



Confidentiality Agreement

Guidance Notes

January 2009

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Introduction

The Confidentiality Agreement (“CA”) has been produced by the Oil & Gas UK Confidentiality Agreement Sub-Committee (the “Sub-Committee”) consisting of representatives from Oil & Gas UK and industry lawyers who were assisted by Bond Pearce LLP.

The Sub-Committee chose not to base this CA on the previous Draft Confidentiality Agreement, because it had not been widely used in the industry. Instead, it was reviewed alongside pro formas provided by several companies, and a new draft was created to reflect current UKCS practice.

The draft is intended to be sufficiently generic to cover a multitude of scenarios where a CA might be required. For this reason, suggested wording for the “Permitted Purpose” is given in these Guidance Notes, rather than in the body of the CA.

The CA was reviewed by the Oil & Gas UK Operator’s Council Legal Committee during its development and also submitted to them for final approval, together with these Guidance Notes.

Confidentiality Agreement

Describing the signatories

It Appropriate information should be included to sufficiently describe the signatories. When describing a company, the company number, country of incorporation and registered office (or equivalent) are sufficient. The CA may be used by entities which are not companies (and then the description should be changed accordingly), but it is anticipated that most entities which use this CA will be companies.

Operators

If an operator is entering into the CA on behalf of a group of co-venturers, it is suggested that this should be addressed in the description. Wording could be added as follows: “acting [for itself and] as agent for and on behalf of [the [] co-venturers][or name each company]”. It should be noted that in many circumstances companies disclosing information may prefer to have a direct contractual link with each company which will have the right to review the information, rather than disclosing to an operator who then has an unlimited right to share the information with other (unspecified) co-venturers.

One-Way and Mutual Disclosure of Information

The CA has been drafted so that it can be easily used for situations where only one of the parties is providing confidential information to the other (one-way provision of information), or where the signatories are swapping information (a “mutual” provision of information).

To make the CA a one-way provision of information, the First Party should be described only as a “Disclosing Party”, and the words in square brackets “[and a Receiving Party]” should be omitted. Similarly, the Second Party should be described only as a “Receiving Party” and the words in square brackets “[and a Disclosing Party]”, omitted.

To make the CA a mutual provision of information, just the square brackets themselves should be removed, such that the First Party is described as a “Disclosing Party and a Receiving Party” and the Second Party is described as a “Receiving Party and a Disclosing Party”.

More than Two Parties

The CA can be signed by any number of signatories, who should be described as a “Third Party”, “Fourth Party” etc. With each party it must be made clear whether they are a Receiving Party, a Disclosing Party or both.

Definitions - “Confidential Information”

The definition of “Confidential Information” covers a wider ambit than “Disclosed Information” – whilst the confidentiality obligation in clause 2 covers all Confidential Information, other clauses – such as those dealing with return of information (clause 4) and warranting information (clause 3), only refer to the Disclosed Information.

Definitions - “Permitted Purpose”

It is important to describe the “Permitted Purpose” – the use for which the Disclosed Information is being disclosed – as accurately as possible, because this links in to the obligation of confidentiality expressed in Clause 2.1.2.

Some common examples of the type of wording which could be included in different scenarios is as follows:-

(i) Where the Receiving Party is obtaining information in relation to a proposed acquisition of an asset.

“the Receiving Party evaluating whether, and if so upon what terms, to make an offer to the Disclosing Party to acquire the Interests.”

NB – if this option is used, an “Interests” definition will also require to be inserted as follows:-

“Interests” means the Disclosing Party’s interests in the area described in the Schedule”

(ii) Where the Receiving Party is obtaining information in relation to a proposed farm-in to an asset.

“the Receiving Party evaluating whether, and if so upon what terms, to make an offer to the Disclosing Party to farm-in to the Interests.”

NB – if this option is used, an “Interests” definition will also require to be inserted as follows:-

“Interests” means the Disclosing Party’s interests in the area described in the Schedule”

(iii) Where the Receiving Party is obtaining information in relation to a transaction (not a purchase or farm-in).

“the Receiving Party evaluating whether, and if so upon what terms, to make an offer to the Disclosing Party to enter into [*describe proposed transaction*].”

(iv) Where the Parties are considering entering into a Joint Bidding Agreement.

“enabling the Parties to enter into a joint bidding agreement for the [] UKCS Licensing Round”

(v) Where a potential business opportunity is being reviewed.

“enabling the Receiving Party to assist the Disclosing Party in developing a business opportunity.”

Clause 3 – Liability

The Sub-Committee reviewed the position in relation to “Consequential Loss”, in particular whether it should be excluded. The Sub-Committee’s view was that, in contrast to other situations in UKCS agreements where Consequential Loss is often excluded, the exclusion of Consequential Loss is not appropriate in a CA situation, where Consequential Loss might be the only loss suffered. Therefore it was agreed that the more standard UKCS position in a CA would be to remain silent on the issue of Consequential Loss.

Clause 5 – Duration

The Sub-Committee reviewed various agreements and were satisfied that a duration of five years is a normal length of time for UKCS CAs. In some circumstances it may be appropriate to reference other agreements to determine the appropriate length of time.

Inclusion of a Schedule for “The Interests”

In many cases the Schedule will not be required, but in instances where there is a potential purchase of, or a farm-in to “Interests” (see note on “Permitted Purpose” above), description of the area covered by the “Interests” by way of map or co-ordinates is common and a schedule is generally the easiest way to incorporate this information.