

These guidance notes do not constitute legal advice. They do not form part of the NDA and are not an aid to interpretation of the NDA.

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GUIDANCE NOTES – IPF NON-DISCLOSURE AGREEMENT¹

We know from our members that there are many different forms of non-disclosure agreements ("NDAs") in the market. Unnecessary time is often spent negotiating these before parties can move on to the main transaction. Also, with the level of investment by overseas buyers (many of whom are not familiar with the UK market), it was felt that an industry template might give some comfort to those investors new to the UK market. With that in mind, the IPF set up a working party from the real estate sector (covering property companies, funds, agents, lawyers and accountants)² with a view to creating a standard form NDA dealing with confidentiality provisions adoptable with minimal amendment.

The template has been created to represent what the IPF believes is a fair and reasonable position for both parties and reflecting general market standards at the current time. Whilst we recognise that some organisations will have their own policy in relation to some of the points below, we hope that the industry will embrace the use of this NDA in keeping with our mission to enhance the efficiency and liquidity of real estate as an investment asset class.

Following finalisation of the English law document, a Scottish version has been prepared which can be used in relation to properties located in Scotland.

1. PARTIES

The NDA allows for the mutual disclosure of Confidential Information between both parties to the agreement. The Recipient of the information can therefore be either party to the NDA (or both) but does not include any affiliated/connected companies/funders/etc ("other parties"). This provides certainty as to who the contracting parties are. The permitted disclosure provisions in the NDA allow the Recipient to share the Confidential Information with other parties although it is not anticipated that such other parties enter into direct NDAs with the Provider. The Recipient remains responsible for ensuring that confidentiality is retained and would be liable for the breach by any other parties. Some entities may have internal policies preventing them from accepting liability for third party breaches in which case, they should procure that any other parties enter into a direct NDA with the Provider before disclosing Confidential Information to them.

2. PROPOSED TRANSACTION

The NDA is appropriate for both an asset or share sale.

¹ The definitions used throughout the NDA are also used in these guidance notes.

² Ciaran Carvalho – Nabarro (chair), Dan Buckle – Aberdeen Asset Management, Steven Cowins – Greenberg Traurig, Sue Forster – IPF, Siobhan Godley – Deloitte, Neil McGibbon – Starwood Capital Europe Advisers, Philip Nell – Hermes Real Estate, Alex Peeke – Land Securities Group, Clare Thomas – Nabarro, Geraint Thomas – JLL

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3. CONFIDENTIAL INFORMATION

The definition of Confidential Information is wide, catching electronic and hard copy information. In reality we would expect there to be an electronic data-room for the types of transaction where an NDA is appropriate.

4. RETENTION OF CONFIDENTIAL INFORMATION

4.1 The requirement to delete all soft copy materials is onerous and unlikely to be complied with in practice. The NDA recognises this by providing that such information remains confidential but does not require its destruction.

4.2 The Recipient can be required to return hard copy documents in the usual way but there is provision for a copy to be retained on a confidential basis where required for regulatory or audit purposes. Whilst a Recipient may prefer to have the option to destroy hard copy documents rather than return them, it is considered usual market practice to return hard copies where these have been provided and if requested (although given the use of electronic data-rooms, the provision of hard copy sales packs has become less frequent).

5. TERM

Two years represents the usual time period in the market for an NDA to remain binding but there may be particular circumstances where a different period is appropriate.

6. WARRANTIES AND INDEMNITIES

6.1 There is no warranty given in respect of the Confidential Information and the Recipient would be required to carry out its own investigations in the usual way.

6.2 We have not included an indemnity for breach of the NDA. Whilst we see these included in initial draft NDAs, they are invariably deleted by the Recipient and are not seen as market standard.

6.3 Remedies for breach of contract may be available at the discretion of the court, usually being damages should loss be proved.

7. EXECUTION

7.1 It is recommended (and good practice) that the actual parties (and not their representatives or agents) sign the NDA.

7.2 The use of electronic signatures is still rare in the UK and so the NDA assumes that a handwritten signature will be used in the normal way (this will be revisited should market practice change). It is however common for the parties to complete on the basis of pdf signed

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documents rather than the originals. In Scotland, it is proposed that the authorised signatory's signature is witnessed ensuring it is "self-proving" and valid.

- 7.3 Where a non-UK entity is a party, it is not usual market practice to request a legal opinion letter for the NDA.

8. MISCELLANEOUS

- 8.1 The NDA is personal to the parties and is non-assignable. There may be circumstances where a party may wish to assign its interest in the agreement and this should be specifically raised with the other party.
- 8.2 While the NDA is drafted to be governed by the law and courts of England, it is appreciated that the parties may choose to use a different jurisdiction depending on the location of the property. The Scottish version has been adapted to use Scottish law and jurisdiction.

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