

User's Guide to the Global Documentation Steering Committee Confidentiality Terms
(2004)

I. Purpose

The Global Documentation Steering Committee (GDSC) is comprised of senior professionals in financial markets and has the objective of encouraging harmonization in standard documentation to reduce risk and improve functioning of markets. The GDSC includes representatives of financial institutions, financial market trade associations and the Federal Reserve Bank of New York.

GDSC members have observed the increasing use of confidentiality agreements in the course of normal relationships between financial institutions and their customers. The GDSC believes that substantial time and effort is being expended in the negotiation of these agreements in situations in which parties were previously content to rely on confidentiality obligations considered to be implicit in the nature of the relationship. The GDSC believes that publication of standard confidentiality terms will be useful in promoting prompt negotiation of confidentiality arrangements between participants in financial markets.

The GDSC Confidentiality Terms are designed to be used in several circumstances in which information is furnished by financial market participants. The Confidentiality Terms can be used:

- To protect information regarding a transaction structure proposed by one party to another that is considered proprietary by the disclosing party.
- To protect information furnished by one party to another party for the purpose of permitting the receiving party to develop a transaction proposal for the disclosing party.
- To cover the delivery of financial or other information not otherwise publicly available for the purpose of initial or ongoing credit evaluation.
- For any other agreed purpose.

The GDSC Confidentiality Terms may not be appropriate for all situations. Confidentiality restrictions may be negotiated in the context of corporate finance transactions as part of an overall engagement. There may be other standard documentation that is more appropriate for use in a particular situation, such as agreements that are promulgated by industry associations with respect to a particular financial asset.

Perhaps most importantly, the GDSC has attempted to produce an even-handed and fair agreement that does not inordinately favor the provider or the recipient of information. It recognizes that in certain circumstances parties expect that special precautions should be employed to protect information being furnished, but equally realizes that there are appropriate limitations on the extent of such precautions. Accordingly, users of the Terms would be expected to both provide and receive information on the same basis. This approach is intended to minimize the need for prolonged negotiation of confidentiality agreements.

II. Format

The GDSC Confidentiality Terms contain undertakings that are designed to be adopted in a Confirmation detailing the circumstances under which information is being delivered and containing any limitations on the standard provisions. The Confirmation can simply refer to the Terms or can be attached to the Terms for ease of reference. If confidential information is to be provided by both parties, the parties could execute two separate Confirmations, corresponding to the parties' different capacities, or could execute one Confirmation in both capacities.

III. Completion of the Confirmation

The Confirmation has four sections requiring completion. Additional negotiated terms can be added to the Confirmation, although, given the purpose for which this document is being published, it is hoped that additional terms will be added only in extraordinary circumstances. The four sections are as follows:

- A. Confidential Information.** This section permits users to specify the information in the Confirmation that will be subject to the Terms. Users may also elect to subject information to the Terms by simply identifying it as "confidential" at or prior to the time of delivery. Election of this option avoids having to describe in the Confirmation the information that is subject to the confidentiality undertakings.
- B. Permitted Use.** This section contains elections that specify the use to which the confidential information will be put.

The first option is "Evaluation of a Proposed Transaction." This would be elected when one party is delivering information containing details of a transaction structure to another party, and requires that the nature of the proposal be briefly described.

The second option, "Development of transaction proposal", is designed for situations in which a party delivers factual information to another party to permit the development of a transaction proposal based on or using the information being furnished.

The third option, "Initial or ongoing credit evaluation", is designed to cover nonpublic financial or other information furnished in connection with an initial or continuing evaluation by the recipient of the other party's credit standing.

The fourth option permits the specification of any other purpose.

- C. Limitation on Disclosure to Representatives.** Some parties may wish to limit disclosure of information to certain functional groups within the recipient. For example, some parties may wish to restrict the delivery of credit information to the credit department, or to require that information not be available to employees in a sales and trading function. This election permits such a limitation.
- D. Termination Date.** The Confirmation permits the parties to specify a period of time during which the confidentiality undertakings will remain in effect. The Confirmation

provides an option to indicate a fixed period from the date of the Confirmation. The Confirmation also provides an option to specify another basis for determining the termination date, which could be used in circumstances in which information will be provided on a continuing basis to specify a fixed period from the date of a delivery of information.

IV. The Confidentiality Terms

The Confidentiality Terms, which are incorporated into a Confirmation, contain the operative terms typical in a confidentiality agreement. These include:

- A. Duty of Confidentiality.** This section contains the basic undertaking to hold information subject to the Terms in strict confidence and to use it only for the purpose specified in the Confirmation—the “Permitted Use”. The Recipient also agrees not to copy or reproduce information subject to the Terms except as necessary for the Permitted Use, or to disclose it to third parties other than to Representatives to the extent they need access to the information for the Permitted Use. The Recipient is responsible for ensuring that Confidential Information is not improperly or inadvertently disclosed or used by it or its Representatives in contravention of the Terms. Representatives are defined in the usual manner as a party’s affiliates, its officers and employees and the like, and its external advisors.
- B. Exceptions to the Confidentiality Undertakings.** The Terms contain usual exceptions to confidentiality undertakings, covering information that is or becomes public; information acquired by the Recipient from third parties when the Recipient is not aware that such third parties are bound by confidentiality obligations; and information that is developed by the Recipient independently and without reference to information furnished under the Terms.
- C. Return/Destruction of Confidential Information.** Providers frequently desire that information furnished by the proposer of a transaction or to permit a party to develop a proposal be returned or destroyed to prevent its further dissemination. This section acknowledges, however, that there may be practical or legal restrictions on doing so.
- D. General.** This section contains typical provisions for agreements of this kind, including an acknowledgement that specific performance should be available to give effect to the Terms; provisions regarding property rights in the information being furnished, etc.