILL IT BE CONTENTIOUS? This definition is my own coinage; I don't recall ever seeing the defined term used in an actual contract. Whether the term will be acceptable to a given drafter or reviewer will likely depend on the context in which it's used.

Seasonably: An action is taken *seasonably* if it is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time.

COMMENT: This definition is reproduced verbatim from UCC [§ 1-205](#).

Signed writing includes, for example, an electronic sound, symbol, or process attached to or logically associated with a *writing* and executed or adopted by a person with the intent to sign the writing.

COMMENT: This definition is adapted from proposed amendments to Rule 1.00 of the Texas Disciplinary Rules of Professional Conduct, Section 9 of the Rules of the State Bar of Texas.

Specified means as specified in the applicable section or in the Agreement unless otherwise clear from the context.

Stated: See *specified*.

Tax refers to any tax, assessment, charge, duty, levy, or other similar governmental charge of any nature. The term includes any and all governmental charges imposed by any federal, state or local authority in the United States or elsewhere. Examples include (1) all income, gross receipts, employment, franchise, profits, capital gains, capital stock, transfer, sales, use, occupation, property, excise, severance, windfall profits, stamp, stamp duty reserve, license, payroll, withholding, ad valorem, value added, alternative minimum, environmental, customs, social security (or similar), unemployment, sick pay, disability, registration, and other taxes, assessments, charges, duties, fees, levies or other similar governmental charges of any kind whatsoever, whether disputed or not, together with (2) all estimated taxes, deficiency assessments, additions to tax, penalties, and interest.

COMMENT: This definition of *tax* is adapted from contract language quoted by the Court of Appeals of New York (that state's highest court of appeals) in [Innophos, Inc. v. Rhodia, S.A.](#), 2008 NY Slip Op 01253, 882 N.E.2d 389 (N.Y. Feb. 12, 2008), available at <http://www.nycourts.gov/ctapps/decisions/feb08/4opn08.pdf>. In that case, the court upheld a summary judgment that a \$20 million-plus water usage charge, levied by a Mexican government entity, was a "tax" within the meaning of the contract's laundry-list definition. See slip op. at 2-3.

Tribunal refers to an adjudicatory body of competent jurisdiction. Examples include a court, an arbitration panel in a binding arbitration proceeding, or an administrative agency or legislative body acting in an adjudicatory capacity. For this purpose, *acting in an adjudicatory capacity* means that in a particular matter, after the presentation of evidence or legal argument or both by one or more parties, a panel of one or more neutral officials renders a binding legal judgment directly affecting the interests of one or more parties in the matter.

COMMENT: Portions of this definition are adapted from proposed amendments to Rule 1.00 of the Texas Disciplinary Rules of Professional Conduct, Section 9 of the Rules of the State Bar of Texas.

Writing or written refers to any tangible or electronic record of a communication or representation. The terms encompass, for example, handwriting, typewriting, printing, photocopying, photography, audio- or video recording, and e-mail.

COMMENT: This definition is adapted from proposed amendments to Rule 1.00 of the Texas Disciplinary Rules of Professional Conduct, Section 9 of the Rules of the State Bar of Texas.

References to sections, articles, exhibits, schedules, addenda, and appendixes refer to those of this Agreement unless clearly indicated otherwise.

2. **Confidential information**

COMMENT: For an excellent overview of confidential-information provisions, see the article "[What is important in a confidentiality agreement or non-disclosure](#)

agreement (NDA)?" by Yoichiro ("Yokum") Taku, a partner at Wilson Sonsini, a leading Silicon Valley law firm.

201 Definitions & related matters

201.01 (x) *Disclosing party*: Each party can be a *disclosing party* whose confidential information is subject to the confidentiality obligations of this Agreement.

OR () *Disclosing party*: Only [PARTY NAME] can be a *disclosing party* whose confidential information is subject to the confidentiality obligations of this Agreement.

WHO WANTS THIS, AND WHY? Both disclosing- and receiving parties have a keen interest in defining which party's or parties' information will be protected:

- A disclosing party will often want the confidentiality obligations to apply only to the other party, so that if the receiving party happens to disclose its own confidential information, the disclosing party will not have any obligation of confidence.
- Receiving parties, however, often object to a one-way agreement, and push for a two-way agreement.

HYPOTHETICAL NEGOTIATION EXAMPLE: Suppose that Parties A and B sign a confidentiality agreement that protects the information of Party A only. They do so because only Party A will be disclosing its confidential information — or so they think.

- It's entirely possible, however, that at a later date, the parties will decide that they also need to protect Party B's confidential information.
- In that case Party A, the original disclosing party, might find itself in the embarrassing position of asking to negotiate a new agreement: In the original negotiation, it played hardball by demanding that Party B agree to tough confidentiality obligations. But then, when it looks like the roles will be reversed, it doesn't want to have to live with those obligations itself as a receiving party.
- If the parties have to negotiate a new agreement, the business people are likely to ask pointed questions about why the agreement couldn't have been "done right" in the first place.

So as a general rule, it's often a good idea to insist that any confidentiality provisions be two-way in their effect from the start, protecting the confidential information of both parties.

POSSIBLE ARGUMENTS PRO AND CON:

- *Receiving-party argument*: "We don't know for sure that we won't need to disclose our own information to you. If that happens, we need for our information to be treated as confidential, too. Besides, with a two-way agreement, it should take us less time to work out a mutually-agreeable set of terms and conditions. Each of us will have to live with the same rights and restrictions that it asks the other side

to accept. That should make both of us more inclined to be reasonable in the negotiations."

- *Disclosing-party argument:* "We want it clear that only our information will be treated as confidential. If you happen to disclose your information to us, we're not necessarily going to use it or disclose it. But we don't want to be contractually obligated to treat your information as confidential — that's one more obligation we'd have to manage, and we don't want to have to do that."

COMMENT: Even in a two-way provision, a good drafter can slant the language in favor of the role he (or she) thinks his client will be playing.

201.02 *Confidential information* refers to any information owned or maintained by a *disclosing party* that (i) is shown to have been the subject of *reasonable efforts* by the disclosing party to preserve the information in confidence; (ii) is disclosed to another party to this Agreement (each, a *receiving party*) by, on behalf of, or with the express or implied approval of, the disclosing party; and (iii) is not shown to be excluded from confidential-information status by this Agreement or by law. For the avoidance of doubt, the term *confidential information* includes the receiving party's notes, summaries, etc., to the extent they contain or reflect confidential information.

WHO WANTS THIS, AND WHY? Both disclosing- and receiving parties normally want clarity, and also to establish just what the disclosing party will and won't have to prove if a dispute should arise.

WILL IT BE CONTENTIOUS? This type of definition is extremely common in confidentiality provisions.

COMMENT: This definition allocates the burden of proof in the usual way: Under clause (i), the *disclosing party* must show that it made reasonable efforts to preserve the information in confidence. Assuming the disclosing party succeeds in doing so, then under clause (ii) it is up to the *receiving party* to show that the information is nevertheless within an exclusion.

COMMENT: Some lawyers for disclosing parties like to include long laundry lists of specific examples of confidential information; this can be done using the checkbox option below.

NOTE: This definition is not as strict as that of "trade secret" under typical state laws — to be a trade secret, generally speaking, the information must give someone who knows it an economic advantage over someone who doesn't.

NOTE: Disclosing parties often want the final avoidance-of-doubt language to drive home the point that the receiving party must treat its notes, etc., as confidential information — and that those documents must be returned or destroyed if required by section 205.01.

WILL IT BE CONTENTIOUS? This type of definition is quite common in confidentiality provisions.

201.03 **Confidential information examples:** For purposes of illustration and not limitation, the term *confidential information* includes, for example, [FILL IN SPECIFIC EXAMPLES].

WHO WANTS THIS, AND WHY? Disclosing parties' lawyers, out of an abundance of caution, sometimes want this language so as to be sure that *their* clients' confidential information is covered by the basic definition.

WILL IT BE CONTENTIOUS? This type of definition is not uncommon in confidentiality provisions.

COMMENT: Personally, I'm skeptical that this kind of laundry list of confidential information types is likely to make any significant difference.

201.04 **Disclosure period:** The confidentiality obligations of this Agreement apply only to confidential information initially disclosed during the [ONE-YEAR] period following the effective date of this Agreement (the *disclosure period*).

WHO WANTS THIS, AND WHY? In relationships (or preliminary negotiations) that are not expected to be long-term, receiving parties sometimes ask for language like this, so that they won't be under confidentiality obligations for information that might be disclosed to them months or years later.

WILL IT BE CONTENTIOUS? This language is often agreed to by disclosing parties.

COMMENT: A disclosing party that wants to rely on a previously-signed confidentiality agreement should routinely check (i) whether the agreement contains a disclosure period, and (ii) if so, whether the disclosure period has already expired.

201.05 **Presumption of confidentiality:** Information that complies with the marking requirements of section 201.10 is presumed to be confidential information until shown otherwise.

OR All information that the disclosing party provides to the receiving party pursuant to this Agreement is presumed to be confidential information until shown otherwise.

WHO WANTS THIS, AND WHY? Disclosing parties often want this language to reverse the usual burden of proof in a lawsuit and make the receiving party prove that information is *not* confidential, instead of the other way around.

WILL IT BE CONTENTIOUS?

- The first choice, concerning information that complies with the agreement's marking requirements, is often accepted by receiving parties.
- The second choice, concerning "all information," favors the disclosing party, shifting the burden of proof to the receiving party. It's sometimes seen in disclosing-party forms, but receiving parties often object to it.

BACKGROUND: Normally the burden of proof would be on the disclosing party to show that its information was confidential. (The disclosing party would usually prove this indirectly, by offering evidence that it had made **reasonable efforts** to keep the information confidential.) A presumption-of-confidentiality provision, if