*Note: this document underwent extensive consultation and was to all intents and purposes agreed by August 2021, but it was never formally launched or published. In August 2022, we decided to make it available through our website in case market participants find it helpful.*

**Proposed form of reliance and disclosure wording for due diligence reports provided in relation to real estate financings**

*The aim of this document is to reduce the time spent (and cost involved) in negotiating and drafting reliance language and disclosure permissions in relation to a variety of property reports, where reliance is extended to a lender group. It may also be a useful reference point for proposed wording in directly addressed reports. CREFC Europe developed this pro forma in consultation with a select group of lenders, with significant input from the RICS and various report providers, including insurance brokers.*

*This document is a pro forma letter which may not be suitable for every transaction and which needs to be adapted for each particular transaction for which it is used. For instance, report providers and lenders may have their own internal requirements including in relation to (a) protection for sanction breaches, (b) the prohibition on addressees being from certain jurisdictions and (c) anti-bribery and corruption. Further, it may need amending to deal with lender / report provider service level panel terms or other lender preferences, or to reflect a more structured type of lending (for example, senior/mezzanine). It may also need to be adapted to reflect specific panel agreed terms (for example in relation to liability periods). Please send any comments you have on this pro forma reliance and disclosure letter to Peter Cosmetatos (*[*pcosmetatos@crefceurope.org*](mailto:pcosmetatos@crefceurope.org)*).*

**Pro forma due diligence report reliance and disclosure language**

**[*To be printed on the report provider's letterhead*]**

**[PLEASE READ ACCOMPANYING DRAFTING AND GUIDANCE NOTES]**

**Date [               ]**

**Addressees**

To: [***INSERT NAMES OR CATEGORIES OR PROPOSED ADDRESSEES***] **[[1]](#endnote-2)**

(each a **Relying Party** and together, the **Relying Parties**).

Please note that if you are not a Relying Party or the Client (as defined below) but have been provided with a copy of the Report, the Report has been provided to you for information only and (except as otherwise expressly agreed by us) you may not rely on it. If you are not a Relying Party or the Client, it is for you to form your own view or take your own professional advice independently of and without any reliance on the Report. We do not assume any responsibility, duty or liability in connection with the Report to anyone who is not our Client or a Relying Party, nor do we give any undertaking to provide any additional information or correct any inaccuracies in it. Our work in preparing the Report was undertaken, and the Report was produced, solely in accordance with the terms of our engagement agreed with our Client and constitutes a report to our Client alone, which we have permitted the Relying Parties to rely upon on the terms set out in this letter.**[[2]](#endnote-3)**

Dear Sirs

**[*Insert name of report*]**

1. We refer to our [letter/agreement] dated [] (referred to as the **Appointment** and included as Appendix 1 to this letter) [to/with] [] (the **Client**), which sets out (among other things) our Scope of Service, Limitations and Terms and Conditions of Business, and our [] report dated [] (the **Report**) concerning [](the **Property**) which was prepared for the Client in accordance with the Appointment. The Report is included as Appendix 2 to this letter.
2. References in this letter to the **Facility Agreement** is a reference to a facility[y/ies] agreement dated on or about the date of [this letter/the Report] pursuant to which loan facilities were or are to be advanced to [] or an affiliate thereof, secured or to be secured over the Property, as such agreement is amended and/or restated from time to time, including any amendment that increases the amount of the facilities provided thereunder and/or extends the term of the facilities. Any reference to a **Lender** is to any lender in connection with such Facility Agreement.
3. [In consideration of £[][[3]](#endnote-4), which is acknowledged as having been paid to us, we agree to allow the use of and reliance upon the Report in accordance with the terms of the Appointment and this letter.]
4. It is acknowledged and agreed that no Relying Party [nor the Client] shall have any independent power to enforce or exercise any right arising under this letter [or the Appointment] except through the Facility Agent or Security Agent in accordance with the terms of the Finance Documents (as defined in the Facility Agreement) [and the terms of the Appointment are hereby agreed to be modified accordingly].

**Extension of duty of care**

1. Notwithstanding any term in the Appointment or the Report stating that only the Client may rely on the Report, we confirm to the Relying Parties that they may rely upon the Report and that in the preparation of the Report we have complied with the terms of the Appointment and have exercised reasonable skill, care and diligence in doing so, being the skill and care and diligence to be expected of an appropriately qualified and competent [***valuer/surveyor/etc.***] experienced in carrying out work similar in scope and character to the services performed.
2. We therefore confirm that we hereby accept that we owe the Relying Parties a duty of care in relation to the Report. That duty is subject to the terms of the Appointment, which terms are hereby incorporated into this letter. Should there be any conflict between the provisions of this letter and the Appointment (or any terms and conditions applying to the Appointment) then this letter shall prevail. [If there is anything in the Appointment (or the terms and conditions attached thereto) that conflicts in any way with the terms of this Letter we have brought these to your attention and have discussed them with you.]
3. The Relying Parties may only rely on the contents of the Report to the same extent as if we had been appointed directly by them, and (subject only to the express terms of this letter) our duty of care to the Relying Parties places no greater obligation or liability on us than is owed to the Client pursuant to the Appointment. Please therefore note the following:

(a) [the Report was prepared according to the Client's instructions and therefore is based on information provided by the Client (or by third parties as instructed by the Client), on the basis required by the Client and for the particular purpose(s) stated in the Report, and places particular emphasis on the issues which are of relevance, priority and significance to the Client. As such, the findings of the Report (and emphasis placed upon them) may not address the Relying Parties' specific purposes, requirements or matters which may be of particular importance to the Relying Parties];

(b) [whilst we have exercised due skill and care in considering whether to use or refer to the following information and documents in our Report, we accept no responsibility for the completeness or accuracy of the following information [and documents] upon which the Report is based and which were provided to us by the Client (or other third party):

(i) [***list relevant documents/information***;]

(ii) [the Associated Reports (as defined below);]]

(c) the contents of the Report are relevant as at the original date of the Report (or such other date as is stated in the Report) and do not incorporate any facts or information which were not available to us at the date of the Report;

(d) [[***for valuations***] we have not revalued the Property since the valuation date set out in the Report, and as such the valuation figure given in the Report may not reflect the current value of the Property; and]

(e) [save as expressly stated in the Associated Reports section below,] we have not taken any steps to update the Report since it was produced. We accept no liability for any part of the Report that was or may become inaccurate as a result of information that was not available to us at the date of the Report or circumstances that have occurred or arisen in relation to the Property after the date of the Report [, other than information referred to in the Associated Reports section below].

**[Associated Reports**

1. [We have reviewed the [final report/certificate on title and leases produced by [], dated [];] [the building survey produced by [] dated [];] [the rights of light survey produced by[], dated [] and] [[] [ ***name other reports that should be reviewed***]] (together the **Associated Reports**). Nothing contained in those Associated Reports causes us to alter the Report [(including the valuation figures and any other conclusions we have stated in the Report)].]

**Professional Indemnity Insurance**

1. A copy of [a letter from our insurance brokers[[4]](#endnote-5), confirming the level of] our current professional indemnity insurance is included as Appendix 3 to this letter, confirming [aggregate] cover in an amount of [not less than] £[] [on an each and every claim basis][[5]](#endnote-6).
2. We undertake to maintain professional indemnity cover at least equal to that currently in place for a period at least equal to the Reliance Period (as defined below) subject to such cover being available at commercially reasonable rates.
3. We shall, upon request by a Relying Party, promptly produce for inspection documentary evidence that such insurance is being properly maintained.

**Limitations on Liability**

**[OPTION 1 (Cap in the Appointment is repeated):**

1. For the avoidance of doubt, our aggregate liability to all of the Relying Parties and the Client (together) in relation to the Report, the Appointment and this letter shall not, in any circumstances, exceed any liability cap(s) or exclusion clauses provided for in the Appointment and/or the Report, being [].
2. The Relying Parties hereby acknowledge and agree that their involvement, and our agreement to the terms of this letter, have no impact or bearing on the reasonableness of the liability cap(s) and/or exclusion clause(s) provided for in the Appointment.]

**[OPTION 2:** **(Cap in the Appointment is amended)**

1. Our liability to the Relying Parties and the Client (together) shall not be limited (in time or amount) by anything contained in the Report or the Appointment and the provisions of this letter shall instead prevail by way of the limitation of our liability.
2. To the extent permitted by law, our liability to all of the Relying Parties and the Client (together) in relation to the Report, the Appointment and this letter shall not, in any circumstances, exceed, in aggregate, the sum of £[][[6]](#endnote-7).]

**Reliance Period**[[7]](#endnote-8)

1. [Any action by any Relying Party in respect of the Report, the Appointment or this letter shall not be brought after the later of (i) the date falling [one] year after the final repayment date in the Facility Agreement being [], and (ii) [six] years from the date of the Report or discovery of the claim, being [] (the **Reliance Period**). We agree that we will not seek to rely on any provision in the Limitation Act 1980 or any statutory provision that may modify, extend, re-enact or replace it, to defend any action or proceedings for any breach of this letter or the duty of care contained herein.]

**Defences and disclosure**

1. In any action or proceedings which may arise under or pursuant to this letter [, subject only to the provisions of the Limitations on Liability section of this letter,] we shall have no lessor nor greater liability to the Relying Parties than we would have or would have had to our Client and we shall be entitled to raise the equivalent defences as we would have had if the action or proceedings had been brought by our Client.
2. In any action or proceedings which may arise under or pursuant to this letter, the Relying Parties shall disclose the same documents as our Client would be required to disclose if it were party to the action or proceedings.

**[Disclosure without reliance[[8]](#footnote-2)]**

**[*INSERT NAMES OF ANY ADDITIONAL PARTIES TO WHICH THE REPORT MAY NEED TO BE DISCLOSED BUT WILL NOT REQUIRE ACTUAL RELIANCE*]]**

**Miscellaneous**

1. We confirm that the Report has been released and is capable of being relied upon by the Relying Parties.[[9]](#footnote-3)
2. No Relying Party shall have any liability to us for any fees or costs payable under the Appointment.
3. No Relying Party shall assign or transfer to a third party any of its benefits (or obligations) under this letter without our prior written consent.
4. Any amendments to the terms of this letter will only be effective if recorded in writing and signed by ourselves and by or on behalf of the Relying Parties.
5. If any term or provision of this letter is or becomes invalid, illegal or unenforceable, the remainder shall survive unaffected.
6. A person who is not a party to this letter has not right under the Contracts (Rights of Third Parties) Act 1999 to enforce or to enjoy the benefit of any of its terms.
7. This letter may be executed in any number of counterparts and this has the same effect as if the signatures on the counterparts were on a single copy of this letter.
8. This letter sets out the entire understanding between us in relation to the conditions upon which the Report is provided to you.
9. This letter and any obligations arising out of or in connection with it are governed by English law. The courts of England have exclusive jurisdiction to settle any disputes arising out of or in connection with the letter and the parties agree that the courts of England are the most appropriate and convenient courts to settle such disputes.

Signed: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Position: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

For and on behalf of [***report provider***]

**[REPORT PROVIDER SIGNING REQUIREMENTS TO BE CONFIRMED ON A CASE BY CASE BASIS BY THE REPORT PROVIDER – TO BE SIGNED BY A PARTNER OR DIRECTOR OF RELEVANT REPORT PROVIDER]**

Signed: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Position: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

For and on behalf of **[]**

as Security Agent for and on behalf of the Relying Parties

**Appendix 1**

**The Appointment**

**Appendix 2**

**The Report**

**Appendix 3**

**[Evidence of] Professional Indemnity Cover**

**FURTHER DRAFTING AND GUIDANCE NOTES:**

1. NOTES TO REPORT PROVIDERS AND RELYING PARTIES
   1. Relevant parts of this letter can be incorporated directly into the Report itself where considered appropriate. It is important to ensure that where this is the case the parties get the benefit of the rights and protections afforded by the terms of this letter, as appropriate. For example, a Valuation is most often just addressed directly to the Relying Parties (as Client) and in such circumstances the provisions contained in this letter should be contained in the Valuation itself or the Appointment.
   2. Report providers should review the terms of the relevant Appointment (including any service level agreement or panel agreement) for inconsistent terms with the reliance letter.
2. identity of ADDRESSEES/RELYING PARTIES
   1. **Suggested Addressee language:**

(a) [***INSERT NAME***] (as Original Lenders under the Facility Agreement, as defined below);

(b) [***INSERT NAME***] as Facility Agent and [] as Security Agent (each for themselves and each in their capacity as agent and security trustee for and on behalf of the Finance Parties (as such terms are defined in the Facility Agreement, as defined below));and

(c) any successors, assigneesor transferees of the Original Lenders from time to time; and

(d) any successors, assigneesor transferees of the Facility Agent or Security Agent from time to time (each for themselves and each in their capacity as agent and security trustee for and on behalf of the Finance Parties (as such terms are defined in the Facility Agreement, as defined below).

* 1. **Note to Report Providers:**
     1. Where the addressee language includes assignees and transferees from time to time (or within a limited period) note that the Report Provider will be accepting responsibility to a wider group than those named in the addressees section. Addressing to a Facility Agent and/or a Security Agent (for itself and as agent for and on behalf of the Finance Parties) can result in a wide ranging, and changing, group of lenders, who may have differing interests, priorities and approaches from the original lenders, having reliance on the report.
     2. Report providers may also need to consider the terms of their professional indemnity insurance and any limitations on addressees of reports.
     3. Where there is sensitivity in relation to the size and nature of the potential addressee group, comfort may be taken from the paragraph that provides that all claims must be brought through the Security Agent.
  2. **Note to Arrangers:** 
     1. Arrangers should check that the parties are named and described accurately, as per the Facility Agreement.
     2. We have not added the Arranger as an addressee because it is difficult to see when an Arranger would be making a claim itself. Where no agent has been appointed at the time the reliance letter is issued, it is fine to address the Report or extend reliance to a "to be appointed" Facility Agent and/or Security Agent for the finance parties.
     3. We have not added hedge counterparties as direct addressees and expect that claims would be able to be made via the Security Agent on behalf of the hedge counterparties if appropriate. However relevant agency provisions should be checked.
     4. The loan documentation should also be checked to ensure that appropriate agency arrangements are in place, failing which it would be necessary for the lenders themselves to be addressees (if not already).
     5. Some lenders do require to be a named addressee (i.e. with reliance) even though it is commonly accepted that such lenders will bring all claims via the Security Agent. There may be regulatory capital reasons where the report is a Valuation.
     6. If the finance parties (and their assignees) are addressees, the Arranger may need to consider whether the Facility Agreement/Intercreditor Agreement should contain a restriction on the addressees from claiming under the Report independently rather than through the Security Agent. The Facility Agreement/Intercreditor Agreement will need to prescribe whose instruction the Security Agent should act on in relation to report claims (majority lender or individual lender instruction). For example:

**"*Proceedings*** *means any litigation, arbitration, proceedings or claims against a Report Provider with a view to obtaining a recovery from that Report Provider;*

***Reports*** *means [] any other report relating to the Property or the Obligors requested by the Facility Agent and in the agreed and approved form; and*

***Report Provider*** *means any professional adviser or other person who has provided a report (including any Report) in relation to or in connection with a Transaction Obligor or any Property.*

***Report Recoveries***

*(a) Each Obligor shall take all reasonable and practicable steps to preserve and enforce its rights and pursue any claims and remedies including under the Transaction Documents and the Reports and shall take any such action in relation thereto that is reasonably requested by the Facility Agent.*

*(b) Notwithstanding any other provision in the Finance Documents, no Finance Party nor any Transaction Obligor may initiate any Proceedings, other than:*

* + - 1. *through the Security Agent; or*
      2. *with the prior written consent of the Security Agent.*
    1. If the finance parties are not addresses then clause 28.19 (Reliance and engagement letters) of the loan market association real estate finance (investment) facility agreement provides that the Facility Agent and the Security Agent has authority to accept on behalf of the finance parties (and ratifies the acceptance on its behalf of any letters or reports already accepted by the Facility Agent or the Security Agent) the terms of any reliance letter or engagement letters relating to any due diligence reports. Clause 28.3 (Instructions) of the loan market association real estate finance (investment) facility agreement then prescribes on whose instruction the Security Agent should act on in relation to report claims (majority lender or individual lender instruction).
    2. Some arrangers further require all Finance Parties (i.e. including arranger, facility agent, security agent, lenders and hedge counterparty etc.) to be direct addressees. Internal policies should be checked. Some accept that addressing the letter/report to just the Facility Agent and/or the Security Agent (for itself and as agent for and on behalf of the Finance Parties) suffices, with appropriate language in the Facility Agreement as to how claims might be brought.
    3. Where there are junior lenders (including mezzanine lenders), the junior finance parties will often require that they are separate addressees, although the relevant intercreditor arrangements will govern who can make claims and how proceeds should be dealt with. The junior arranger will have the same considerations as to whether to accept the reliance is addressed to the junior agent (for itself and as agent for and on behalf of the junior finance parties) or whether direct reliance by finance parties is required even though claims can only be made via the junior agent.
    4. Where a whole loan is intended to be subsequently bifurcated into separate loan agreements, for example senior and structurally subordinated mezzanine, with separate facility agents, it is possible that the common security agent could hold the benefit of the report claims for the mezzanine (even once the senior is repaid) but in cases where that is not the case, separate addressee language in favour of any additional facility agent/security agent may be desirable, as follows "any additional facility agent or security trustee for any lender where the loans advanced pursuant to the Facility Agreement are subsequently tranched into separate facilities with or without separate ranking security over the Property and related assets" Depending on how the debt is to be pushed up to the structurally subordinate position, Arrangers may also want to consider extending addressee language to any entity which take a novation of the debt or refinances (directly or indirectly through Obligor subsidiaries) an Original Lender within a specified period.
    5. The arranger will need to consider whether any other wider group of parties need to be named, for example those entities involved in a securitisation (for example note holders, note trustees or liquidity facility providers) or any entity to whom or for whose benefit any Lender charges, assigns or otherwise creates security over its rights under the Facility Agreement and related security. It will need to be considered on a case by case basis whether they should be addressees, or whether they should rely on the note documentation giving them the rights to instruct the Facility Agent to make a claim, should circumstances arise. In circumstances where the actual party that requires reliance (as they may suffer loss) is once removed from the actual Relying Party (for example in a securitisation where the loan level Facility Agent may be the addressee of the report or the Relying Party, but it is the note level trustee (on behalf of the noteholders) who may be interested in making a claim) advisers to the note level trustee/note holders must ensure that the documentation provides that the note level trustee (or similar) can require the loan level facility agent/security agent to bring claims.

Either way, even if these additional parties are not direct addressees, they should be included in the disclosure language.

* + 1. Sub-participants should not need to be included in the Relying Parties, since their reliance would be through the lender that has sub-participated and the sub-participation agreement will deal with whether and when claims should be made by the fronting lender etc.
  1. **Is a Report Recoveries Side Letter required?**

It is prudent to check who has commissioned the report and, if it was commissioned by (or is also separately addressed to) a group entity which is not an obligor, consider whether such non obligors should also sign this letter to agree that actions need be taken through the Security Agent, or whether a separate report recoveries side letter is required, whereby the entity that is not a borrower or guarantor under the facility agreement agrees to either not make a claim without Security Agent consent or to hand over any recoveries it gets to the Security Agent. The report recoveries side letter should be stated to override the Appointment or Report. Alternatively, the rights of the non-obligor entity under such report could be assigned to the borrower or alternative obligor. This may be relevant for acquisitions where Bidco has not been appointed at the time of the commissioning and addressing of the report.

1. DISCLOSURE ON A NON-RELIANCE BASIS
   1. Where the Report contains confidentiality provisions restricting disclosure of its contents, consider whether there are any parties to which disclose on a non-reliance basis may be required.
   2. **Suggested wording:**

The below is some suggested wording to add to the reliance letter. It is a long list, but perhaps not exhaustive, and each transaction should be considered on a case by case basis.

1. Notwithstanding any terms of the Appointment or the Report restricting the disclosure of the Report, we hereby consent to the disclosure of the Report, the Appointment, this letter and any accompanying documentation confirming the level of professional indemnity insurance by a Relying Party to any of the following parties (and in each case their respective professional advisers) or in the following circumstances, on terms that (i) we do not owe any party to whom disclosure is made pursuant to this clause any duty, obligation, responsibility or liability in relation to the Report or the information or advice contained in it, and (ii) that permitting such further disclosure does not waive confidentiality in the Report or permit any such third party recipients to make any further or wider disclosure, and provided further that the Relying Party disclosing the Report states those terms to the receiving party(ies) expressly in writing at the time of disclosing the Report:
2. its affiliates (or related funds, and in each case their investment and/or fund advisors), officers, directors, employees, auditors, insurers, lawyers, asset managers and other advisers or anyone appointed to receive notices on its behalf;
3. any Lender or potential Lender, any potential transferee, assignee and/or any potential or actual sub-participant of any Lender and their affiliates and any entity providing funding (or intending to provide funding) to any of them;
4. rating agencies;
5. any potential hedge counterparty or any potential transferee or assignee of a hedge counterparties rights and/or obligations;
6. any investors or potential investors in any Lender and any entity providing funding (or intending to provide funding) or investing (or intending to invest) in those investors;
7. any potential and actual purchasers of the Property or of shares in any entity that owns the Property either directly or indirectly, and any entity providing funding (or intending to provide funding) in relation to the same;
8. [any entity to whom or for whose benefit any Lender charges, assigns or otherwise creates security over its rights under the Facility Agreement and related security, or intends to do the same;
9. any trustee or potential trustee (including any *Treuhander*) for any noteholders in relation to any Pfandbrief or other covered bond relating to the Facility Agreement;][[10]](#footnote-4)
10. any administrative, settlement or numbering service providers in relation to the Facility Agreement;
11. any surviving entity as a result of a merger, demerger or consolidation of any Finance Party;
12. in connection with any claim against us as provider of the Report;
13. where requested or required by law or regulation or by any court of competent jurisdiction or any competent judicial, governmental, taxation, supervisory or regulatory body;
14. where required by the rules of any stock exchange or listing authority or similar body;
15. to whom information is required to be disclosed in connection with any insurance; and
16. [all relevant persons for the purpose of a Related Transaction (as defined below), which shall include (but not be limited to):
    * + - 1. investors or potential investors in such Related Transaction and any entity providing funding (or intending to provide funding) in relation to the same;
          2. rating agencies;
          3. [any trustee [(including any Treuhander)] for any such investors, any manager, arranger or underwriter or provider of liquidity facility, hedging or credit support and any servicer and any security trustee;]
          4. [to any potential trustee (including any Treuhander) for any such investors, or any potential manager, arranger or underwriter or potential provider of liquidity facility, hedging or credit support and any potential servicer or security trustee;]] and/or
          5. insurers (and other providers of credit insurance) and verification agents and their affiliates.][[11]](#footnote-5)

The Report may also be disclosed to anyone to the extent that the relevant Relying Party making the disclosure can demonstrate that it is already in the public domain (other than as a result of its breach or the breach of a person to whom it has disclosed the Report).

References in this letter to a **Related Transaction** is to any actual or proposed assignment, transfer, syndication, sub-participation or securitisation (including a cash or synthetic securitisation) or other capital markets transaction or collateralisation (including Pfandbrief or other covered bond) related to the Facility Agreement.

1. RELIANCE PERIOD
   1. Finance Parties offering long term loans may wish to consider asking for an extension of the limitation period for bringing claims against report providers.
   2. Further, Finance Parties may wish to future proof reliance such that it survives any amendment, restatement or refinancing (where the refinancing is with the same parties, provided perhaps, that it is within the same original Reliance Period).
   3. The language in the definition of Facility Agreement in the letter should help with this. However, in some cases the Relying Parties may wish to consider adding the following language, where they anticipate that co-operation will be required with re-addressing the Report should the facilities be refinanced with new Facilities (particularly where the Facility Agent and Lenders of the refinancing are the same). This is to prevent the administrative burden of needing to get reports and reliance letters re-addressed at the point in time of a ‘pseudo’ refinancing that is really only an extensive amendment and restatement with new security:

*If the Facility Agreement is amended, restated or refinanced within the Reliance Period, we agree to, upon the request of the Facility Agent, extend reliance in respect of the Report and the Appointment on the same terms as this letter so as to include as "Relying Parties" the Relying Parties as defined herein, but by reference to any replacement facility agreement, such that this letter may be re-issued with consequential amendments to the definition of the "Facility Agreement" but otherwise on the same terms,* ***provided that*** *there shall be no consequential extension to any long stop of any reliance period or limitation on liability by virtue of such re-issue of this letter, and no additional addressees shall be included as Relying Parties other than the Relying Parties as at the date of this letter. We will act reasonably and without delay (and without any additional charge) in relation to any such request from the Facility Agent.*

* 1. Where Reliance Periods are requested to be extended, report providers may wish to consider whether it would be commercially advisable (including with regard to the terms of their professional indemnity insurance and their IT and document retention policies) to accept.

1. Professional indemnity insurance and whether available at commercial rates
   1. You will notice that there is a reference to PI cover being available at commercial rates otherwise the obligation to provide falls away. This has been accepted on the basis that if PI cover is not renewed, it likely means that the report provider is ceasing business in any case. It should also be noted that it is generally the PI cover in place at the time a claim is made (not the PI cover that was in place when the report was prepared) which will respond to a claim.
2. EACH AND EVERY CLAIM BASIS
   1. It should be made clear whether any limit of indemnity contained in the report provider’s professional indemnity insurance, is referring to an aggregate limit (i.e. the cumulative limit for all claims on the policy in the policy year) or an "each and every claim" limit (i.e. the individual limit for each claim on the policy). This determines how much the policy will pay out in the event of a claim.
   2. A £1m "in aggregate" limit of indemnity will pay out up to £1m in total (aggregate). A £1m "each and every claim basis" (also known as any one claim). The limit of indemnity must be read in conjunction with the statement regarding the basis of cover e.g. each and every claim/any one claim or in the aggregate.
   3. If the limit is a £1m each and every claim limit and six different claims of £200,000 each are made, the policy will (subject to the policy conditions being met) respond. If the limit is a £1m aggregate claim limit and six claims of £200,000 each are made, the first five claims will be covered, the final claim will not as the £1m limit has been exceeded.
3. PROPorTIONAL LiabilIty CLAUSES/NET CONTRIBUTION CLAUSES AND CONTRIBUTORY NEGLIGENCE
   1. Some report providers may find that their professional indemnity insurers of architects and other professional consultants usually request that a net contribution clause is included.
   2. The parties to this letter should consider whether a proportional liability clause (also known as net contribution clause) would be appropriate.
   3. A net contribution clause states that where two or more parties involved are each jointly liable for the same loss or damage, the liability of each party will be limited to the amount which would be apportioned to that party by a court. The net contribution clause may include assumptions, which will affect this apportionment.
   4. Without a net contribution clause, the Relying Party could claim for and recover 100 per cent. of its damages from the report provider, despite the fact others may have been involved in the loss.
   5. This leaves the report provider with a right to recover a share of those damages from others who may have been responsible (under the Civil Liability (Contribution) Act 1978). The effect of a net contribution clause is that if the court found one party 40 per cent. liable for those damages and another 60 per cent. liable, the Relying Party can recover only 40 per cent. of its damages from the first and bring a claim against the other to recover the remaining 60 per cent. of its damages.
   6. It is important to note that with a net contribution clause, if (say) the party that was 40 per cent liable is insolvent when the claim is brought the Relying Party may in practice recover only 6 per cent. of its damages in total. However, without a net contribution clause, the Relying Party would be able to claim the full 100 per cent. of the damages against either report provider and leave the report providers to argue out the position.
   7. The options are to remain silent in the Reliance Letter and default to the position that is in the Appointment or the default position under the Contribution Act or to include the following words in the reliance letter:

*[In addition, our liability to the Relying Parties will be limited to that proportion of any loss or damage the Relying Parties may suffer as is just and equitable, having regard to the extent of their own responsibility for the loss and damage and that of any other person who may also be liable to the Relying Parties in respect of it. In considering whether other persons may be liable to the Relying Parties, no account is to be taken of any inability on their part to enforce remedies against another person by reason of causes of action against that person becoming time-barred, or the person's lack of means or the person's reliance on exclusions or limitations of liability or by their insolvency.]*

1. OFFERING CIRCULARS ETC.
   1. If finance parties require the ability to refer to the Report in an offering circular or similar, report providers should consider whether to agree to that and if so on what terms. In that context, Report Providers will need to bear in mind that in some circumstances agreeing to the publication of the contents of a Report can lead to unlimited liability to a wide class of potential claimants, and also bear in mind any relevant professional obligations or requirements (such as the RICS requirements for valuers to ensure that references to a valuation report are accurate and that the reader is not misled, to clearly identify and state the purpose of a valuation and to state information about any prior involvements with the subject property).

Report providers may wish to maintain control over the use and dissemination of their advice. However, if one of the options below is agreed, it should be on the basis that if the Report is used in a modified way, the Report Provider should retain the right to approve such amendments or modifications first. If the Report is summarised the Report Provider should ensure that the reader is clear that it needs to make its own enquiries and not rely on any summary.

* 1. **Suggested rider to be inserted after the Paragraph on Disclosure on a Non-Reliance basis:**

**[OPTION 1 (Report providers consent required)**

Furthermore, we acknowledge that the contents of the Report (and the methodologies and concepts on which the same is based) may, with our prior written consent (not to be unreasonably withheld or delayed) be:

1. presented by a Relying Party to other Relying Parties and/or to investors or potential investors in a Related Transaction in whole or summary format;
2. included, quoted or otherwise summarised by a Relying Party in any information memorandum, offering circular, private placement memorandum, registration statement or prospectus relating to the Facility Agreement or Related Transaction; or
3. included, quoted or otherwise summarised by a Relying Party in any on-going reporting materials generated for the purposes of the Facility Agreement or any Related Transaction.

It is hereby agreed that our consent to any such use of the contents of the Report will be conditional upon our approval of the terms in which the Report is included, quoted or otherwise summarised in the relevant document(s) and that it shall be reasonable for us to withhold such consent if the Relying Parties do not agree to the inclusion in the relevant document(s) of a statement to the effect that we do not owe a duty to any reader of the relevant document(s) unless expressly agreed to the contrary and/or any other disclaimer of duty/liability which does not conflict with the terms of the Appointment and/or the terms of this letter. In no circumstances shall our logo be included in any relevant document(s).]

References in this letter to a **Related Transaction** is to any actual or proposed assignment, transfer, syndication, sub-participation or securitisation (including a cash or synthetic securitisation) or other capital markets transaction or collateralisation (including Pfandbrief or other covered bond) related to the Facility Agreement.

**OPTION 2 (Report provider grants a licence to the Relying Parties)**

Furthermore, we grant to the Relying Parties an irrevocable, royalty free, non-exclusive licence to use, reproduce and/or summarise the Report (and the methodologies and concepts on which the same is based) for all purposes including:

1. presenting by a Relying Party to other Relying Parties and/or to investors or potential investors in a Related Transaction in whole or summary format;
2. quoting or otherwise summarising by a Relying Party in any information memorandum, offering circular, private placement memorandum, registration statement or prospectus relating to the Facility Agreement or Related Transaction; or
3. quoting or otherwise summarising by a Relying Party in any on-going reporting materials generated for the purposes of the Facility Agreement or any Related Transaction,

provided that in each case is made clear that the reader is not to rely on any summary and should instead make its own enquiries and provided further than in no circumstances shall our logo be included in any relevant document(s) and any use of material in our Report shall include a statement to the effect that we do not owe any duty to any reader of the relevant document(s) and no liability to the reader may be inferred.

It is hereby agreed that we will supply to the Relying Parties on request copies of such materials referred to in the Report subject to payment of our reasonable charges for providing such copies.

References in this letter to a **Related Transaction** is to any actual or proposed assignment, transfer, syndication, sub-participation or securitisation (including a cash or synthetic securitisation) or other capital markets transaction or collateralisation (including Pfandbrief or other covered bond) related to the Facility Agreement.

1. See Drafting and Guidance Notes re the identity of the Addressees/Reliance Parties. [↑](#endnote-ref-2)
2. It would be prudent for report providers to ensure that a form of this disclaimer is included in the Report too and is also emphasised to anyone to whom the Report is disclosed. [↑](#endnote-ref-3)
3. Consideration must be paid to ensure a contractual arrangement exists between the Report provider and the Relying Parties. If a fee is required to be paid to extend reliance, the amount should be amended accordingly to reflect the commercial agreement. Many panel arrangements will not allow the charging of an additional payment. If this is the case then minimum consideration of £1 should be inserted. [↑](#endnote-ref-4)
4. Note that this letter need not be addressed specifically to the Relying Parties. [↑](#endnote-ref-5)
5. Drafting and Guidance Notes re Each and Every Claim Basis. [↑](#endnote-ref-6)
6. Any caps on liability should be considered on a transaction by transaction basis. For report providers, the starting point (and often the finishing point) will usually be that the terms of the Appointment should apply. [↑](#endnote-ref-7)
7. Drafting and Guidance Notes re Reliance Periods. [↑](#endnote-ref-8)
8. See Guidance notes as to who it may be necessary to disclose the report to, and in what circumstances this may be relevant. If this is already covered in the underlying Appointment or Report (for example disclose by anyone to [↑](#footnote-ref-2)
9. Note: the Report provider may wish to first check that any fees in relation to the report have been paid. [↑](#footnote-ref-3)
10. If paragraph (xv) is included then users may wish to delete paragraphs (vii) and (viii) as these become superfluous. [↑](#footnote-ref-4)
11. Beneficiaries of the report should consider the circumstances in which they may need to disclose the terms of the Report and ensure that this is permitted under the terms of the reliance letter. If a Beneficiary wants full flexibility on their sell down strategy then they may want to consider including the Related Transaction optionality provided for in this letter. [↑](#footnote-ref-5)