

Anatomy of the Target Company Privilege Provision in Merger Agreements

The following example language is pulled from **over 100 precedent merger agreements**, all of which had different language addressing pre-closing attorney-client privileged communications of the target company (or “target company privilege”). SRS Acquiom does not make any assertion regarding whether this language should be considered model language or is right for any particular transaction. We use **Shareholder Group-favorable language** here because **it is the most inclusive of provisions** that parties might want to consider including.

Who owns the target company privilege?

SHAREHOLDER GROUP	38%
SILENT (BUYER)	23%
SHAREHOLDER GROUP & THE POST-CLOSING REP	18%
POST-CLOSING REP	15%
BUYER	3%
SURVIVING CORPORATION	3%

Defining target company privilege, Deal Communications, the sellers and seller’s counsel

Who controls the target company privilege?

SILENT	41%
POST-CLOSING REP	39%
SHAREHOLDER GROUP & THE POST-CLOSING REP	13%
SHAREHOLDER GROUP	6%
BUYER	1%

Buyer’s ability to assert target company privilege against third parties

INCLUDED	54%
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Buyer’s ability to waive target company privilege to third parties

SILENT	54%
WITH CONSENT	35%
YES	9%
NO	2%

Buyer’s ability to disclose Deal Communications if legally required

SILENT	83%
WITH NOTICE	9%
YES	4%
WITH CONSENT	3%
NO	1%

Buyer cannot request Deal Communications

SILENT	76%
INCLUDED	22%
WITH CONSENT	2%

Seller Parties’ counsel named as a third-party beneficiary

INCLUDED	4%
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Savings Clause

INCLUDED	30%
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For good and valuable consideration, the sufficiency and receipt of which is hereby acknowledged, Buyer, for itself and on behalf of any affiliates and subsidiaries, including without limitation the Surviving Corporation, hereby transfers and assigns to the Shareholder Group any and all rights, privileges and ownership of any and all attorney-client privilege, attorney work product, legal advice and any other expectation of client confidentiality, in any form or format whatsoever, solely with respect to the evaluation, negotiation, documentation, execution, delivery, consummation and performance of this Agreement, the transactions contemplated hereby[, alternative transactions similar to the transactions contemplated hereby but not consummated]¹ and any dispute or proceeding arising under or in connection thereto that, immediately prior to the Closing, would be deemed to be privileged communications between the Shareholder Group and the Company (collectively, the “Seller Parties”), on the one hand, and the Seller Parties’ counsel, including, without limitation, the Law Firm and internal Company counsel, on the other hand, and would not be subject to disclosure to Buyer or the Surviving Corporation in connection with any process relating to a dispute arising under or in connection with this Agreement or otherwise as a result of the Seller Parties and Buyer being adverse to each other prior to the Closing (“Deal Communications”). The rights and privileges of the Deal Communications shall be controlled, and waiver thereto may only be approved, by the Shareholder Representative. If there is a dispute between Buyer and a third party, Buyer may assert privilege against such third party with respect to the Deal Communications but may not waive such privilege without the prior written consent of the Shareholder Representative. If Buyer is required by any legal proceeding or government authority to disclose any Deal Communications notwithstanding anything herein to the contrary, Buyer shall promptly notify the Shareholder Representative (if legally permissible) prior to furnishing such information, and will seek reasonable arrangements to protect the Deal Communications to the maximum extent possible and only disclose that information necessary to comply with such legal proceeding or government authority. All files, attorney notes, drafts or other documents in the Seller Parties’ counsel’s possession that are Deal Communications shall be the property of the Shareholder Group, and the Seller Parties’ counsel shall have no duty, and Buyer may not request Seller Parties’ counsel, to disclose any Deal Communications to Buyer or any of its affiliates. Seller Parties’ counsel shall be deemed a third-party beneficiary for purposes of this section. Buyer hereby agrees not to search for or use any Deal Communications existing on the Company’s electronic backup systems, e-mail archives or other books and records after the Closing, the existence of any Deal Communications in the Company’s possession after the Closing shall not be deemed a waiver of the privilege related to such Deal Communications, and the parties agree to take all reasonable steps necessary to ensure such privilege shall survive the Closing.