

Adapting the Model Form – The Evolution of Private Placement Documentation in the Global Marketplace

July 19, 2018

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Adapting the Model Form – The Evolution of Private Placement Documentation in the Global Marketplace

- I. Core Principles of Private Placement Documentation
- II. Issuance Themes Driving the Evolution of Documentation
- III. Resulting Legal Trade-Offs and Considerations vs. Traditional Model Form and Private Placement Principles
- IV. “Globalizing” the Model Form to Take the Lead in Driving Standardization?

I. Core Principles of Private Placement Documentation

- Parity to Obligor Group (“matching guarantee”)
- Parity to Core Covenants
- Priority Debt
- Anti-Cookson
- Make Whole
- Free Transferability of Notes

II. Issuance Themes Driving the Evolution of Documentation

- Growth in European private market activity
 - No single European private placement market
 - Documentation more bank market/LMA focused
 - Significant portion of issuance lack covenants or is non-IG (although unrated)
 - Expansion of Schuldschein market
- What's driving issuance in Europe?
 - Growth in European investor base targeting private placements
 - Bank push for “local” product options
 - Fragmentation of markets businesses within banks (competing P&L's)
 - Attractive terms versus public markets or USPP, at the moment

II. Issuance Themes Driving the Evolution of Documentation

- The Push for Alternative Documentation Growing Globally
 - Expanding beyond traditional infrastructure
 - Provides option for Issuer to issue to into multiple markets & multiple currencies
 - Pari Passu approach consistent with US private placement documentation principles
 - Sponsor desire for private placement documentation consistent with syndicated bank agreements

II. Issuance Themes Driving the Evolution of Documentation

- What Are the Prevalent Alternative Forms of Documents?
 - Common Terms Platform
 - Multi-debt platform in which creditors of different classes accede to common financing documents and share common representations and warranties, covenants, events of default and remedies
 - Typically, transactions on Common Terms Platforms have been more infrastructure related, but have moved more towards corporate style (although still usually secured)
 - UK's Loan Market Association (LMA) Private Placement Forms
 - Designed to appeal to European Issuers looking for documentation aligned with syndicated bank loan documentation

III. Resulting Legal Trade-Offs and Considerations vs. Traditional Model Form and PP Principles

- US Specific Provisions Need to be Negotiated
 - Use of proceeds
 - Margin Regulations & US Securities Laws
 - ERISA
 - OFAC/Sanctions/Anti-Money Laundering/Anti-Corruption Laws
 - Important for both regulatory and reputational considerations
 - Increasing number of European issuers have concerns about making the full representation and warranty in Section 5.16 of the ACIC Model Form NPA

III. Resulting Legal Trade-Offs and Considerations vs. Traditional Model Form and PP Principles

- Prepayments
 - Change of Control – Trending away from a mandatory offer of prepayment following a change of control (in the infrastructure space and when other principle credit facilities do not have it)
 - Swap protection – Generally has withstood the test of time, provided, in certain cases Issuers are not willing to give swap protection and instead consider a lower margin (e.g., 0, 20 or 25 basis points) over US Treasuries for purposes of the Reinvestment Yield in determining Make-Whole Amount
 - Make Whole Calculation - For purposes of determining Make-Whole Amount, trending towards the “mid-point between the bid and ask yields” for purposes of the Reinvestment Yield
 - Certain prepayments at par (equity cures, lock-up amounts)

III. Resulting Legal Trade-Offs and Considerations vs. Traditional Model Form and PP Principles

- “Reasonable Endeavors” to maintain a rating – as opposed to a strict covenant to maintaining a rating
- The priority debt concept has generally held, though, in some transactions, there is no priority debt covenant (or limits on subsidiary and secured debt) and the limitation is provided by overall financial covenants
- Limited or no visitation rights
- Limited or no request for other information
- Matching subsidiary guarantees and anti-Cookson have also generally held

III. Resulting Legal Trade-Offs and Considerations vs. Traditional Model Form and PP Principles

- Limited or no right for financial statements, reports, notices sent to Issuer's other principal creditors
- Limitation on application of fair value treatment under IAS 39. Because this provision is not typical in most European documentation, most European issuers must be educated on this point
- Non-US Issuers are apprehensive about sharing copies of material financing agreements

III. Resulting Legal Trade-Offs and Considerations vs. Traditional Model Form and PP Principles

- No equivalent consideration for noteholders that do not consent to amendments and waivers
- Governing law (other than NY) – For some time now, English law has been the alternative to New York law in transactions out of Europe
- Loan notes versus security – European issuers want to avoid being made subject to US securities laws and sometimes push toward transactions structured as loans. Structured as a loan, the issuer can potentially avoid US securities laws. As to commercial investors, they can by-pass the liability protections under US securities laws.
- Transfer restrictions (competitors, hedge funds, distressed debt funds)

III. Resulting Legal Trade-Offs and Considerations vs. Traditional Model Form and PP Principles

- Voting rights
 - Snooze-You-Lose – usually a minimum quorum of noteholders responding by a certain date in order to satisfy a minimum percentage (typically very low, e.g., 20%) and then only need requisite majority of those noteholders that responded. Those noteholders that do not respond are not counted in the vote, either in the numerator or denominator.
 - Drag-Along Voting (*aka* block voting) – if requisite majority satisfied, then 100% of the principle in the relevant class of Notes is voted as a “block”. 100% of the vote is added to the broader group vote of all classes of debt. Potentially reduces the right of minority to have a voice in the overall group of all classes of debt.

III. Resulting Legal Trade-Offs and Considerations vs. Traditional Model Form and PP Principles

- Voting rights
 - Discretion of Security Agent
 - Common Terms Platforms commonly use a security agent/trustee that acts on behalf of all classes of creditors. In many transactions, such trustees often have a level of discretion that is typical for European bank lenders but is greater than the level of discretion to which U.S. institutional investors are accustomed. This may include the right to permit the issuer to deviate from covenants such as (i) amending organizational documents, (ii) creating security interests, (iii) disposals, (iv) acquisitions, (v) creating indebtedness and (vi) making loans (among others).
 - Further, Common Terms Platforms commonly permit the security agent to vote on amendments, waivers and consents so long as such transactions are not, in the opinion of the security agent, materially prejudicial to the interests of any of the lenders (where “*materially prejudicial*” means that such amendment, waiver or consent would have a material adverse effect on the ability of the Obligors to perform their payment obligations to the lenders under the Finance Documents).

III. Resulting Legal Trade-Offs and Considerations vs. Traditional Model Form and PP Principles

- Voting rights
 - Affected Holder Voting vs. Super-Majority Voting (*e.g.*, changes to certain covenants, events of default, trigger events, release of guarantees/security)
 - Ability of issuer and its affiliates to hold and vote debt. Typically included in infrastructure transactions, where the ultimate sponsor may hold and vote the Notes.

III. Resulting Legal Trade-Offs and Considerations vs. Traditional Model Form and PP Principles

- Enforcement/Acceleration
 - No right for individual acceleration/enforcement upon a payment default
 - Make-Whole Amount and Swap Breakage Amount subordinated in waterfall
 - Standstill periods on enforcement
 - Lenders not permitted to enforce remedies, including acceleration, suit, setoff or foreclosure
 - Standstill will last anywhere from 30 business days to 12 months
 - Usually super-majority (662/3%) can override
 - Usually terminated by certain events, including bankruptcy/insolvency

IV. “Globalizing” the Model Form to Take the Lead in Driving Standardization?

- Global Sanctions – Anti Money Laundering and Sanctions
- More LMA Style Tax Indemnity and Tax Gross-Up
- Thoughts from the Audience?

Charles Kolin, Greenberg Traurig, LLP



Charles Kolin is a shareholder with Greenberg Traurig, LLP. Charles represents insurance companies, pension funds and other institutional investors in various types of private placement transactions with issuers from a variety of jurisdictions, including the US, Europe and Australia. These transactions encompass corporate, infrastructure, project and other structured finance transactions of a variety of assets.

Greenberg Traurig has a team of attorneys engaged on a full-time basis in the practice of institutional private placements (including attorneys in the Chicago, New York, London, Berlin and Amsterdam offices).

Charles is a member of the American College of Investment Counsel (the ACIC). Charles is currently the Co-Chair of the Transaction Process Management Committee of the ACIC and, in this capacity, is part of the group responsible for the continued development of the model form note purchase agreements which are used as the starting template to document these transactions in the global private placement market.

Nicolette Lopez, MetLife



Nicolette Lopez is a Senior Counsel in MetLife's Investments Law Department. Nicolette practices in the Debt Transactions and Global Investment Services Unit, where she advises on a variety of domestic and cross-border investments, including private placements, public bonds, social investments, and bank loans. She also supports MetLife's Treasury Department regarding custody agreements and various other types of banking arrangements. Additionally, Nicolette advises on compliance matters and provides support for various special projects. She is currently a member of both the Transaction Process Management Committee and the Development Committee of the American College of Investment Council.

Prior to joining MetLife, Nicolette practiced at Hawkins, Delafield & Wood, LLP, primarily representing issuers, underwriters, borrowers, and credit enhancers in public finance transactions.

Nicolette received her Juris Doctor degree from Fordham University School of Law, and her Bachelor of Science degree, *magna cum laude*, from New York University's Stern School of Business.

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Jim Moore joined the Private Credit Team at Barings in 2015 as a Managing Director. Jim is the Head of Barings' Corporate Private Placement business and a member of the Private Placement Investment Committee. Prior to joining Barings, Jim was a Managing Director and Head of US Private Placements at RBS, placing over \$50 billion of transactions for issuers globally. Before joining RBS in 2001, Jim worked at JP Morgan in various roles in Private Banking, Investment Banking and Debt Private Placements. Jim has a B.S. in Business Administration from the University of Delaware and an MBA from Temple University.

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Noelle is a member of the Steering Committee for Nuveen LEAD (Leadership, Education, Advocacy and Development), which is focused on improving diversity and inclusion in the asset management industry and at Nuveen. She also supports efforts within the Nuveen/TIAA legal department with respect to improving diversity & inclusion in the legal industry. Ms. Sproul is also active in the Associate for Corporate Counsel, serving on the Sponsorship Committee for the Charlotte Chapter of ACC.