

## LETTERS OF UNDERTAKING

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### INTRODUCTION

Brokers are often requested by third parties (i.e. parties other than their client) to provide Letters of Undertaking (LUs). Often the request will come from lenders providing the broker's client with finance in real estate transactions, project finance transactions and other loan facilities. The loan is probably secured against the insured's property, and the lender, understandably, wants to ensure that it gets the benefit of that property's insurance.

The LU that the lender requires will typically be prepared by it, or more likely its legal adviser, and will be drafted on the basis that the broker confirms the existence of certain insurance arrangements, including details of the type of covers placed, limits of indemnity, and who the loss payee is. It is also likely that it will contain provisions to ensure that the broker gives notice to the lender of material developments which may affect the insurance, and will sometimes go as far as requiring the broker to undertake that all premiums will be paid in accordance with the policy terms.

### THE OBLIGATIONS ASSUMED

Giving any undertaking is to assume a binding obligation, and may well have serious consequences for the giver. This bulletin is intended to provide practical advice to Members as to how they may limit potential exposures should they choose to issue an LU.

It is important to remember, and start from the position, that it is very unlikely that Members will be under any legal duty or obligation to issue an LU. Absent a contractual agreement to do so (which a Member will have had to enter into freely, for example in a TOBA) a Member would be perfectly entitled to decline any request to do so. Members should resist any suggestion by the third party that the position is otherwise.

By providing an LU a Member will not only be accepting obligations to a third party to whom it would not otherwise owe any duty of care, but will be doing so without any form of remuneration in return for what may turn out to be onerous and time consuming responsibilities. However, Members are often put in an invidious position where valued clients require financing which will only be granted to them if an LU is given in relation to an insured's policies.

### THE ALTERNATIVE APPROACH

If a Member considers it appropriate to provide an LU, where possible, and to reduce the extent to which duties to the third party are assumed, it would be preferable for the LU to be addressed to the client, rather than the third party lender. Ideally, the LU will be restricted to providing an outline of the cover that the broker has placed.

In most cases, however, lenders are likely to insist that the LU is provided on the Members' headed paper addressed to them. It is not obligatory to comply with such a request, but if, in the interests of the client and the Member's relationship with that client, it is felt appropriate to do so, the Member should aim to ensure that the contents of the LU are purely factual, free of any express acceptances of obligations to third parties, and are expressly approved by the client prior to the letter being issued – it should not be forgotten that the information within the letter is confidential to the client.

## INTO THE FIRING LINE

Although the principal reason behind these letters may be to ensure that the third party's investment is suitably protected, Members should not lose sight of the fact that there is likely to be a secondary purpose - to give that third party another source of potential financial recovery if its investment turns to loss.

Any third party will argue that the content of the LU was important to its decision to invest or lend, and any inaccuracy in the LU's content could well lead to significant exposure. As could any failure by a Member to carry out any obligation that it has accepted in signing the LU – often lenders will seek to include promises by the broker to advise them of the occurring of certain events. These may include a failure by an insured to pay premium, or the happening of an event which is material to the validity of the cover in question.

## PROTECTION

Clearly, a Member should never agree to assume an obligation that it is not entirely confident it can carry out. Agreeing to a promise that premium will be paid, for example, would be inappropriate as this is likely to be beyond the Member's control - but it is not unusual to see such a promise included in LUs that brokers are put under pressure to sign. On the other hand, agreeing to notify the third party if the Member has not received premium from the insured (for onwards payment) by a certain date may be performable, but will introduce a potential conflict between the Member's new responsibility to the third party and the interests of its client – hence the importance of obtaining the client's express consent to any LU that may be issued.

From a risk management perspective therefore, the Member should, as far as possible, limit the scope of the LU with regard to any obligations it accepts and ensure that procedures are put in place so that these will be complied with. For example, if notice needs to be given of any claim above a certain size it will be necessary to consider how the claims team will be alerted to this need.

Members should be particularly cautious about providing an LU where they are acting as a placing broker upon instructions from their producing broker client. Where there is a chain of brokers the placing broker will rarely have had direct contact with the insured and is unlikely to be in a position to confirm any information regarding the suitability of the cover for the insured, for example. Similarly where a Member is placing only part of an order it may not be aware of the full details of the risk or the insured's requirements.

We have drafted two suggested forms of LUs which are attached to this Bulletin (and are also published on the Griffin website in the Members' area). The first ("A") is preferable from a risk management perspective as it is addressed to the client from the Member. The second ("B") is intended for use where the lender is unwilling to accept an LU addressed to the Member's client and is addressed the lender instead.

## RISK MANAGEMENT MESSAGE

The Griffin is happy to provide assistance to Members in preparing an LU following a request from a client.

Set out below is a (non-exhaustive) list of issues that Members may wish to consider when requests for LUs are put to them:

- Ensure you have your client's informed written consent to provide all of the information that has been requested in the LU – that information is confidential to the client until it has authorised its release.
- Check every detail of the LU for accuracy before signing and ensure that you are entirely confident that you are able to comply with all of the requirements set out in it.
- Ensure that insurers are happy with any wording amendments or endorsements requested by third parties (for example a new loss payee clause), before agreeing that they will be implemented.
- Make sure notification periods confirming timescales specified in the LU, for example advising cancellation or changes to the policy, can be met.
- Do not provide any undertakings as to the solvency of the security. Likewise, avoid undertakings that relate to the security being sufficient to meet the requirements of the third party.
- It is always preferable to specify English law and the exclusive jurisdiction of the courts of England and Wales in any LU.

This bulletin is for general information purposes only and does not provide a comprehensive or complete statement of the law relating to the issues discussed nor does it constitute legal advice. In addition, by its nature, this bulletin may be superseded by subsequent regulatory or legal developments. Professional advice should be sought where appropriate in relation to any particular circumstances.

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**N.B. Wording in square brackets is intended solely as guidance to Members and should not appear in any final version.**

[VERSION A: ON HEADED PAPER OF MEMBER AND  
ADDRESSED TO THE MEMBERS' CLIENT]

Dear Sirs

1. This letter is provided by us upon your instructions in respect of the insurance policies listed in the attached schedule which we have placed solely on your behalf ('the Insurances').
2. We confirm that as at the date of this letter:

*[List here the matters, which, after careful checking, you are comfortable to confirm. Below are some examples of the types of confirmations sought by third parties in relation to policies placed on behalf of the insured.]*

- (\*) *all of the Insurances are in full force and effect and premiums on the Insurances have been paid to date;*
  - (\*) *we are not aware of any circumstances which would render any of the Insurances void or voidable and we have not received any written notice of cancellation or non-renewal with respect to any of the Insurances;*
  - (\*) *the Insurances provide cover in relation to your business and assets against those risks that we consider it is usual for companies carrying on the same or substantially similar businesses to you to insure against, and to the extent we consider that it is usual to insure.*
3. We confirm that *[the third party lender]* is named as *[a/sole]* loss payee under the Insurances. *[It is a common requirement of the lender for it to be named as a loss payee in the policies, but you should clearly establish whether that is the case before issuing this letter.]*
  4. The advice which we have given to you in relation to your insurance has been given in respect of your specific requirements and may not meet the requirements of any third party. We understand that you may wish to pass this letter to *[the third party lender]*. We have no objection to the letter being provided to such third party on the strict understanding that it is furnished to them as a matter of information only. The provision of this letter and any related communication by you to any third party does not establish a professional duty of care on our part to that party, nor does it establish a contract between us and that party, nor does it make that party an additional insured, nor does it modify in any manner the contract between yourself and insurers. We do not accept any liability for any loss, howsoever arising, out of or in connection with your provision of this letter to any third party,
  5. This letter will be governed by, and construed in accordance with English law and the parties irrevocably submit to the exclusive jurisdiction of the courts of England and Wales.

Yours faithfully

for and on behalf of *[Member]*

**N.B. Wording in square brackets is intended solely as guidance to Members and should not appear in any final version.**

**[VERSION B: ON HEADED PAPER OF MEMBER AND  
ADDRESSED TO THE THIRD PARTY LENDER]**

Dear Sirs

1. This letter is provided by us on the instructions of our client [*client name*], with its full knowledge and consent to its terms. This letter does not constitute an acceptance by us of any advisory relationship between us and you and/or your successors. We owe no duty of care to you and/or your successors in respect of the Insurances, which we have placed solely on behalf of [*client name*].
2. We act as insurance brokers to [*client name*] in respect of the insurance policies listed in the attached schedule (the Insurances).
3. We confirm that as at the date of this letter:

*List here the matters, which, after careful checking, you are comfortable to confirm. Below are some examples of the types of confirmations sought by third party lenders in relation to policies placed on behalf of the insured.]*

- (▪) *all of the Insurances are in full force and effect and premiums on the Insurances have been paid to date;*
  - (▪) *we are not aware of any circumstances which would render any of the Insurances void or voidable and we have not received any written notice of cancellation or non-renewal with respect to any of the Insurances;*
  - (▪) *the Insurances provide cover in relation to [*client name*] business and assets against those risks that we consider it is usual for companies carrying on the same or substantially similar businesses as [*client name*] to insure against and, to the extent that we consider it is usual to insure;*
  - (▪) *in the event that we are informed of any proposed cancellation of any of the Insurances we shall inform you as soon as reasonably practicable;*
  - (▪) *in the event that we are informed that the cover under the Insurances is to be reduced or any insured risks are to be restricted, or if we are informed that the overall cover is to be changed in a manner, which, in our opinion results in it being reduced or restricted we will advise you as soon as reasonably practicable.*
4. We confirm that you are named as [*a/sole*] loss payee under the Insurances. [*It is a common requirement of the lender for it to be named as a loss payee in the policies but the Member clearly needs to establish this is the case before confirmation is given.*]
  5. The advice which we have given to [*client name*] in relation to its insurance has been given in respect of the specific requirements of [*client name*] and may not meet your requirements. You should therefore take such steps as you consider necessary to satisfy yourselves that your own requirements have been met, and should not rely upon the professional advice that we have given to [*client name*] as doing so. The

provision of this letter and any related communication by us to you does not establish a professional duty of care to you on our part, nor does it establish a contract between us and you. We do not accept any liability for any loss, howsoever arising, out of or in connection with our provision of this letter to you,

6. The information in this letter is confidential and is not to be disclosed to any third party without our or *[client's name]* prior consent in writing.
7. This letter will be governed by, and construed in accordance with English law and the parties irrevocably submit to the exclusive jurisdiction of the courts of England and Wales.

Yours faithfully

for and on behalf of [Member]