

Chapman *Insights*

OPPORTUNITIES FOR OUR CLIENTS

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ACIC Model Form and LMA Forms Comparison Primer

As you are aware, billions of U.S. Dollars, Pounds Sterling, Euros, Australian Dollars and other currencies are invested each year in the global private placement market. In order to maintain the global private placement market as an attractive market for both issuers and investors, the American College of Investment Counsel undertook to update its Model Form Note Purchase Agreement last year and released its Transaction Process Management Committee Updated Model X Form No. 2, draft dated April 15, 2014 (the “*Model Form*”). The Model Form was based upon a prior ACIC Model Form Note Purchase Agreement and both issuers and investors alike are familiar and comfortable with the contents of the Model Form.

Recently, the United Kingdom’s Loan Market Association (the “*LMA*”) released its proposed private placement agreement forms on January 6, 2015. Among other documents, the LMA has prepared two forms of agreements, one in the form of a Term Facility Agreement and one in the form of a Subscription Agreement (collectively, the “*LMA Forms*”). Depending on the form selected, the debt instrument issued would either take the form of a loan or an unlisted note. The rationale provided for having two distinct forms is to provide flexibility in structuring transactions, but ultimately achieve the same term financing result despite the form proposed to be used by a specific issuer.

Both the Model Form and the LMA Forms caution that they are each starting points in the structuring and negotiation for a private placement transaction. As such, below is a primer to assist both investors and issuers in determining the similarities and differences between the Model Form and the LMA Forms (including any standard provisions that may be incorporated as a result of market practice).

Structural Provisions	Model Form	LMA Forms
Independent Credit Rating Requirement	No; however there is a presumption that the issuer will be an investment grade equivalent.	No; however there is a presumption that the issuer will be an investment grade equivalent.
Guarantor(s)	A Parent guaranty is customarily included in the Model Form. Subsidiary Guarantors deliver guarantees under separate guaranty agreement(s).	Original Guarantors are party to the LMA Forms. Additional Guarantors deliver an accession to the LMA Forms with no separate guaranty agreement. (Section 17 and 24.2)
Guarantor Matching/“Cookson” Protection	Yes (Section 9.7 and 10.5).	No.
Paying or Calculation Agent	No.	Available (Section 28.8).

Economic Provisions

Fixed or Floating Interest Rates	Both.	Both.
Voluntary Prepayments	Permitted with the Make-Whole Amount (Section 8.2).	Permitted (Section 6.4). There is a placeholder in the LMA Form for including a Make-Whole Amount provision, though no related Make Whole definitions are included. Any Make-Whole provisions would have to be included as a commercial point.

	Model Form	LMA Forms
Tax Prepayments	Permitted with either a Modified Make-Whole Amount or Make-Whole Amount under the Model Form (Section 8.3). However, some issuances permit a tax prepayment <i>at par</i> as a commercial point.	Permitted under the Subscription Agreement only (Section 6.6). As noted above, the Make-Whole Amount is not required by the LMA Forms thus would have to be included as a commercial point.
OFAC Sanctions Prepayments	Yes <i>at par</i> (Section 8.4).	No.
Illegality Prepayments	No.	Yes <i>at par</i> (subject to the right of the borrower to substitute a new lender under the Facility Agreement but not the Subscription Agreement) (Section 7.1 in the Facility Agreement and Section 6.2 in the Subscription Agreement).
Change of Control Prepayments	Customarily included <i>at par</i> but there is no requirement in the Model Form.	Yes <i>at par</i> (Section 7.2 in Facility Agreement and Section 6.3 in Subscription Agreement).
Increased Costs Protection for Lenders	No.	Yes (Section 13.1); however application for increased costs may permit the issuer to prepay <i>at par</i> .
Tax Indemnity	Yes (Section 13).	Yes (Section 12 generally).
Interest Rate Swap Provisions	Model Form swap provisions are available.	No swap provisions are included in the LMA Forms.

Covenant Structure

Financial Covenants	Typically sourced from Primary Bank Facility.	Typically sourced from Primary Bank Facility.
Lien Covenant	Yes; though the form's language is often customized to reflect the Primary Bank Facility's covenant (Section 10.5).	Yes; though the form's language is often customized to reflect the Primary Bank Facility's covenant (Section 21.3).
Most Favored Lender Covenant	Included on a deal-by-deal basis.	Yes, a placeholder is included in the LMA Form (Section 21.8). However, it may be that, like a deal documented on the Model Form, this covenant is only included on a case-by-case basis.
Priority Debt Covenant	Yes. This included as a matter of customary market expectation though no specific covenant is included in the Model Form.	No. Though we would anticipate that such a covenant would be included as a matter of market expectation similar to the Model Form.
Sale of Assets Covenant	Included in virtually all deals, though there is no specific covenant included in the Model Form.	Yes (Section 21.4).
Mergers and Consolidations	Yes though typically only applicable to the issuer and the Parent (Section 10.2).	Yes and applicable to all obligors (including Subsidiary Guarantors) (Section 21.5).

	Model Form	LMA Forms
Line of Business Covenant	Yes (Section 10.3).	Yes (Section 21.6).
Economic Sanctions Covenant	Yes (Section 10.4). (See also the OFAC Sanctions Prepayment provision).	No. Although this may be required depending on the specific transaction.
Reporting Covenant	Financial statements and compliance certificates on an annual and interim (either quarterly or semi-annually) basis (Sections 7.1 and 7.2).	Similar to the Model Form, but only semi-annual (as opposed to quarterly) interim reports are included (Sections 19.1 and 19.2).
General Housekeeping Covenants	Yes--Compliance with Laws (Section 9.1), Insurance (Section 9.2), Maintenance of Properties (Section 9.3), Payment of Taxes and Claims (Section 9.4), Corporate Existence (Section 9.5), Books and Records (Section 9.6) and Priority of Obligations (Section 9.8).	Compliance with Laws only (Section 21.2).

Defaults/Remedies

Defaults	Payment default, covenant default, misrepresentation default, cross-default (or cross-acceleration depending on the credit), bankruptcy/insolvency defaults, judgment defaults and defined benefit plan defaults (Section 11 generally).	Consistent with the Model Form, however the LMA Forms also include a material adverse change default and a default triggered by an obligor no longer being a Subsidiary of the Parent. However, unlike the Model Form, the LMA Form only provides for a cross-default in all instances (Section 22 generally).
Acceleration by Investors	Required Holder approval (i.e., typically a majority) is required other than for any acceleration other than as a result of payment or bankruptcy/insolvency defaults (Section 12.1).	The LMA Forms contemplates two potential regimes relating to rights of acceleration to: (a) majority of the investors or (b) any individual investor (Section 22.13). We anticipate that the choice will be the subject of commercial negotiation.
Premium Upon Acceleration	Yes, the Make-Whole Amount (Section 12.1).	No. As noted above, no Make-Whole provisions are included in the form. The LMA notes that Make-Whole may be included on a deal-by-deal basis.
Sharing of Recoveries by Investors	No.	Yes. Recoveries are shared among all investors (Section 26.1).

Miscellaneous Provisions

Scope of Representations	Generally broad including various U.S. related	Generally more limited than the Model Form (and no U.S. related
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	Model Form	LMA Forms
	representations (U.S. securities laws, margin regulations, ERISA, and OFAC) (Section 5 generally).	representations are included) (Section 18 generally).
Transfers by Investors	Free transferability without issuer consent, though transfers to competitors are routinely prohibited as a commercial point (Section 14.2).	Provides options for transfers with (a) issuer consent, (b) consultation of the issuer or (c) free transferability (Section 23.2).
Amendments/Consents/Waivers	Generally with the majority of Noteholders, though amendments of fundamental economic provisions require 100% consent (Section 18.1).	Same (Section 34.2 in Subscription Agreement and Section 33.2 in Facility Agreement).
Choice of Law	New York (Section 23.6), though some deals are governed by the laws of England.	England (Section 37 in Facility Agreement and Section 38 in Subscription Agreement).

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