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The complete guide to reviewing confidentiality agreements

Mattersmith on Confidentiality Agreements

Date: October 2021

Version: 1.0

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Mattersmith on Confidentiality Agreements provides a wealth of information and content with which to draft and review confidentiality agreements.

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1. Introduction

Thank you for choosing to use Mattersmith on Confidentiality Agreements. The guidance in this booklet represents years of dealing with a volume of NDAs each day in the capital markets and technology sectors. Our aim is to help you accelerate your negotiations, so that you achieve a tenable and reasonable position quickly.

Each topic is addressed from the perspective of the disclosing and receiving party and includes suggested text with which the agreement may be amended. Appendix 1 contains longer clauses and documents. However, you may well have to adapt the language to suite the style and context of your document.

I hope you find the guide helpful. The content is derived from our legal practice platform, Mattersmith Productivity Centre, powered by Etimo*logic* technology. Our Membership plan provides access to the automated form of the guidance in this document and much more. For more details, please visit www.mattersmithpro.com

Andrew Scott
Chief Executive Officer

2. Is your NDA *really* mutual?

Not all NDAs that govern the exchange of information are entirely mutual in practice. In some cases, there is an imbalance in the relative importance of the information being disclosed by the parties.

The interests of the parties who respectively disclose and receive confidential information – referred to in this guide as **disclosing party** and **receiving party** – are obviously different, if not directly opposing. In most cases, whether a party is one or the other is obvious. However, where a party will disclose and receive information, it does not follow that its interests are the same as the other party who will do the same. Consideration is needed of whether their interests are mutual to the same degree. In practice, this often depends on the relative importance of a disclosing party's information to *that* party.

The guidance contained in the following chapters distinguishes the positions of disclosing party and receiving party. In applying the principles, where the information of one party is more valuable to that party than the other party's information is to them, it would be prudent for the former to follow the guidance applicable to disclosing party, even though that may result in a more onerous position with respect to the information it receives. By comparison, where the relative importance of the information is the same or is unknown, it would be reasonable to treat the NDA as being fully mutual and review the guidance in that light.

3. Definition of Confidential Information

The description of information that is subject to the NDA is of fundamental importance. Some NDAs contain a formal definition of the confidential information, and in others a provision describes the scope of the information to which the agreement refers. In this guide, references to the **definition of confidential information** covers both scenarios.

3.1. Limiting the NDA to information that is confidential, secret, or private

In some cases, all information which is disclosed, whether it is confidential or not, is subject to the agreement. Confining the NDA to confidential information only is usually fine. However, disclosing party may want the requirement of confidentiality to be removed, and receiving party may want it to be included. A mutual NDA could adopt either position.

Information may not be legally confidential, but it may be detrimental to disclosing party's interests if it is misused. Therefore, the alternative for disclosing party is to delete a requirement that the information is confidential and ensure that the exceptions to confidentiality are appropriate, such as that the NDA does not apply to public information.

Confining the NDA to confidential information reduces the scope of the information to which receiving party's obligations apply. However, in practice, it may be prudent to treat all information received under the NDA as confidential anyway; alternatively, receiving party could require that the confidential information must be marked as confidential (see section 3.5).

3.2. Information that is not necessarily confidential

It is not usually a problem for either side to include a reference that all information disclosed is governed by the NDA, provided the usual exceptions to confidentiality (e.g., public information) are included. It is important for the enforceability of the NDA that the exclusions are adequate (see Chapter 4.

3.3. Derivative information

3.3.1. Derivative information not covered

Disclosing party should consider whether the undertakings of confidentiality in the NDA should also apply to information created by receiving party which may (if not protected in the same way) compromise the confidentiality of the underlying confidential information or result in receiving party obtaining an unintended advantage, often called "derivative information" or "derivative material".

The concept is introduced to make sure that the confidentiality provisions of the NDA apply to that information and, where appropriate, to make special provision for the delivery-up, destruction, or retention of the derivative information (see section 9.2.3).

It is generally reasonable for the definition of confidential information to include derivative information. A suggested definition is as follows:

> *"**Derivative Information** means analyses, compilations, notes, studies, reports, and similar forms of information created by or on behalf of Receiving Party or its Representatives in connection with the Purpose that contain or reflect[, are based on or derived from[and reveal or disclose,]] Confidential Information."*

3.3.2. Qualifying the scope of derivative information

In the definition of derivative information or derivative material, receiving party should avoid expressions such as "derived from" and "based on" the confidential information, because the derivative material may not in fact reveal any of disclosing party's confidential information. Disclosing parties often resist this approach because of the value obtained by receiving party from using the confidential information. A compromise allows the words to remain if receiving party may destroy, redact, or retain derivative information rather than deliver it up at the end of the NDA. Receiving party is advised to be able to retain derivative information for record-keeping.

3.4. The source of the information

The source of the information to which the agreement applies should be clear, such as disclosing party, a member of its group, an adviser, or a target company of a proposed investment.

3.5. Information marked as confidential

A requirement that information be marked as confidential, or that the recipient is notified that the information is confidential, before or at the time of disclosure is a common way of designating information that is subject to the NDA. Receiving party will generally accept the provision, but it creates an operational risk for disclosing party because the qualification may not be rigorously applied on every occasion.

A compromise for disclosing party, or which may be applied in the case of a mutual NDA, would be to include a provision that there is no need to notify or mark information where the information ought reasonably to be regarded as confidential.

> *"…information that is marked or identified as being confidential or which ought reasonably to be regarded as confidential…"*

3.6. Method of disclosure

The definition of confidential information may well refer to information being disclosed in any manner, including verbally and in documentary form. If that is inappropriate or undesirable, confine it to information disclosed at a single event such as a meeting, or information disclosed at events of a given description, such as meetings held between given dates, or in writing only.

Disclosing party should consider including information of which receiving party becomes aware or observes, even though the information may be unconnected with the purpose of the NDA, for instance during a site visit.

> *"Disclosure of information by or on behalf of Disclosing Party includes where a recipient becomes cognisant of the information, including by observation, whether or not following the deliberate disclosure of it by or on behalf of Disclosing Party."*

3.7. Personal data

If the definition of confidential information includes personal data, it would be prudent to find out whether any personal data will, in fact, be disclosed.

Receiving party will be a controller in relation to any personal data obtained and processed under the agreement. The parties may be joint controllers, but in practice they usually act independently. Where substantive personal data will be disclosed, the agreement could include the language set out in Section 1 of Appendix 1, but more complex provisions may be required.

3.8. The purpose of the NDA

Unless the agreement is intended to cover all manner of disclosures or is a master NDA to cover different purposes as they are agreed (see section 11.15), it is prudent to link the definition of confidential information to a specific purpose, otherwise the undertakings of confidentiality may be too broad.

3.8.1. Purpose is defined

In principle, there is no need to amend the NDA in respect of the purpose for which information may be used or disclosed. However, where the purpose as such is confidential, then reference to it should be included in the definition of confidential information.

3.8.2. No purpose is defined

The following definition of purpose may be appropriate, which should be used consistently throughout the NDA.

> *"**Purpose** means considering, evaluating, or negotiating the [Proposed Transaction]."*

3.9. The NDA

If you want the fact that the NDA has been concluded or the terms of the NDA (or both) to be treated in confidence, include reference to "the fact of the NDA" or "the fact and the terms of the NDA" in the definition of confidential information.

3.10. The proposed transaction

If the parties are to discuss a particular transaction or other agreement, then it would be prudent to refer to it in the agreement and link it to the agreed purpose. If the proposed transaction or agreement is confidential then it should be included in the definition of confidential information.

3.11. When the information is disclosed

The issue of whether information has been disclosed before the date of the NDA is relevant to the definition of confidential information and, if so, whether the NDA should take effect (as between the parties) when the information was first disclosed (the **effective date**). The following guidance is formulated by reference to the circumstances surrounding the disclosure of the information and that only the NDA is intended to apply to that information.

3.11.1. It is unknown whether information has been previously disclosed

It would be prudent to find out whether information has been disclosed, but if the issue is not material or a sensible fallback is required, provide that the NDA applies to the information prospectively, i.e., without including an effective date. This is done by providing that the NDA applies to information already received without affecting the position before the date of the NDA. Two amendments would be required:

- amend the definition of confidential information

  > *"…includes all [such] information disclosed to Receiving Party, or of which Receiving Party became aware, before the date of this agreement…"*

- include a clause along the following lines:

"Nothing in this agreement affects the rights and liabilities of the parties (if any) accrued under or in connection with any agreement or arrangement having effect before the date of this agreement in relation to the use or disclosure of information that is the subject of this agreement."

3.11.2. The previous disclosure of information is irrelevant

Where the NDA applies to information disclosed before the date of the NDA, receiving party may well be willing to concede that the NDA applies to prior disclosed information if receiving party is satisfied either that no information has been disclosed or that it is aware of the disclosure and what use and disclosures (if any) have taken place. Alternatively, delete the references to information being disclosed before the date of the NDA.

3.11.3. Information was previously disclosed subject to an agreement that continues to apply to that information

No effective date is needed, the definition of confidential information must include the prior disclosed information *prospectively*, and (assuming the parties are the same) the NDA must provide that the prior agreement ceases to apply to that information to the extent the use and disclosure of it is governed by the NDA, but without affecting the accrued rights and liabilities of the parties.

- The definition of confidential information could be amended to include the following:

  "…including all [such] information disclosed to Receiving Party, or of which Receiving Party became aware, before the date of this agreement…"

- Where the parties to the prior agreement and the NDA are the same, the following can be included to terminate the application of the prior agreement:

  "With effect from the date of this agreement (inclusive), each party hereby releases and discharges the other from all rights, obligations, and liabilities under or in connection with [identify agreement] to the extent the use and disclosure of Confidential Information (to which that agreement would otherwise apply) is subject to this agreement, but without affecting the rights and liabilities of the parties which have accrued under that agreement before the date of this agreement."

3.11.4. Information was previously disclosed subject to an agreement that does not cover other information

If the NDA is intended to apply to information which is subject to the prior agreement *prospectively*, and the prior agreement does not cover other information, no effective date is needed, the definition of confidential information should include the prior disclosed information, and the NDA should terminate the prior agreement with effect from the date of the NDA without affecting accrued rights.

- The definition of confidential information could be amended to include the following:

"…including all [such] information disclosed to Receiving Party, or of which Receiving Party became aware, before the date of this agreement…"

- Where the parties to the prior agreement and the NDA are the same, the following can be included to terminate the prior agreement:

"With effect from the date of this agreement (inclusive), each party hereby releases and discharges the other from all rights, obligations and liabilities under or in connection with [identify agreement] [to the extent it contains undertakings relating to the use and disclosure of confidential information] but without affecting the rights and liabilities of the parties which have accrued under that agreement before the date of this agreement."

3.11.5. Information to which the NDA does not apply was previously disclosed under a prior agreement

No effective date is needed, and the definition of confidential information should exclude all information to which the prior agreement applies:

***"…**excluding all such information which is subject to the agreement between the parties dated [insert date]…"*

3.11.6. Information has been previously disclosed under an agreement that is to be replaced by the NDA

The NDA needs to include an effective date, the definition of confidential information is to include the prior disclosed information, and the NDA must terminate the application of the prior agreement to confidential information.

- An effective date clause could be in the following terms:

***"**This agreement shall be deemed to have come into effect (as between the parties) on [insert date]."*

- Where the parties to the NDA are the same as the parties to the prior agreement, a clause based on the following could be inserted to terminate the prior agreement:

***"**With effect from the [effective date] (inclusive), each party hereby releases and discharges the other from all rights, obligations and liabilities under or in connection with [identify agreement] [to the extent it contains undertakings relating to the use and disclosure of confidential information]."*

- Amend the definition of confidential information along the following lines:

***"…**including all [such] information disclosed to Receiving Party, or of which Receiving Party became aware, before the date of this agreement…"*

3.11.7. Information has been previously disclosed subject to an agreement that survives in respect of other information only

The NDA needs to include an effective date, the definition of confidential information in the new NDA must include prior disclosed information of the same kind as covered by the NDA, and the prior agreement must cease to apply to the prior disclosed information to the extent its use and disclosure is governed by the NDA. In relation to the latter requirement, it would be preferable to amend the prior agreement. The suggested language below is for inclusion in the new NDA. If the prior agreement is amended, it would be unnecessary also to include a provision in the new NDA to terminate the prior agreement.

- An effective date clause could be in the following terms:

  "This agreement shall be deemed to have come into effect (as between the parties) on [insert date]."

- Where the parties to the NDA are the same as the parties to the prior agreement, a clause based on the following could be inserted to terminate the prior agreement:

  "With effect from the [effective date] (inclusive), each party hereby releases and discharges the other from all rights, obligations and liabilities under or in connection with [identify agreement] to the extent the use and disclosure of Confidential Information (to which that agreement would otherwise apply) is subject to this agreement."

3.11.8. Information has been previously disclosed which was not subject to an agreement

Where the NDA does not apply to the prior disclosed information, the NDA does not need to include an effective date and the definition of confidential information should exclude the prior disclosed information.

- Amend the definition of confidential information along the following lines:

  "…excluding all such information disclosed to Receiving Party, or of which Receiving Party became aware, before the date of this agreement…"

Where the NDA applies prospectively to the disclosed information, the NDA does not need an effective date, the definition of confidential information in the NDA should include the previously disclosed information, and the NDA should not affect the accrued rights of either party.

- Amend the definition of confidential information along the following lines:

  "…including all such information disclosed to Receiving Party, or of which Receiving Party became aware, before the date of this agreement…"

- Insert a clause along the following lines to preserve the accrued rights of the parties:

"Nothing in this agreement affects the rights and liabilities of the parties or any of their Affiliates (if any) accrued under or in connection with any agreement or arrangement having effect before the date of this agreement in relation to the use or disclosure of information that is the subject of this agreement."

Where the NDA is to apply retrospectively to the disclosed information, the NDA should include an effective date and the definition of confidential information should include the prior disclosed information.

- An effective date clause could be in the following terms:

  "This agreement shall be deemed to have come into effect (as between the parties) on [insert date]."

- Amend the definition of confidential information along the following lines:

  "…including all such information disclosed to Receiving Party, or of which Receiving Party became aware, before the date of this agreement…"

3.12. Disclosure in material form

Consider whether you need to confine the agreement to information in material form, such as a particular document or a product, such as software. In that case refer to the appropriate form of the information in the agreement.

4. Excluded Information

If the undertaking of confidentiality is unqualified, it is likely to lead to unintended consequences, and in some cases the NDA may be unenforceable. Consequently, parties typically make provision for information that is excluded from the definition of confidential information.

4.1. Overview of exceptions

The principal exceptions to information being treated as confidential are that the information is in the public domain; the information is already known to receiving party or is later acquired by receiving party without being subject to a duty of confidentiality; has been created or invented by receiving party without reference to the confidential information; and information that is retained in the form of the general knowledge of individuals involved in the dealings between the parties. The position can be nuanced.

4.2. Public domain

4.2.1. The undertakings of confidentiality do not apply to information in the public domain

Information which is in the public domain is not confidential as a matter of law, and the NDA should acknowledge this in some way.

> *"Nothing in this agreement applies to information that is in the public domain."*

Two refinements of this principle can be included in favour of disclosing party.

The confidentiality of a compilation of information is not lost even though individual items of information within the compilation are or have become public.

> *""A compilation of information which is not in the public domain shall not be considered to be in the public domain by reason only that the individual items of information forming the compilation are in the public domain."*

The confidentiality obligation continues for a period after the information has become public (to prevent receiving party using information as a springboard to obtain an advantage over others), but that is rare in routine business-to-business NDAs.

> *"Where and to the extent Confidential Information is only relatively confidential at the time of its disclosure, or any Confidential Information becomes wholly in the public domain after its disclosure[, other than by a breach of this agreement by Receiving Party,] the undertakings of confidentiality of Receiving Party in this agreement remain in effect for so long it would*

reasonably require a person [in the same or similar circumstances as Receiving Party] (who is not in possession of the Confidential Information) to acquire the Confidential Information in question, whether by compiling the information, analysing or examining other information, by disassembling, decompiling or reverse engineering a product, or otherwise."

4.2.2. Information in the public domain other than due to a breach of the NDA by receiving party

An exception of that kind is normally acceptable. The counterargument is that all public information should be excluded, even because of receiving party's default, in which case disclosing party should rely on a financial remedy. In practice, there is usually no reason for disclosing party to accept that position and it is rarely seen.

4.2.3. Information in the public domain by reason of a third party's breach of contract or duty owed to disclosing party

Receiving party will normally reject any provision which continues the undertaking of confidentiality where the information becomes public due to the default of a third party. In those circumstances, receiving party will point to disclosing party's rights (if any) against the third party and maintain that receiving party should not be at a disadvantage to others once the information has become public through no default on its part.

4.3. Knowledge

Receiving party will not want to be subject to obligations in respect of information which it already knows at the time of disclosure, or which it acquires after disclosure.

"Nothing in this agreement applies to information that is[, according to the records of Receiving Party or any of its Affiliates,] known to Receiving Party or any of its Affiliates from time to time, except where the known information is already subject to a duty of confidence owed to Disclosing Party, any of its Affiliates,[or any other third party,] and in the case of information obtained later from a third party (other than an Affiliate of Disclosing Party), where the recipient knows or ought reasonably to know that the information is subject to a duty of confidence owed by that person to Disclosing Party or any of its Affiliates[, or any other third party]."

Disclosing party may require that the information is evidenced in the records of receiving party.

"Where it falls to be determined whether information is known by Receiving Party or any of its Affiliates, or was obtained from a source other than Disclosing Party or someone acting on its behalf, the matter shall be resolved by reference to the written records of Receiving Party and its Affiliates."

This is often reasonable. Although care is needed by disclosing party, receiving party may want to have the benefit of the knowledge of its affiliates and other third parties.

"Information that is known by a director, other officer, or employee of Receiving Party or any of its Affiliates, or an agent, contractor, or professional adviser engaged by Receiving Party or any of its Affiliates in connection with the Purpose, shall be imputed to Receiving Party or its Affiliate (as appropriate)."

4.4. Residuals

Receiving party may seek to retain the right to exploit information which represents general know-how or experience gained because of having been involved in the agreement. This ought to be resisted by disclosing party because it is often very difficult to distinguish between information which forms part of someone's legitimate knowledge on the one hand and the confidential information on the other. To render such provisions acceptable, it is usually necessary to preserve the rights of disclosing party in or to the confidential information and its intellectual property rights.

"Any general knowledge, experience, or know-how that Representatives may acquire during their involvement in the Purpose is excluded from this agreement, except that this exception does not authorise the use or disclosure of Confidential Information or any act that would be an infringement of the Intellectual Property Rights or other property of Disclosing Party or any of its Affiliates, and all rights are reserved to Disclosing Party and its Affiliates."

4.5. Independently created information

Information which has been created without reference to confidential information, from receiving party's perspective, should be excluded from the definition of the confidential information or an obligation of confidence.

"*Nothing in this agreement applies to information that is developed, created, or invented by Receiving Party or its Affiliates without reference to any Confidential Information."*

5. Confidentiality and Security

The undertaking of confidentiality lies the heart of the agreement. Obligations of security to prevent inadvertent disclosure and unauthorised access are common in practice but are concerned with the handling of information rather than preservation of secrecy as such.

5.1. Undertakings of confidentiality

Any obligation that the confidential information must be kept confidential and not used or disclosed except as provided in the NDA is acceptable.

Unless the agreement is intended to cover all manner of disclosures or is a master NDA to cover different purposes as they are agreed (see section 11.15), it is prudent to link the definition of confidential information to a specific purpose, otherwise the undertakings of confidentiality may be too broad. Where the purpose as such is confidential then reference to it should be included in the definition of confidential information (see section 3.8).

5.2. Security

Obligations of security apply to the safe keeping of confidential information and to physical and digital copies. They are not present in all NDAs, although disclosing party should consider including some requirements reflecting the sensitivity of the information. Depending on the measures to be taken, reasonable obligations of security are not contentious.

5.2.1. Location of the information

It is rare to see in a routine business-to-business NDA an obligation limiting the location at which confidential information may be held. However, it may be prudent for disclosing party to provide a secure address at which hard copies of the information or any material form of confidential information must be stored:

> *"The recording media in or on which Confidential Information is stored shall be held at [*insert address*] and kept physically separate from other records of information held by or on behalf of Receiving Party or its Affiliates."*

5.2.2. Separation of information

Confidential information which is held with other information is at greater risk of unauthorised access or of being lost or damaged. Disclosing party may well require receiving party to separate it. Although relatively easy to do physically, doing so within a system may be problematic. Obligations to keep

information "logically" separate should be avoided in favour of specifying what is required in practice; for instance, it may be sufficient to keep the information in a marked file:

> *"Confidential Information shall not be:*
>
> *(a) stored as data in a system unless the system is in the possession or control of Receiving Party or any of its Affiliates, the Confidential Information is stored in a file within the system that does not contain other data, and the file is designated as containing confidential information; or*
> *(b) hosted as a service provided by a third party that is not a Representative of Receiving Party."*

5.2.3. Standard of security

A requirement to apply a reasonable standard of security is widely regarded as reasonable. However, it would be prudent for receiving party to qualify the obligation to standards that receiving party applies to information of similar significance.

5.2.4. Storage systems

Given the vulnerability of systems to cyber-attack, disclosing party may want to preclude information being stored in the cloud or, indeed, any system which can be accessed remotely. However, the latter is likely to be problematic or very constraining for receiving party. The language in section 5.2.2 makes provision for systems in which confidential information may not be stored.

5.3. Obligation to mark information as confidential

Where the information is already marked as confidential or bears a copyright notice, an obligation to ensure that a copy of the information includes the mark or notice is often acceptable.

An obligation to mark copies of confidential information as confidential where the original information is not marked as confidential tends to create problems for receiving parties, in which case they typically delete the requirement. By comparison, disclosing party may want to impose an obligation to ensure that copies are so marked:

> *"Receiving Party shall mark copies of Confidential Information as being confidential."*

A compromise is that the obligation to mark copies does not apply where a reasonable person would appreciate that the information is confidential.

> *"Receiving Party shall mark copies of Confidential Information as being confidential except where a reasonable person ought to know that the information is confidential."*

However, it may be advisable for receiving party nevertheless to mark all information as confidential and rely on the exception if a mistake is made. Disclosing party may well want this exception removed, although it is difficult to resist.

5.4. Record keeping

It is common for NDAs to oblige receiving party to keep records of copies made of confidential information and of notes and other documents which contain or refer to confidential information, and persons to whom confidential information is disclosed. Depending on the nature of the information, the requirements may be reasonable. However, these obligations can create significant operational risk for receiving party, particularly for organisations handling a lot of confidential material in the ordinary course of business.

5.4.1. Duty to keep records of copies

Section 2 of Appendix 1 contains language that requires receiving party to keep records of copies of confidential information and documents which refer to confidential information.

5.4.2. Lists of recipients

Section 3 of Appendix 1 contains language that requires receiving party to keep records of organisations and individuals to whom confidential information has been disclosed.

5.5. Unauthorised use or disclosure

Obligations to notify disclosing party of the loss or unauthorised use or disclosure of confidential information, and to assist or co-operate in mitigating the consequences, are generally acceptable, or at least is difficult to resist. It would be unusual for disclosing party to reimburse receiving party's costs in those circumstances.

> *"Receiving Party shall notify Disclosing Party immediately after it becomes aware of any loss, or unauthorised disclosure or use of Confidential Information[and shall provide all assistance Disclosing Party may require (acting reasonably) to minimize the effects of the breach or to mitigate the consequences of the breach]."*

6. Authorised Discretionary Disclosures

Receiving party will typically need to involve third parties, such as professional advisers and affiliates, to progress the purpose of the NDA. These authorised or permitted disclosures are discretionary in the sense that receiving party is not obliged to do so to comply with applicable law or regulation.

6.1. Permitted disclosures

Where confidential information must be disclosed to other members of receiving party's group (or "affiliates"), and receiving party's and group member's officers, employees, agents, contractors, and professional advisers, language along the following lines could be included.

> *"…Receiving Party's Affiliates, and Receiving Party's or any of its Affiliates' directors, employees, agents, contractors, and professional advisers."*

6.2. Permitted disclosure safeguards

A disclosing party will typically require safeguards to be followed by receiving party when making an authorised discretionary disclosure.

6.2.1. Need to know basis

A qualification that the disclosure is permitted provided the recipient needs to know the information is generally acceptable.

6.2.2. Notice to representatives of the confidentiality of the information

This may take the form of language such as:

> *"any person to whom Receiving Party discloses the Confidential Information shall be informed in writing in advance of its confidential nature and that it is subject to this agreement."*

6.2.3. Receiving party responsible for representatives

This often takes one of two basic forms:

> *"Receiving Party shall procure that each [representative] to whom disclosure is made complies with the confidentiality provisions of this Agreement[, except in the case of a*

representative that has entered into direct undertakings of confidentiality with disclosing party].”

“Receiving Party is responsible for any breach of this Agreement by any of its [representatives] as if they were the acts or omissions of Receiving Party[, except in the case of a [representative] that has entered into direct undertakings of confidentiality with Disclosing Party].”

6.2.4. Back-to-back agreement

A common safeguard is to require receiving party to enter an undertaking with the recipient to preserve the confidentiality of the confidential information in substantially the same terms as the agreement (a so-called "B2B undertaking", “B2B agreement”, or “joiner”).

“…provided that, prior to any such disclosure, Receiving Party shall ensure that the recipient is subject to undertakings of confidentiality no less stringent than the terms of this agreement[, and for this purpose professional duties of confidentiality or duties of confidentiality in an employee’s contract of employment shall satisfy the requirements of this clause].”

“…provided that, prior to any such disclosure, Receiving Party shall enter into an agreement with the recipient on substantially the same terms as this agreement [as relates to the Confidential Information] with such changes as are necessary being made.”

In fact, these offer limited protection over the alternative permitted disclosure safeguards unless disclosing party is a beneficiary of the undertaking.

The template letter in Section 4 of Appendix 1 is intended to give effect to such an obligation, assuming there is no confidential information being disclosed that is not covered by the underlying NDA.

6.2.5. Agreement with disclosing party

Receiving party must procure that the recipient enters into an agreement with disclosing party on terms no less stringent than the NDA. This offers disclosing party the most protection because it creates a contract between disclosing party and the recipient.

“As soon as reasonably practicable after receipt of a written request to do so by or on behalf of Disclosing Party, Receiving Party shall[use reasonable endeavours to] procure that any or all of Receiving Party’s [Representatives] [(other than persons subject to professional duties of confidentiality or duties of confidentiality in a contract of employment that apply to the Confidential Information)] identified or described in the request (and in the absence of identification or notification, all of them) enter into an agreement in writing with Disclosing Party on terms equivalent to those contained in this agreement.”

Needless to say, receiving party may not be able to comply – and so may seek to qualify its obligation to use of reasonable endeavours - and could resist (with good reason) procuring that its members of staff or professional advisers enter into such agreements.

6.3. Rights of representatives

Where an agreement permits disclosure to affiliates or other representatives, it is usually necessary to extend the rights of receiving party, e.g., to comply with mandatory disclosures, to the representatives.

> *"Where any provision of this agreement confers a right, power or benefit on Receiving Party, that right, power or benefit may be exercised by Representatives who have been provided with Confidential Information by or on behalf of Disclosing Party or Receiving Party in accordance with this agreement (except that the parties may vary or discharge this agreement without reference to the Representatives)."*

7. Legally Required Disclosures

It is conceivable that receiving party may become subject to a legal requirement to disclose confidential information, e.g., in connection with legal proceedings. It is usual for NDAs to allow receiving party to do so, subject to safeguards to protect disclosing party. It is particularly important for regulated entities to be able to deal openly with their regulator. These provisions can be complex.

7.1. Compliance with legal disclosures and whistleblowing

Receiving party must be able to disclose confidential information to comply with law or regulation, and the agreement should not purport to prevent disclosures that cannot be prevented by law, such as whistleblowing. The disclosure can be limited "to the extent and for the purpose of the disclosure". The right to comply should not be subject to a proviso or other qualification.

> *"Receiving Party may disclose Confidential Information where, to the extent and for so long as it is necessary to do so in order to comply with law, regulation (including the rules of any exchange or similar trading facility on which the securities of Receiving Party or any of its Affiliates are or are to be listed), the order of a court, or other requirement of a competent authority.*
>
> *Nothing is this agreement shall apply to prevent or hinder:*
>
> *(a) dealings between Receiving Party and a competent authority in the ordinary course of the competent authority's supervisory or regulatory function in relation to Receiving Party; or*
> *(b) any disclosure where and to the extent the application of any provision of this agreement would be contrary to applicable law or regulation[, including [specific examples]."*

7.2. Legal disclosure safeguards

7.2.1. Notify disclosing party

If information must be disclosed, disclosing party will usually want to be informed so that it can take steps to prevent or limit the disclosure. Section 5 of Appendix 1 contains suggested language.

The agreement should clarify when disclosure is required and, if the agreement is silent, it may be possible to imply a term that notice must be given as soon as reasonably practicable, which in the

circumstances could be before or after the disclosure is made. However, it would be prudent for disclosing party to require that notice is given.

Disclosing party will want to be notified before disclosure is made, and where that is not practicable, then immediately, promptly, or (latest) as soon as reasonably practicable after the disclosure. This is normally acceptable, provided the requirement is subject to being "legally permissible" (or a similar qualification). Receiving party may also want the requirement to notify beforehand to be where it is reasonably practicable, because in practice there may be competing demands on receiving party at the time. In return, receiving party may offer to give notice at the earliest opportunity (or similar) where it is not reasonably practicable to give notice beforehand.

It is difficult to give specific time periods within which disclosure must be made, and so these are not seen often. However, the requirement of notice may be accompanied by a statement that it is intended to provide disclosing party with an opportunity to resist the disclosure. A receiving party should resist the statement because of the difficulty in practice of knowing what constitutes that period.

7.2.2. Minimum essential disclosure

Disclosing party has a legitimate interest in ensuring that only the minimum amount of confidential information is disclosed in accordance with a mandatory requirement. Whilst specific language to that effect may be regarded as unnecessary, it is difficult to resist. Some agreements require receiving party to obtain legal advice that the disclosure must be made. However, this is often unnecessary.

> *"Receiving Party shall only disclose Confidential Information that Receiving Party has received [external] legal advice in writing is the minimum that must be disclosed in order to comply with the relevant requirement."*

7.2.3. Co-operation with disclosing party

Where receiving party is required to co-operate with disclosing party in resisting a mandatory disclosure, including taking of steps to avoid or mitigate the disclosure, the interests of the parties may well not be aligned. From receiving party's perspective, the requirement should be no more than to use reasonable endeavours to co-operate or to make clear that, in co-operating with disclosing party, receiving party is not required to act contrary to its interests (see Section 6 of Appendix 1).

Ensuring that the recipient is bound by a duty of confidence (where one does not already exist) is outside of the control of receiving party. Some regulators, such as the Financial Conduct Authority, refuse to give undertakings because they are already subject to statutory duties. Given that receiving party has no choice other than to make the disclosure, from its perspective, the requirement should be confined to *seeking* the undertaking, and it would be reasonable for receiving party to include an exception where the recipient is already subject to statutory or other duties of confidence.

> *"Receiving Party shall seek an undertaking of confidentiality from the disclosee, except where the disclosee is subject to statutory or other duties of confidence that will apply to the information."*

If the NDA is silent on whether receiving party must co-operate with disclosing party, it would be reasonable for disclosing party to require a degree of co-operation, bearing in mind there is a limit to what receiving party can reasonably agree. The clause should not go so far as create the risk of receiving party being unable to comply (Section 6 of Appendix 1).

7.2.4. Consulting with disclosing party

Disclosing party has a legitimate interest in being consulted about how and when confidential information is disclosed. A requirement of consultation and taking into account comments should be qualified to where it is legally permissible to do so.

An obligation to consider comments is not the same as being required to give effect to them (which would ordinarily be unacceptable). Therefore, it may not be too onerous to agree to do so. A more diluted form of the obligation would be to use reasonable endeavours to take into account the comments, but that is less palatable to disclosing party.

An important issue is whether the obligation to do so is strict or whether it is qualified by notions of reasonableness. The implications are different depending on whether the issue is one of consultation or considering disclosing party's comments. It may also be impractical to consult leading up to making a mandatory disclosure. Receiving party would ordinarily want the requirement to be qualified to use of reasonable endeavours to consult with disclosing party or only where it is reasonably practicable to do so.

8. Duration

There is no legal principle that imposes a finite period on the confidentiality of information. However, in practice, the confidential quality of information may be denuded over time. The question of whether information possesses the requisite quality of confidence involves a question of law, and so undertakings of confidentiality that apply to information that is not confidential or is no longer confidential, may be unenforceable.

In principle, an undertaking of confidentiality can remain as long as the information is confidential. In practice, organisations prefer to agree when the obligations end. The time limit reduces the risk that the NDA is an unenforceable restraint of trade. Any period between two to five years is in-line with practice. Disclosing party has a legitimate interest in ensuring that the obligations last for as long as possible and should be comfortable that a fixed period is long enough to protect the value of the information.

Non-contractual duties of confidentiality may exist alongside the NDA. If receiving party is to be released from non-contractual duties when the NDA terminates, then this should be made clear in the duration or termination clause. If this is not done, there is a risk that the other duties continue even though the NDA has come to an end.

> *"With effect from the termination of this agreement, Receiving Party shall also be released and discharged from all (if any) non-contractual duties of confidence in relation to the Confidential Information[in relation to the Purpose]."*

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9. Delivery-up and Destruction

At the conclusion of the dealings between the parties for which the NDA is concluded or earlier termination, the parties need to decide whether receiving party will be entitled to retain the information, and if so, what safeguards will apply for the protection of disclosing party. This issue is often complicated by receiving party having created documents which include the confidential information which also contain the confidential information of receiving party. Where the parties enter into a new agreement, that may make new provision for the confidentiality of the information disclosed under the NDA.

9.1. Delivery-up and destruction obligations

Disclosing party will usually want receiving party to deliver-up or destroy the confidential information (see Section 7 of Appendix 1). The obligation is normally uncontentious in principle. Receiving party may want to choose whether it delivers-up or destroys the information so long as it does one or the other. Disclosing party may well require that it has the right to decide.

Issues may arise in relation to the time for performance, with some agreements requiring receiving party to do so on demand or immediately. Naturally, receiving party may want to soften the requirement to doing so as soon as reasonably practicable or without undue delay.

9.2. Permitted retention

It is usual to agree exceptions to an obligation to deliver-up or destroy confidential information. A common solution is for the confidentiality obligations to continue in respect of the retained information.

9.2.1. Retention to comply with applicable law, regulation, and internal policies

It would be prudent for receiving party to include exceptions that permit retention to comply with law, regulation, court orders, and retention policies. A disclosing party may well not agree to compliance with retention policies. Suggested language:

> *…"information that Receiving Party is required to retain in order to comply with any court order, applicable law or regulation, or to comply with Receiving Party's document retention policy…"*
>
> *"…information that Receiving Party is required to retain for audit and compliance purposes…"*

"…information that Receiving Party is required to retain in order to comply with any applicable law or regulation…"

"…information that Receiving Party is required to retain in order to comply with Receiving Party's document retention policy…"

9.2.2. Retention of archived information

Given the difficulty of locating and destroying data that is automatically archived or backed-up, receiving parties often seek to exempt information held in those systems.

""Receiving Party may retain Confidential Information stored in back-up or archive systems."

A less specific provision, which is intended to cover the same point, qualifies the obligation to deliver-up or destroy confidential information to where it is technically or reasonably practicable to do so. However, some receiving parties consider that technical practicality is too narrow, because accessing back-up or archive copies is technically achievable but nevertheless time-consuming. A reference to the process being "reasonably practicable" is less onerous, but it is generally preferable to be explicit (as above).

9.2.3. Treatment of derivative information

Receiving party will usually want the right to destroy notes and other material rather than deliver them to disclosing party, redact its own confidential information from materials that are returned to disclosing party, or (probably most importantly) to retain the derivative information.

"Notwithstanding clause [insert reference to clause entitling Disclosing Party to elect whether confidential information is delivered-up or destroyed], Receiving Party is entitled to retain Derivative Information in accordance with this agreement."

"… but, in relation to Derivative Information, Recipient Party may elect instead to destroy the Derivative Information or redact the Confidential Information."

9.3. Certificate of destruction

Disclosing party will usually want to know that receiving party has delivered-up or destroyed confidential information. For this purpose, receiving party usually certifies compliance. Consideration will be needed of who should sign the certificate. Receiving party will often prefer to provide the certificate "as soon as reasonably practicable" after being requested. Disclosing party may require the certificate to be delivered immediately. A compromise may be a reference to "promptly" or "without undue delay".

"*Receiving Party shall deliver to Disclosing Party a certificate signed by a duly authorised officer on behalf of Receiving Party that it has complied with this clause, and shall do so as*

soon as reasonably practicable after receipt of a request in writing from Disclosing Party for the certificate to be provided."

10. Data Protection

If the definition of confidential information includes personal data, receiving party should enquire whether personal data will, in fact, be disclosed. An impact assessment in accordance with best practice may be required.

Receiving party will usually be a controller in relation to personal data obtained and processed under the NDA. The parties could be joint controllers, but in practice they tend to act independently. Where receiving party acts on behalf of disclosing party in relation to the processing of personal data, receiving party will be disclosing party's processor. However, that would be unusual.

If the personal data will only include contact details of individuals, it is probably sufficient to include an obligation of each party to comply with applicable law.

"Disclosing Party and Receiving Party shall process Relevant Personal Data in accordance with [data protection regulations]."

More detailed provisions that prescribe how the parties will comply with applicable law are also acceptable, but consideration could be given as to whether they are unnecessarily burdensome. If more substantial personal data will be disclosed, an impact assessment (however informal) is required to assess the implications (see Section 1 of Appendix 1 for example language).

11. Dealings and Liability

NDAs often also cover issues in addition to maintenance of confidentiality, such as indemnities for breach of the NDA, assurances (if any) as to the quality of the information, and non-solicitation clauses to prevent the poaching of key staff.

11.1. Indemnities

An indemnity agreement is a promise to pay losses or other amounts incurred or sustained by a person in circumstances to which the indemnity applies. The amount due is calculated according to the terms of the indemnity and is not subject to rules which limit the amount of the claim, as would be the case in a claim for damages.

Indemnities are regarded as onerous clauses which increase the risk for the indemnifying party. Consequently, one of the problems is that the indemnifying party may not be covered by its insurance. Ordinarily, the party who would be subject to an indemnity will resist the provision and ask for the indemnity to be deleted. However, depending on how the "indemnity" is drafted, it may be no more than a statement of liability for damages, in which case the normal rules on claims for damages apply.

The following language avoids the implications of an indemnity, but by the same token, a party insistent on the protection of an indemnity will not accept it.

> *"Where a party is required to indemnify the other in respect of the financial implications (or any of them) of the former's breach of this agreement or any negligent act or omission in connection with this agreement, the indemnity shall be subject to applicable law as would apply to a claim in damages for breach of contract or negligence (as appropriate), and, accordingly, in determining the extent of the party's liability under the indemnity, no account shall be taken of any of any loss, damage, cost, or expense incurred or sustained by the other (**Loss**) that would be too remote under such law, would not have been incurred or sustained had the other exercised all reasonable steps to avoid or to mitigate the Loss, or Loss as may reasonably be attributed to the contributory negligence (if any) of the other."*

11.2. Exclusion of liability

NDAs invariably provide that the confidential information is supplied without any assurance as to its accuracy, quality, completeness, validity, or timeliness, and that receiving party relies on it at its own risk.

> *"Disclosing Party undertakes no duty of care or responsibility to Receiving Party or its Representatives in relation to the Confidential Information, makes no representation and gives no warranty, undertaking or other assurance as to the quality of the Confidential Information or the timeliness of its disclosure, and hereby excludes all liability under or in connection with this agreement for all loss, damage, cost, and expense incurred or sustained by Receiving Party or any of its Representatives arising from or in connection with its or their use or reliance on the Confidential Information, except that nothing in this agreement affects the liability of Disclosing Party to the extent the liability may not be excluded or limited by law."*

Receiving party could reasonably ask to include a warranty of disclosing party's authority to disclose the information, or delete the exclusion or limitation of liability in relation to the lack of authority to disclose:

> *"Disclosing Party [represents,] warrants [and undertakes] that it is entitled to disclose the information that it provides to Receiving Party."*

For greater protection, the warranty could be expanded to cover the intended use of the information.

> *"Disclosing Party [represents,] warrants [and undertakes] that it is entitled to disclose the information that it provides to Receiving Party and to authorise Receiving Party to use and disclose the Confidential Information in accordance with this agreement."*

If disclosing party is willing to give an assurance as to the quality of the information, the following language might be suitable

> *"Disclosing Party [represents,] warrants [and undertakes] that the information that it provides to Receiving Party shall be accurate and complete in relation to the subject matter to which it refers."*

11.3. Intellectual property rights

Whether provisions relating to intellectual property rights and the grant of licences are needed depends on the nature of the confidential information and the relationship between the parties. NDAs often don't grant licences and reserve all rights.

> *"Neither Receiving Party nor any of its Representatives shall acquire under this agreement any right, title or interest in or to the Confidential Information or any of the Intellectual Property Rights subsisting in or relating to the Confidential Information, and all rights are reserved to Disclosing Party or its licensors."*

However, the use and disclosure of confidential information often involves an act that, strictly speaking, requires a licence, such as making a physical copy or uploading the information into a system. If that is the case, then it would be prudent to include a provision to that effect.

"Receiving Party may copy the Confidential Information to the extent reasonably required in connection with the Purpose."

11.4. Remedies for breach

It is common to see an acknowledgment that damages "shall not" be an adequate remedy and that the counterparty "is entitled" to an injunction or other remedy. The language should be changed to say that damages "may" be inadequate and equitable remedies "may" be available. Not all breaches of confidence will necessarily lead to unquantifiable damages, and equitable remedies are in the discretion of the court.

In some cases, the agreement prohibits receiving party from objecting to an application for a remedy such as injunction or specific performance or requires receiving party to waive a requirement for disclosing party to post a bond or to give undertakings in return for the grant of an interim injunction or other remedy. There is no strong legal reason for such restrictions to be accepted. Equitable remedies are discretionary and there may be legitimate grounds to resist the application, for instance having regard to the prior conduct of the applicant, or to require disclosing party to give undertakings that protect receiving party in case the remedy is not granted.

11.5. Communications

Some agreements prescribe to whom communications should be made, usually at the instance of disclosing party. They are usually uncontroversial.

"Receiving Party shall direct all its communications regarding this agreement and the Proposed Transaction to [insert details], or to any other person who is nominated by Disclosing Party in writing from time to time."

11.6. Non-solicitation

The NDA may prohibit the solicitation of directors and staff of disclosing party or a target company. In order to justify a non-solicitation clause, and to reduce the risk that it is unenforceable, it must protect a legitimate interest and last for no longer than required to protect that interest. The reason is often to protect the value of a business that may be adversely affected as a result of the loss of key personnel. In terms of the duration of the obligation, common variations are from six months to two years after the end of the agreement. It is usual to include certain exceptions. Section 8 of Appendix 1 contains an example non-solicitation clause including permitted exceptions.

A party should consider whether it is acceptable (if the NDA so provides) that affiliates are subject to the restriction. If so, the party must be comfortable that it can ensure that the affiliates comply with the obligation. If in doubt, it is better to amend the clause so that it does not refer to the affiliates. The

problem for the party benefiting from the restriction is that it would be very easy to avoid it by recruiting a person through an affiliate. A compromise may be for the non-solicitation to apply to affiliates to which the confidential information has been disclosed.

11.7. Non-circumvent clauses

A non-circumvent clause prohibits receiving party from dealing with another person or entity involved in the relevant transaction or the purpose of the agreement.

> *"Receiving Party shall not contact, approach, or otherwise deal with [insert description of third parties] in connection with the Proposed Transaction."*

They often serve a valuable purpose and protect the interests of disclosing party. A clause which is confined to the purpose of the NDA or the transaction being considered is generally reasonable. Where the clause is wider than that, receiving party should amend the provision so that the restrictions apply only to the proposed transaction or the purpose of the agreement. It may also be prudent to include a provision that preserves the ability of receiving party to conduct its business in the normal course through members of staff who have no knowledge of or access to the confidential information.

> *"Nothing in this clause prohibits lawful dealings by Receiving Party in the ordinary course of business where either the persons involved have no knowledge of the Confidential Information or arrangements exist to prevent unauthorised disclosure of Confidential Information."*

11.8. Tree structures

Where a receiving party may work with other entities interested in a transaction, disclosing party could reasonably require that receiving party establish separate teams for the purpose. Suggested language is contained in Section 9 of Appendix 1.

11.9. Market soundings

Market soundings take place when disclosing party (such as the issuer of securities or someone acting on its behalf) communicates information, prior to the announcement of a transaction, to gauge the interest of potential investors in a possible transaction and the conditions relating to it, such as its potential size or pricing. If conditions are met, market soundings can form a safe harbour under regulations from liability that would otherwise arise for unlawful disclosure of inside information.

There is no reason in principle why a recipient should undertake to keep lists of people to whom it discloses confidential information that represents inside information and material non-public information, although agreeing to do so would be helpful to disclosing party. In the case of a market sounding, under EU regulations, receiving party must keep certain lists anyway. Before agreeing to

keep lists, it would be prudent to seek advice from compliance experts. The language in Section 3 of Appendix 1 covers the keeping of lists.

11.10. No front running

Front running is an unethical and illegal practice whereby receiving party takes advantage of the knowledge of confidential information by engaging in communications and other dealings in respect of a financial asset, such as making a price. As such it may constitute insider dealing. In principle, no-front running clauses are acceptable, although the detail of them may be negotiable.

11.11. Standstill agreement

A standstill clause prevents receiving party and certain third parties (as the case may be) from engaging in a transaction relating to the issuer or borrower during a given period. The purpose is to enable the issuer, borrower, or disclosing party (such as a fund or intermediary) to control the proposed transaction. Whilst the standstill clause may be acceptable in principle, care is needed to make sure that it does not have the unintended consequence of preventing or impeding other business in the ordinary course, and so it may be necessary to establish and maintain information barriers or tree structures (see section 11.8).

11.12. Cleansing announcements

Cleansing announcements are agreed public disclosures of confidential information so that the insider trading rules do not restrict or prevent dealings on the information contained in the announcement. NDAs may make provision for agreed forms of cleansing announcements or so-called “self-cleansing”, whereby one party may publish certain confidential information sufficient to enable dealings in an asset class to take place without contravening the insider dealing rules.

11.13. Restrictive covenants

A restrictive covenant prevents one or more parties from conducting business in a field or geographic territory (or both) for a period of time. It is not the same as a non-circumvent clause. Confidentiality agreements don't usually warrant the inclusion of restrictive covenants, in which case they should be deleted. Specialist advice should be obtained if the agreement is to include a restrictive covenant.

11.14. Legal privilege

If confidential information includes legally privileged information, disclosing party may want to include a provision that the disclosure to receiving party is not a waiver of any privilege.

> *"Receiving Party acknowledges that the Confidential Information may contain material which is subject to legal professional privilege, and that the provision to it, and its receipt, of the material is not intended to and does not constitute a waiver of such privilege against any third party."*

11.15. Master NDAs

Master or framework NDAs are useful where you contemplate disclosing or receiving confidential information on a number of occasions because they avoid the need to sign a separate NDA each time. However, it is usually prudent to do so only where the purposes and issues will be similar. It is also good practice to document each agreement and link it to the NDA.

If the master agreement does not clearly refer to separate matters or transactions being documented in an agreed way, this should usually be avoided because of the risk of inadvertently disclosing or receiving information which should not be subject to the agreement. Section 10 of Appendix 1 contains a language to incorporate schedules to a master NDA.

12. SRA Compliance

The Solicitor's Regulatory Authority (SRA) expects lawyers to act in accordance with their professional obligations when dealing with NDAs or any agreement containing confidentiality provisions and has set out how it expects lawyers to act when dealing with confidentiality provisions and where they would be improperly used.

The SRA issued a warning notice in March 2018 (updated in November 2020) regarding the use of NDAs and confidentiality provisions in agreements. The SRA is concerned about the potential for the attempted prevention of reporting to the SRA, other regulators, law enforcement agencies, and disclosures which are protected by law, such as whistleblowing.[1] Failure to comply with the warning notice may lead to disciplinary action, and so solicitors must be cautious in drafting NDAs that may conflict with their overriding duties to the court in the administration of justice and the prevention of legitimate disclosure. It would be prudent to include the following language in an NDA.

> *"Nothing is this agreement prevents or hinders disclosure of information where and to the extent the application of any provision of this agreement would be contrary to applicable law or regulation."*

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[1] https://www.sra.org.uk/solicitors/guidance/non-disclosure-agreements-ndas/

APPENDIX 1

1. PERSONAL DATA AND DATA PROTECTION

1.1 This clause applies to the processing of Relevant Personal Data, and references to the processing of Relevant Personal Data includes the disclosure of personal data to Receiving Party or its Representatives under this agreement.

1.2 Disclosing Party and Receiving Party shall, and Receiving Party shall procure that its Representatives shall, comply with Data Protection Regulations in relation to the processing of Relevant Personal Data for or in connection with the Purpose and shall co-operate with the other in dealing with any matter to which this clause refers, including by providing documentation and assistance.

1.3 The parties acknowledge that each of them determines the purposes and means of the processing of Relevant Personal Data in connection with the Purpose, and so, as between them:

1.3.1 Disclosing Party is the controller in relation to all processing of Relevant Personal Data in its possession or control, except that, for the purposes of this clause, the rights of Disclosing Party under this agreement do not constitute control of Relevant Personal Data in the possession or control of Receiving Party or its Representatives; and

1.3.2 Receiving Party, and any Representative that receives personal data under this agreement, is a controller in relation to the receipt of that personal data and all processing of Relevant Personal Data in its possession or control thereafter.

1.4 It is for a party alone to determine the reason for which Relevant Personal Data are processed in connection with the Purpose and the means of doing so, to the intent that neither Receiving Party nor any of its Representatives is to be a processor acting on behalf of Disclosing Party or any of its Affiliates, and neither of them shall act jointly with Disclosing Party or any of its Affiliates under this agreement in relation to the Purpose.

1.5 Disclosing Party and Receiving Party shall promptly, and in any event no later than reasonably required to enable the other to fulfil its duties under Data Protection Regulations, disclose to the other communications (including subject access requests) from persons who are data subjects of Relevant Personal Data or Competent Authorities that relate, or may reasonably be understood to relate, to the processing of Relevant Personal Data by the other.

1.6 Disclosing Party and Receiving Party shall (to the extent legally permissible) immediately report to the other verbally and confirm the position in writing as soon as reasonably practicable of any circumstances of which that party becomes aware in connection with the Purpose, whether or not involving a breach of this agreement, which indicate or may reasonably be expected to constitute or to result in a breach, or

possible breach, of Data Protection Regulations by the other, or a claim or action or any legal or other proceedings being brought against the other under Data Protection Regulations, in respect of the processing of Relevant Personal Data.

Affiliate means, in relation to any company, partnership or other legal person, any other company, partnership or other legal person which Controls, is Controlled by, or is under common Control with, that company, partnership or other legal person, and for these purposes, **Control** means, in relation to a company, partnership or other legal person, the beneficial ownership of more than fifty per cent (50%) of the issued share capital of, or the legal power to direct or cause the direction of, the company, partnership or other legal person in question (or its holding company as the case may be), and Controlled shall be construed accordingly.

Competent Authority means any court, governmental body, or regulatory authority having authority over or in respect of a party or its Affiliates, including a branch, office or agency, or in respect of any business or ancillary activity conducted by the party or its Affiliates.

Data Protection Regulations means all directives, regulations, statutes, laws, secondary legislation, and rules relating to data protection and privacy.

Relevant Personal Data means Confidential Information that is personal data.

Representative means any of Receiving Party's Affiliates, and Receiving Party's or any of its Affiliate's, directors, employees, agents, contractors, and professional advisers.

2. RECORDS OF DOCUMENTS

2.1 Receiving Party shall establish and maintain an accurate and complete record of all copies made of Confidential Information and of documents created by or on behalf of Receiving Party that contain or refer to Confidential Information, including:

2.1.1 a description of the Confidential Information in question;

2.1.2 when the copy or document was made;

2.1.3 the location of the copy or document, including (where appropriate) the system in which the copy or document is stored, the name of the individual who is responsible for the copy or document, and his or her address, telephone number and e-mail address.

2.2 A copy of the record to which this clause refers shall be made available by Receiving Party as soon as reasonably practicable after being requested to do so by Disclosing Party in writing and in any event within five (5) working days after the date of the request.

3. LISTS OF RECIPIENTS

3.1 Receiving Party shall establish and maintain an accurate and complete list of the organisations to which and individuals (whether or not an employee or representative of an organisation) to whom Confidential Information has been disclosed by or on behalf of Receiving Party, and individuals who have access to Confidential Information, containing:

3.1.1 a description of the Confidential Information disclosed or to which a person has access (as appropriate);

3.1.2 the date on which a disclosure of Confidential Information took place;

3.1.3 the reason for a person being provided with access to Confidential Information; and

3.1.4 in the case of:

(a) an organisation, its name, address, name of a contact and his or her telephone number and e-mail address;

(b) an individual, his or her name, the name of the organisation (if any) he or she represents, and his or her business address, telephone number and e-mail address,

and shall make available a copy of the list as soon as reasonably practicable after being requested to do so by Disclosing Party in writing and in any event within five (5) working days after that request.

4. BACK-TO-BACK LETTER TEMPLATE

[To be typed on Headed Notepaper of Party to Recipient – form assumes there is no confidential information being disclosed that is not covered by the underlying NDA]

Dear [insert name]

Undertaking of confidentiality

We refer to the agreement between [*insert details of parties to NDA*] dated [*insert date*] (**Original Agreement**), a copy of which is set out in the appendix to this letter.

We have expressed interest in [*insert description*], and for that purpose you propose to disclose to us Confidential Information (as defined in the Original Agreement) that you have

received from [Disclosing Party] under the Original Agreement, subject to our undertaking to keep the Confidential Information we receive from you confidential in accordance with the Original Agreement.

Accordingly, in consideration of your making Confidential Information available to us which is subject to the Original Agreement and for other good and valuable consideration (the sufficiency of which we hereby acknowledge), we hereby agree to the terms set out below.

[Subject to paragraph[s] 2 [and 3], we][We] shall observe, perform and discharge the same obligations and liabilities as apply to [Receiving Party] under the Original Agreement as if we were a party to the Original Agreement in lieu of you.

[The following provisions of the Original Agreement are hereby amended (as between us) for the purposes of this letter.

[*insert amendments*]

[The following provisions of the Original Agreement do not apply as between us:

[*insert excluded provisions*]

This letter and the agreement between us (and any non-contractual duties arising in connection with the agreement) shall be governed by and interpreted in accordance with [English law].

[The courts of [England and Wales] shall have [non-]exclusive jurisdiction to hear and determine any suit, action or proceedings, and to settle any disputes, which may arise out of or in connection with this letter or the agreement between us.]

The agreement between us may be executed in a number of counterparts, all of which constitute one single agreement between the parties, and the exchange of signed copies of this letter by electronic mail in portable document format (pdf) or by any other electronic means shall constitute effective execution of the agreement by each of us.

Your [faithfully] [sincerely]

Signed by [*name*], [*position*]
For and on behalf of
[*recipient*]

Agreed:

Signed by [*name*], [*position*]
For and on behalf of
[*NDA party*]

5. LEGAL DISCLOSURE SAFEGUARDS

Where Receiving Party proposes to disclose or has disclosed (as appropriate) Confidential Information to comply with law, regulation (including the rules of any exchange or similar trading facility on which the securities of Receiving Party or any of its Affiliates are or are to be listed), the order of a court, or the requirement of a Competent Authority, to the extent legally permissible, Receiving Party shall:

5.1.1 at the earliest [reasonably practicable] opportunity, provide Disclosing Party with written notice of the existence, terms and circumstances of the requirement[so that Disclosing Party may take appropriate action, including to apply for a protective order]; and

5.1.2 [use reasonable endeavours to]keep Disclosing Party fully and promptly informed of all matters and developments which have, or may reasonably be expected to have, a bearing or influence on its decisions relating to, or concerning, the Confidential Information in question.

6. CO-OPERATION WITH DISCLOSING PARTY

Where Receiving Party proposes to disclose or has disclosed (as appropriate) Confidential Information to comply with law, regulation (including the rules of any exchange or similar trading facility on which the securities of Receiving Party or any of its Affiliates are or are to be listed), the order of a court, or the requirement of a Competent Authority, to the extent legally permissible Receiving Party shall:

6.1.1 use reasonable endeavours to co-operate with Disclosing Party in such manner as Disclosing Party may require (acting reasonably) in avoiding, limiting or resisting the disclosure or dealing with the consequences or the anticipated consequences of the disclosure; and

6.1.2 seek an undertaking of confidentiality from the disclosee, except where the disclosee is subject to statutory or other duties of confidence that will apply to the information.

7. DELIVERY-UP AND DESTRUCTION

7.1 Undertakings

7.1.1 Subject to clause 7.2 (*Retained information*),[as soon as reasonably practicable][immediately][without undue delay] after termination of the Purpose, being requested to do so in writing by Disclosing Party from time to

time, or expiry of this agreement, whichever is the earlier, Receiving Party shall:

(a) return or[(at the election of Receiving Party)] destroy Confidential Information and all copies then in its possession or control;

(b) [destroy Derivative Information then in its possession or control;] and

(c) cleanse Confidential Information from any system into or on which it is stored or running.

7.1.2 Receiving Party shall deliver to Disclosing Party a certificate signed by a duly authorised officer on behalf of Receiving Party that it has complied with this clause, and shall do so[as soon as reasonably practicable][immediately][without undue delay] after receipt of a request in writing from Disclosing Party for the certificate to be provided.

7.2 Retained information

Receiving Party may retain:

7.2.1 information that Receiving Party is required to retain in order to comply with any applicable law or regulation or court order; and

7.2.2 data stored in back-up or archive systems.

8. NON-SOLICITATION

8.1 [During the period commencing with the Effective Date (inclusive) and ending [insert period] after the termination of this agreement or of the Purpose, whichever is the earlier, neither] [During the term of this agreement, neither] party shall solicit, entice, induce or encourage, or endeavour to solicit, entice, induce or encourage, any employee, director, other officer, or any other person employed or engaged in relation to the Proposed Transaction by the other or any of its Affiliates to leave or seek to leave his or her position with the other or its Affiliate.

8.2 Clause 8.1 does not apply to a person who:

8.2.1 responds to a general recruitment campaign;

8.2.2 makes an unsolicited approach to the relevant party or any of its Affiliates; or

8.2.3 is approached by or on behalf of the relevant party or any of its Affiliates by a person who has no knowledge of the Confidential Information provided that the person making the approach was not requested, encouraged or advised to do so by a person who has knowledge of the Confidential Information.

9. TREE STRUCTURES

9.1 Meaning of Team

In this clause, **Team** means a separate team comprised of members of staff of Receiving Party or any of its Affiliates whose remit is to work exclusively in relation to the Purpose.

9.2 Creation of Teams

9.2.1 Receiving Party undertakes during the period to which clause 9.3 refers to establish a Team whose members shall work only with Disclosing Party in relation to the Purpose (**Disclosing Party Team**).

9.2.2 If Receiving Party is in, or at any time commences, discussions with a third party concerning the Proposed Transaction or other business in relation to the Proposed Transaction, Receiving Party shall establish a Team whose members shall work with the third party only in relation to the Proposed Transaction, and undertakes:

(a) that no member of a Team (including Disclosing Party Team) shall become a member of another Team; and

(b) to establish and maintain appropriate measures to ensure that Confidential Information is received by and disclosed to members of Disclosing Party Team or in accordance with clause 9.2.3 only.

9.2.3 Members of Disclosing Party Team may disclose Confidential Information to members of Receiving Party's credit committee, legal, risk, regulatory, and internal compliance teams who in the opinion of Receiving Party (acting reasonably) need to know the Confidential Information for the purpose of carrying out their professional duties, but only to the extent and for the purpose of those duties.

9.3 Period

The period to which this clause refers is the period from the date of this agreement to the earlier of the following to occur:

9.3.1 Disclosing Party terminates the Purpose;

9.3.2 a third party is granted exclusivity in relation to the Proposed Transaction; and

9.3.3 [insert period] after the date of this agreement (inclusive).

10. MATTER SCHEDULES

10.1 The parties may agree from time to time to disclose and receive Confidential Information for one or more purposes under this agreement, and where they agree to do so they shall sign an agreement in writing substantially in the form set out in the schedule to this agreement (**Matter Schedule**).

10.2 Neither party is obliged to disclose or receive Confidential Information under this agreement except pursuant to a Matter Schedule.

10.3 [A Matter Schedule forms a single and separate agreement between the parties incorporating the terms of this agreement (other than this clause), and so that each Matter Schedule is severable from each other Matter Schedule except to the extent provided in a Matter Schedule.]

10.4 [Each Matter Schedule is concluded under and subject to this agreement, and so that each Matter Schedule is severable from each other Matter Schedule except to the extent provided in a Matter Schedule.]

10.5 Where there is any conflict or inconsistency between the terms of a Matter Schedule and the terms set out in this agreement, the former prevails to the extent of the conflict or inconsistency.

10.6 [No Matter Schedule may be entered into under this agreement after the [insert relevant number] anniversary of the date of this agreement.]

Form of Matter Schedule

This is a Matter Schedule to the agreement between [insert name of parties] dated • (**Master Agreement**).

1. In this Matter Schedule, unless the context otherwise requires, capitalised terms in the Master Agreement have the same meaning[and the following definitions apply:

   [Insert additional definitions].]

2. This Matter Schedule shall come into effect on [insert date/event].

3. All of the terms of the Master Agreement are incorporated into this Matter Schedule as if set out in full, except as amended in the terms set out below:

   [Insert amendments].

Agreed

SIGNED BY:

Duly authorised for and on behalf of

[Insert name of party]

SIGNED BY:

Duly authorised for and on behalf of

[Insert name of party]

Mattersmith

Contact

Andrew Scott
11 Telford Court
Morpeth
Northumberland
NE61 2DB

T 0333 242 0546
M +44 (0)7402 727000
E andrew.scott@mattersmith.co.uk
www.mattersmith.co.uk
www.mattersmithpro.com