

C L I F F O R D  
C H A N C E

**FUNDAMENTALS OF PRIVATE CAPITAL AND M&A TRANSACTIONS**  
SINGAPORE | WEDNESDAY, 4 SEPTEMBER 2024

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## **CONFIDENTIALITY AGREEMENTS**

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SINGAPORE | WEDNESDAY, 4 SEPTEMBER 2024

# CONFIDENTIALITY AGREEMENTS



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# CONFIDENTIALITY AGREEMENTS

## TODAY'S TRAINING

TODAY WE ARE GOING TO COVER:		
<p><u>What</u> does an NDA do?</p> <p>●</p>	<p><u>When</u> is an NDA entered into?</p> <p>●</p>	<p><u>Who</u> should you disclose Confidential Information to?</p> <p>●</p>
<p><u>How</u> to review the key provisions in the NDA?</p> <p>●</p>		

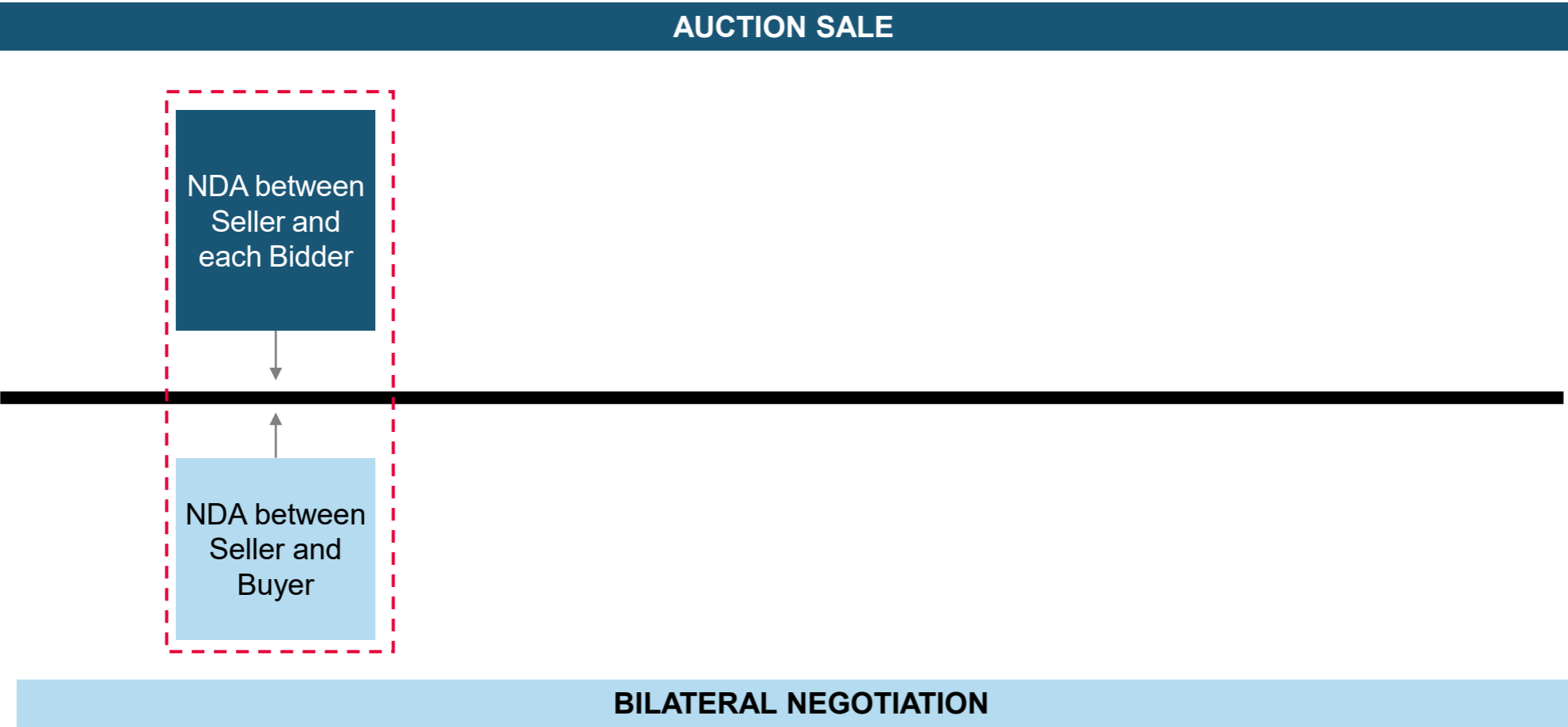
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*What does an NDA do?*

1. Limits the use Confidential Information to the **purpose** of evaluating the contemplated transaction; and
2. Ensures that the Confidential Information are only disclosed to a **specific group of recipients**.

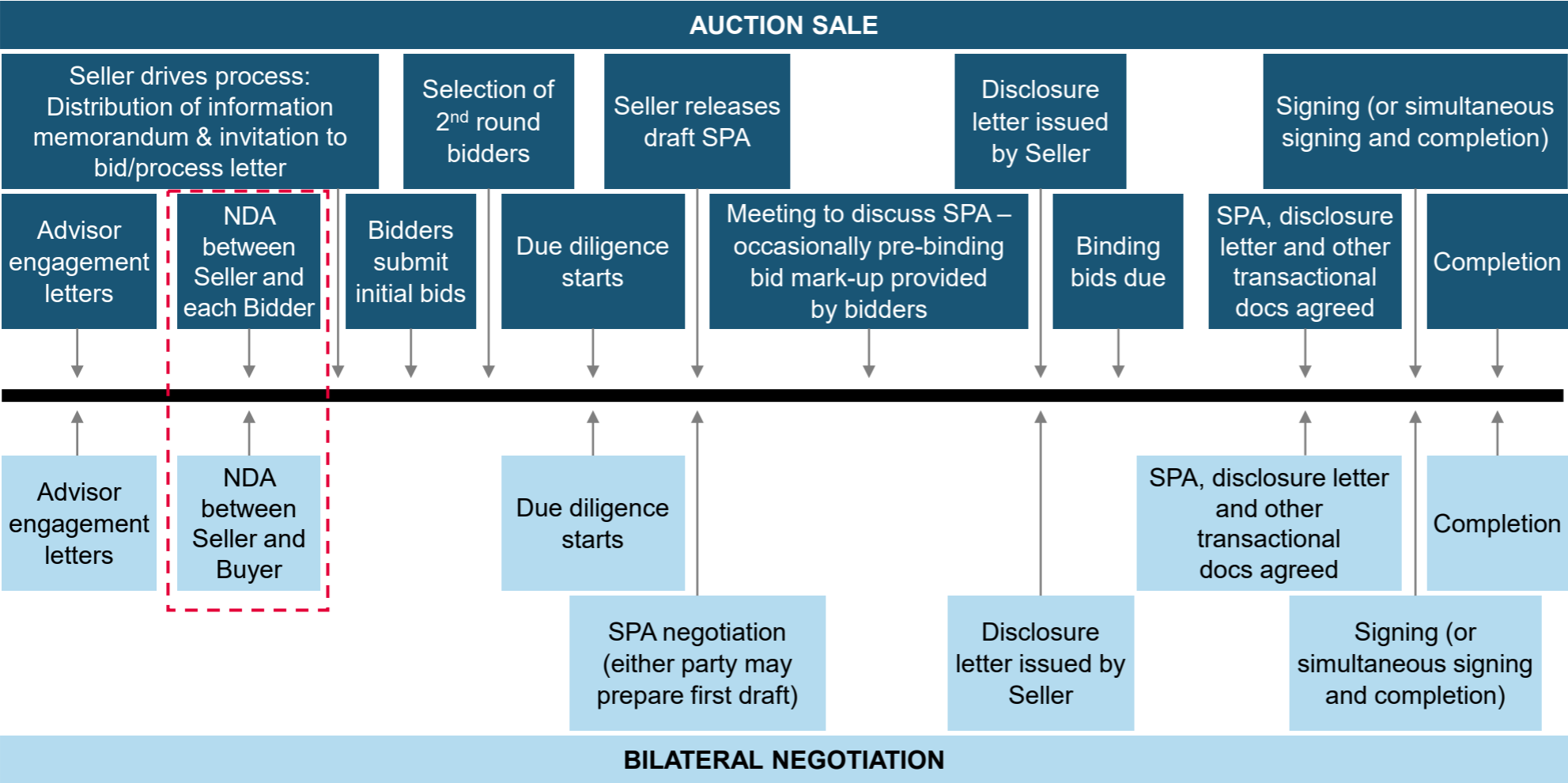
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*When are NDAs typically entered into?*



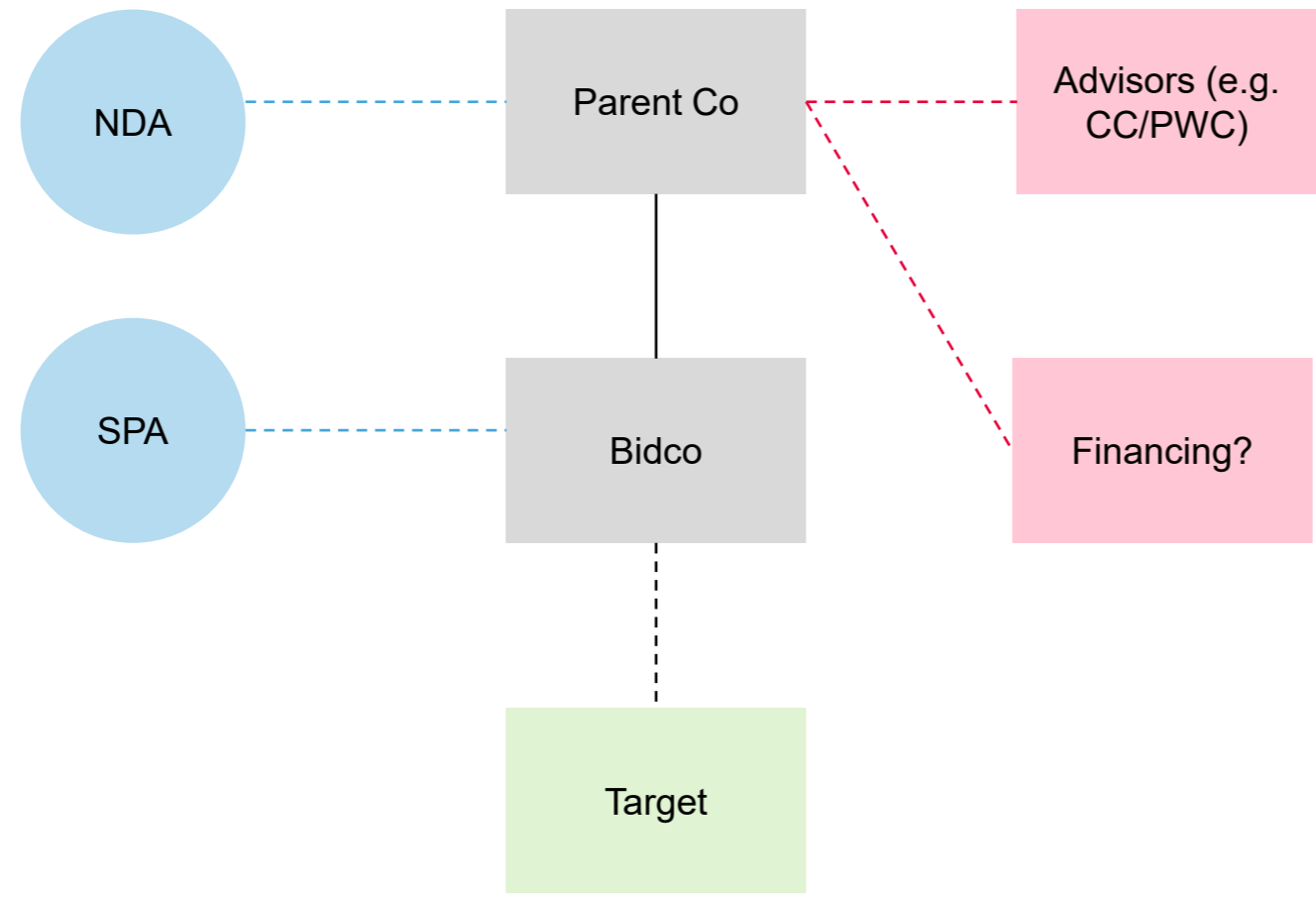
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When are NDAs typically entered into?



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## DISCLOSURE OF INFORMATION – CORPORATE BUYER



Who does a corporate need to disclose information to?

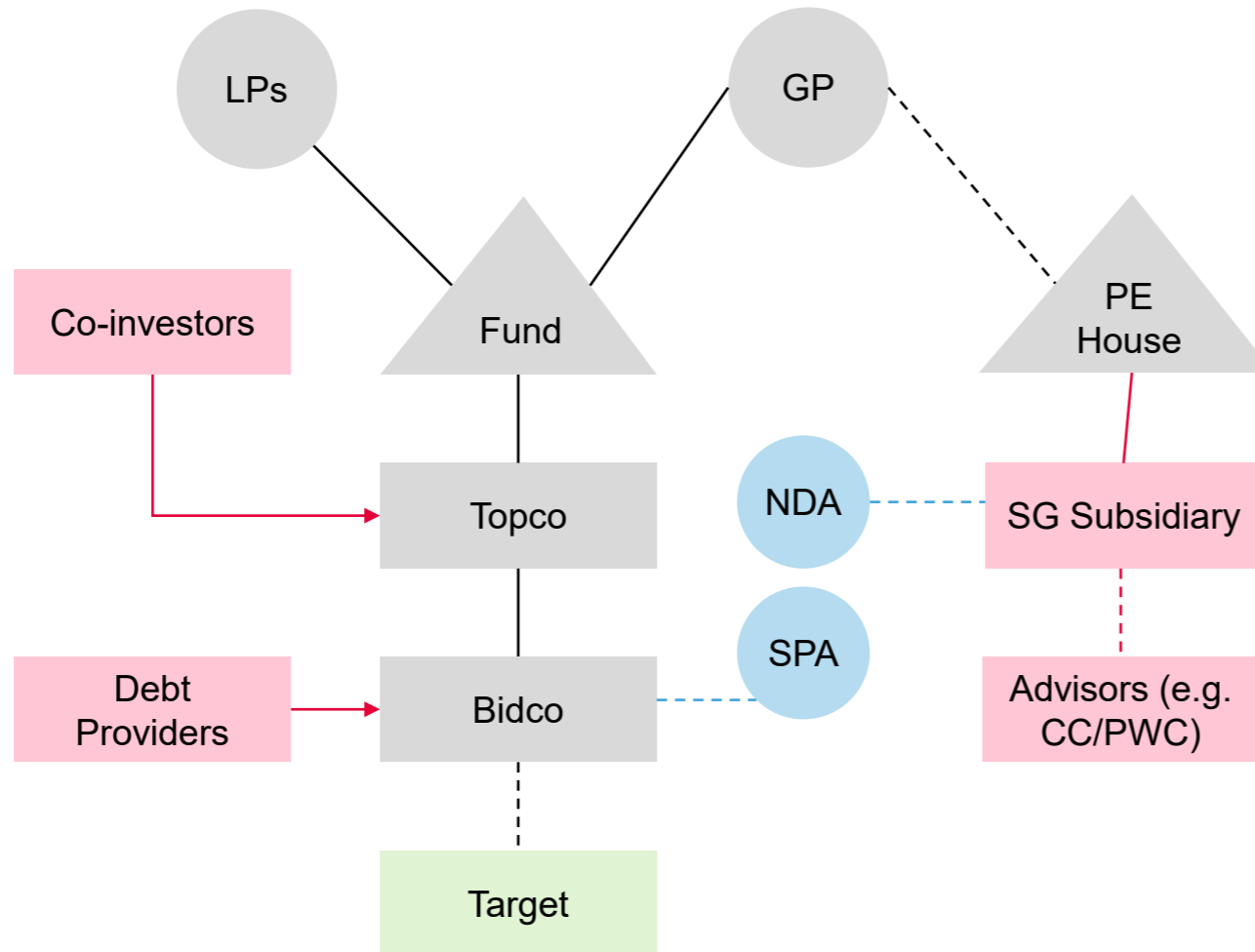
- Advisors;
- Subsidiary making the acquisition;
- Directors, officers and employees;

Also:

- Equity/debt financing?

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## DISCLOSURE OF INFORMATION – PEH BUYER

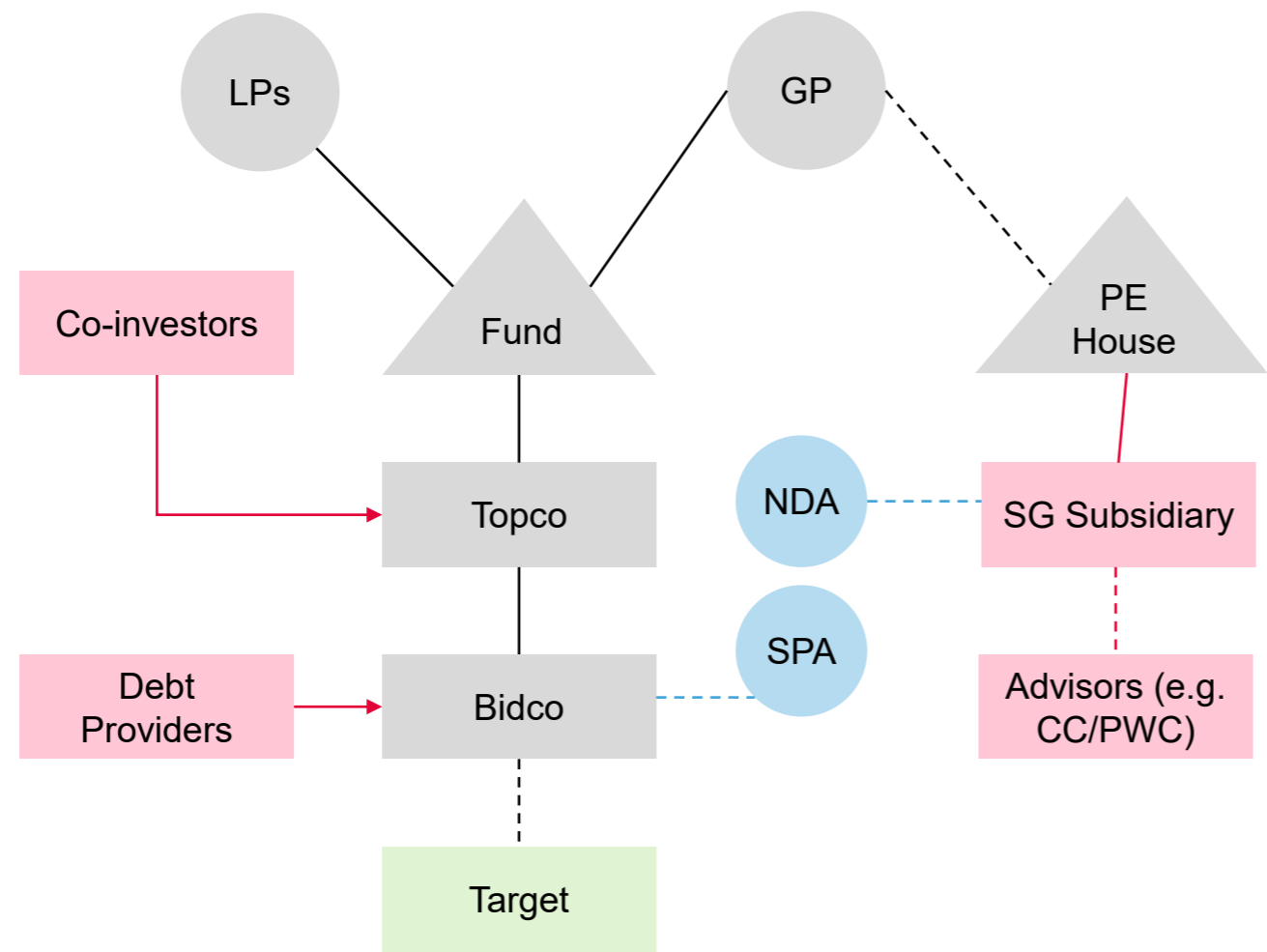


Who does a private equity house need to disclose information to?

- All entities within management/advisory structure;
- General and Limited Partners;
- Acquisition structure (Topco, Bidco etc.);
- Debt providers;
- Co-investors;
- Advisors;
- Directors, officers and employees.

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## DISCLOSURE OF INFORMATION – PEH BUYER



Other key points:

- Make it clear that SG Subsidiary is not acquiring the Target.
- Will SG Subsidiary take responsibility for breaches of the NDA by permitted recipients?

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## PARTIES / TRANSACTION DESCRIPTION

### Example:

The parties intend to enter into discussions regarding the sale of an equity stake in [●] (“**Target Company**”) (the “**Transaction**”).

### Suggested amendments for a Buyer:

The parties intend to enter into discussions regarding the potential sale of an equity stake in [●] (“**Target Company**”) to one or more Affiliates or designees advised by [insert PEH] or its Affiliates (the “**Transaction**”).

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## DEFINITION OF 'CONFIDENTIAL INFORMATION'

### Example:

**“Confidential Information”** means any and all non-public proprietary information, written or oral and disclosed through any means of communication by Seller or Seller’s Representatives to the Buyer or the Buyer’s Representatives ...

### Suggested amendments for a Buyer:

**“Confidential Information”** means any and all non-public proprietary information of a confidential nature relating to the Proposed Transaction, written or oral and disclosed through any means of communication by the Seller or the Seller’s Representatives to the Buyer or the Buyer’s Representatives on or after the date of this Agreement in connection with the Proposed Transaction...

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## DEFINITION OF 'CONFIDENTIAL INFORMATION' (CONTINUED)



### Typical carves-outs:

- information in, or which comes into, the public domain;
- information which is known to the recipient or is independently developed by the recipient;
- information disclosed to recipient by a third party without obligations of confidentiality; and
- information required to be disclosed by law/rule/regulation.



### Question:

What about secondary information (or derivative information) such as notes, memos or other materials generated from the Confidential Information? Do they fall within the ambit of Confidential Information?



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## STANDARD TERMS



### Obligation to return or destroy Confidential Information:

When acting for the recipient:

- upon **written** request of discloser;
- at **recipient's option** to return or destroy; and
- recipient shall be entitled to retain Confidential Information to the extent:
  - required to comply with any law or regulation; or
  - it is automatically retained by any IT back-up or disaster recovery system or procedure.



### Indemnity:

Recipients typically reject providing any indemnity.



### Other key points to consider:

*Term:* NDA to terminate on the earlier of:

- 12-24 months after entry into NDA; and
- entering into a definitive sale and purchase agreement.

*Governing law / jurisdiction*

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## REGULATION OF SALE PROCESS / BEHAVIOUR

### An NDA may also include:

- *Non-contact with the following in relation to the Proposed Transaction:*
  - shareholders, directors, officers and employees of the Target group;
  - suppliers, customers, regulators, lenders and/or advisors of the Target group.

***Buy-side carve-outs: (i) insert a time frame; and (ii) allow contact in the ordinary course of the buyer's businesses.***

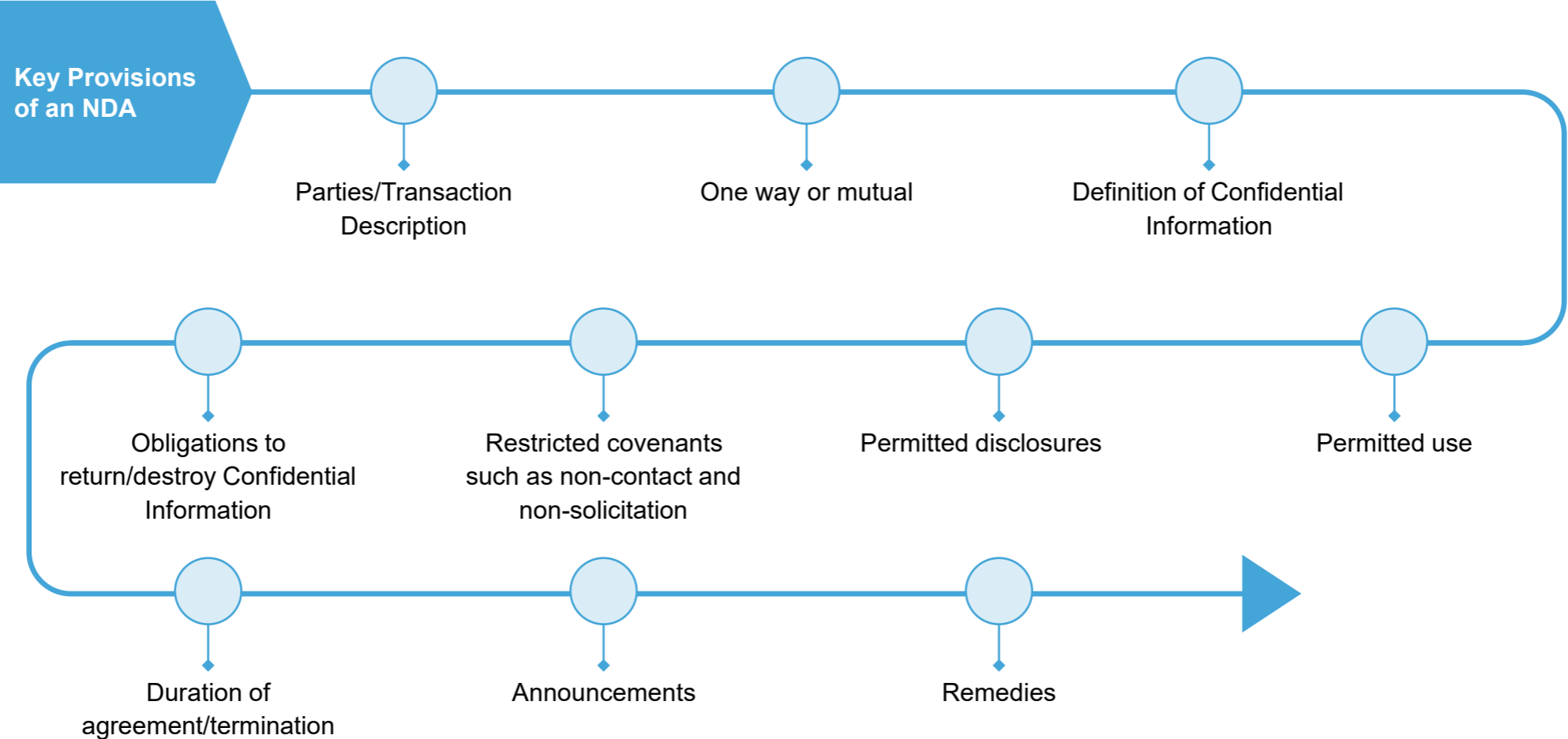
- *Non-solicitation of employees of Target group*

***Buy-side carve-outs: (i) limit scope of employees to key employees of the Target group; (ii) insert a time frame; and (iii) employees who respond to a general public advertisement or contacted the buyer on their own volition.***

- *Non-competing with the Target group*



# CONCLUSION



**PLEASE GET IN TOUCH AND CONTINUE THE CONVERSATION**

*Feedback Survey*



*Client Portal Subscription*





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