

## BATTLE OF THE FORMS IN THE EUROPEAN PRIVATE PLACEMENT MARKET: AN ANALYSIS AND COMPARISON OF THE NEW LMA PRIVATE PLACEMENT DOCUMENTATION VS. THE ACIC MODEL X FORMS

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## 1. INTRODUCTION

Over the last few years, there have been ongoing discussions and a series of initiatives aimed at developing a “Pan-European Private Placement Market” (PEPP Market) for private placement transactions between European issuers and European investors.<sup>1</sup> To date, however, the private placement market in Europe remains largely fragmented and regionalized. Among the perceived barriers to the development of the PEPP Market are unfavorable tax and accounting treatment in some European jurisdictions, a tendency towards regionalization, the lack of a perceived need for a separate European market, no established track record for the market and the absence of standardized documentation for this market. In an effort to help move these initiatives forward, the Loan Market Association (the LMA) recently established a working group of industry participants to produce recommended forms intended for use in the PEPP Market. The hope is that standardized private placement documents, developed specifically for use in the PEPP Market, will help remove certain perceived barriers to the development of a cohesive private placement market in Europe by streamlining the documentation process, establishing market standards and reducing transaction costs.<sup>2</sup>

The LMA recently released proposed forms of documentation, which include a term facility agreement (the LMA Facility Agreement), a subscription agreement (the LMA Subscription Agreement and, together with the LMA Facility Agreement, collectively, the LMA Forms), a form of term sheet, a form of confidentiality agreement, and a Users Guide to the Form of Pan-European Private Placement Documents (the Users Guide). The appropriate LMA Form to be used in a particular private placement transaction is determined based on the structure of the transaction. The LMA Facility Agreement is designed for use in a European private placement structured as a loan transaction, and the LMA Subscription Agreement is designed for use in a European private placement structured as an issuance and sale of notes. The LMA based both forms largely on the LMA’s form of single currency term facility agreement for syndicated bank loans, the basis of many bank loan deals in the European market. The LMA working group intended for this consistency between the two sets of documentation, given that the LMA banking forms (i) may be more familiar to European issuers and (ii) would help make the private placement market a more appealing financing alternative if issuers could line up substantive provisions in their new private placement documentation with those in their existing bank loan documentation.

In contrast to the nascent PEPP Market, the US private placement market is well established and has been successfully operating for a number of years. For more than 20 years, parties have documented private placement transactions involving both US and European issuers and investors using model form note purchase agreements developed by the American College of Investment Counsel (the ACIC) in coordination with other market participants. While the ACIC’s initial forms were for use by US issuers, subsequent additional forms (the Model X Form No. 1 Note Purchase Agreement (Model X Form 1) and Model X Form No. 2 Note Purchase Agreement (Model X Form 2) and, collectively, the Model X Forms) were specifically designed for use by non-US issuers. These forms have gained wide market acceptance and have been integral to the establishment of an efficient and cost-effective global private placement market. Given that, historically, most investors participating in these deals have been US-based insurance companies or pension funds, the ACIC’s forms are “US-centric” and contain numerous provisions addressing issues and concerns specific to US-based institutional investors.

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1. In this article, a “private placement” transaction generally refers to the issuance and sale by a company of debt securities (typically long-term, fixed-rate notes) to a limited number of institutional investors in a transaction that is exempt from the registration requirements under Section 4(a)(2) of the US Securities Act of 1933.

2. In addition to the LMA’s efforts, there is a French group (the Euro Private Placement Working Group) that has issued a “Charter for Euro Private Placements” and the International Capital Markets Group that has produced a “Pan-European Corporate Private Placement Market Guide.” The Euro Private Placement Working Group has prepared separate form documents which were released in January 2015.

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While the LMA developed its forms primarily for use in the PEPP Market—for transactions between European investors as well as European issuers—US investors have been active investors in the European market for years and have displayed a continuing trend toward investing in new markets and growing their European investment portfolio. Given the large appetite of US investors and the continuing trend toward internationalization, it would not be surprising if US investors sought to participate in the PEPP Market as it begins to develop. It is important then, for both US and European investors, to understand certain key differences between the familiar Model X Forms and the new LMA Forms. Also, since US private placement transactions have traditionally been structured as issuances of debt securities (rather than loans), our expectation is that this practice will likely continue as the PEPP Market develops and, therefore, it is particularly important to understand the key terms and provisions of the LMA Subscription Agreement.

Below is a summary and analysis of some of the more significant differences between the LMA Forms (and, in particular, the LMA Subscription Agreement) and the Model X Forms.

## 2. OVERVIEW

As noted above, the LMA based the LMA Forms substantially on its form agreement for syndicated bank loans so that the substantive provisions of a European issuer's private placement documentation could closely track those of its LMA bank facility documentation. As outlined below, a number of provisions in the LMA Forms depart from the Model X Forms and existing US private placement market conventions, with some changes favoring investors while other changes favor issuers.<sup>3</sup> Both the LMA Forms and the Model X Forms are intended for use in investment grade financings. However, whereas the Model X Forms are governed by New York law and do not assume a jurisdiction of organization of either the investors or the obligors, the LMA Forms assume that both the investors and the obligors are incorporated in England and Wales, and provide that English law governs the agreements themselves.<sup>4</sup>

## 3. PAYMENT PROVISIONS

In reviewing the payment provisions of the LMA Subscription Agreement, there are several departures from the Model X Forms:

### 3.1: Floating Rate Issuance

The LMA Forms contain an option for either a fixed or a floating rate of interest on the debt issued thereunder, whereas the Model X Forms only contemplate an issuance of fixed rate debt.<sup>5</sup> An overwhelming majority of private placement transactions are structured as fixed rate issuances. However, floating rate note issuances occur occasionally and the use of floating rate debt has increased over the years.

### 3.2: Computation of Interest; Paying Agent

The LMA Forms compute interest on the basis of actual days elapsed and a year of 360 days, rather than a year of 12 thirty-day months which is used in the Model X Forms.<sup>6</sup> The LMA Subscription Agreement's approach is consistent with the day-count convention commonly used in the London interbank market

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3. As a preliminary matter, we note that the LMA Forms, even without certain key provisions like "Make-Whole Amount," are more than 100 pages long, including schedules and exhibits, whereas the Model X Form 2 is approximately 20 pages shorter, including make-whole provisions, schedules, and exhibits.

4. Clause 38 of the LMA Subscription Agreement and Clause 37 of the LMA Facility Agreement.

5. Clause 9.1 of the LMA Subscription Agreement and Clause 8.1 of the LMA Facility Agreement.

6. Clause 31.3 of the LMA Subscription Agreement and Clause 30.3 of the LMA Facility Agreement. This clause does provide for an alternative where "the practice in the Relevant Market differs" but tentatively defines "Relevant Market" as the "European interbank market." Note that the actual/360 convention results in an interest rate that is 1/72 higher than the stated rate of interest; the 30/360 convention does not have that result.

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(except where the currency is Sterling, for which the London interbank convention is actual/365), whereas the 30/360 convention in the Model X Forms is consistent with the US bond market.

While the LMA Forms do not contemplate the appointment of an administrative agent to act on behalf of the investors, the LMA Forms do include provisions for the use of a paying agent to assist with the making of payments to lenders and noteholders thereunder and/or a calculation agent to assist lenders and noteholders with the determination of the applicable floating rate of interest on the debt from time to time. There is no corresponding concept in the Model X Forms. Most institutional investors have traditionally been unwilling to take on any kind of agency role on behalf of a noteholder group, so we would expect that any paying agent or calculation agent would need to be a third-party agent or a non-traditional private placement participant.

## 3.3: Default Interest

Under the LMA Forms, the default rate of interest only accrues on overdue payments and not on the entire principal amount of the notes during an Event of Default.<sup>7</sup> The Model X Forms take the latter approach.<sup>8</sup>

## 3.4: Make-Whole Amount

The LMA Forms do not define “Make-Whole Amount” and do not specifically set forth circumstances under which a Make-Whole Amount or other prepayment premium is required.<sup>9</sup> The Make-Whole Amount has historically been a cornerstone of the US private placement market and, consistent with its significance within the market, the Model X Forms contain a detailed methodology for calculating the Make-Whole Amount. The Make-Whole Amount’s importance within the market stems from the fact that, historically, insurance companies that invested in private placement transactions have matched their invested funds and returns expected with payments required under insurance products they have offered. A prepayment of notes (whether at the option of the issuer or upon acceleration) could potentially cause a disconnect between returns expected in respect of a private placement and amounts required to be paid by that insurance company in respect of its insurance products. Thus, the Model X Forms require payment of a Make-Whole Amount in connection with any voluntary prepayment and/or acceleration of notes to limit this disconnect. The absence of a Make-Whole Amount definition in the LMA Forms and the optionality for payment of a Make-Whole Amount in the relevant prepayment provisions may reflect a movement away from this US market standard. Section 4.3(e) of the Users Guide, in fact, indicates that no formula is included as standard since “this is a matter for commercial negotiation.”

## 3.5: Change of Control Put

Unlike the Model X Forms, the LMA Subscription Agreement contains a Change of Control put right.<sup>10</sup> A similar prepayment right is included in the LMA Facility Agreement.<sup>11</sup> While this right and the related put mechanics have become relatively standard in most private placement transactions (subject to negotiation of an appropriate Change of Control trigger), no model provisions have been developed for the Model X Forms. Also, in a departure from typical private placement practice, the change of control prepayment provision in the LMA Subscription Agreement requires an investor to deposit its notes with the issuer prior to payment, rather than surrendering the notes upon prepayment.<sup>12</sup> Market convention in

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7. Clause 9.3 of the LMA Subscription Agreement and Clause 8.3 of the LMA Facility Agreement. The LMA Forms do not propose a specific default rate nor do they provide for an alternative default rate calculated by reference to the prime rate, as do the Model X Forms.

8. Clause (b)(y) of the first paragraph of the form of Note attached to the Model X Forms.

9. Clause 6.10 of the LMA Subscription Agreement and Clause 4.3(e) of the Users Guide.

10. Clause 6.3 of the LMA Subscription Agreement.

11. Clause 7.2 of the LMA Facility Agreement.

12. Clause 6.3(c) of the LMA Subscription Agreement.

the US private placement market has been that the notes only need to be surrendered either at the time of redemption or promptly following redemption. US issuers are largely comfortable with this approach because the notes are non-negotiable instruments and there is no realistic risk that a demand for payment could be made under the notes by another party following such redemption under US law.

### 3.6: Prepayment Upon Event of Illegality

Under the LMA Forms, there is a requirement that any debt holder be prepaid if it becomes unlawful for such holder to perform any of its obligations under the financing agreements or hold debt of the issuer for any reason whatsoever.<sup>13</sup> Such prepayment would be required to be made on the next interest payment date occurring after the holder has notified the issuer of such illegality event or, if earlier, the date specified by such holder in the notice delivered to the issuer (subject to any applicable grace periods permitted by law). The forms contemplate that such payment would be at 100% of the outstanding principal amount of the affected notes or outstanding loans, as applicable, although the amount is bracketed in the LMA Subscription Agreement indicating that this may be a negotiated term. The Model X Forms contain a much more limited “illegality” prepayment right, which provides only for the right of an investor to put its notes back to the issuer upon the occurrence of certain OFAC-related issues that cause such investor to be in violation of, or subject to sanctions under, applicable US federal or state law.<sup>14</sup> Such prepayment is at par and must be made not less than 30 and not more than 60 days after the offer of prepayment is required to be made.

### 3.7: Ratable Prepayment Offers

The LMA Subscription Agreement is consistent with the Model X Form 1 language, which provides that the issuer may make offers to purchase notes on a ratable basis upon the same terms and conditions outside of the optional prepayment provisions.<sup>15</sup> We note that, in practice, this provision is also frequently added into Model X Form 2 deals as well. This approach would permit an issuer to make discounted prepayment offers and potentially avoid paying any make-whole amount or other prepayment premium in connection with such discounted prepayment. However, unlike Model X Form 1, the LMA Subscription Agreement does not contain the so-called “exit consent” language (see discussion in paragraph 9.9 below).

### 3.8: Increased Costs

The LMA Form provides for the issuer to pay investors’ “Increased Costs” incurred as a result of a new law or regulation (or interpretation of an existing law or regulation) becoming effective after the closing.<sup>16</sup> Although this is a fairly typical provision in the bank loan market, there is no equivalent concept in the Model X Forms and it is inconsistent with market practice in the US private placement market. Under the LMA Subscription Agreement, if any holder of notes claims indemnification from the issuer under the “Increased Costs” provisions in Clause 13 of the LMA Forms, the issuer has the right to redeem the affected notes under Clause 6.7 of the LMA Forms at par (although the redemption price is in brackets). Clause 7.4 of the LMA Facility Agreement contains similar provisions that permit the issuer to cancel the commitment of the lender making demand for payment of such Increased Costs and repay the loans held by such lender or replace the lender.

## 4. INFORMATION COVENANTS

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13. Clause 6.2 of the LMA Subscription Agreement and Clause 7.1 of the LMA Facility Agreement.

14. Section 8.4 of the Model X Forms.

15. Clause 7 of the LMA Subscription Agreement and Section 8.5 of Model X Form 1.

16. Clause 13 of the LMA Subscription Agreement. “Increased Costs” are defined to mean “(i) a reduction in the rate of return from the notes or on a Holder’s (or its Affiliate’s) overall capital; (ii) an additional or increased cost; or (iii) a reduction of any amount due and payable under any Finance Document . . . .” A similar provision is included in Clause 13 of the LMA Facility Agreement.

The financial information and reporting covenants in the LMA Forms and the Model X Forms are generally consistent; however, there are several key differences:

- The LMA Forms do not require delivered financial statements to include a comparison of the financial results for the period being reported on against the corresponding period from the prior fiscal year.<sup>17</sup>
- The LMA Forms do not require that no “going concern” or similar qualification exist in an annual audit opinion of issuers’ accountants.<sup>18</sup>
- The LMA Forms require reporting of any litigation or administrative proceeding current, threatened, or pending that, if adversely determined, might have a Material Adverse Effect.<sup>19</sup>

## 5. AFFIRMATIVE COVENANTS

The Model X Forms expressly include affirmative covenants as to (i) compliance with law, (ii) insurance, (iii) maintenance of properties, (iv) payment of taxes and claims, (v) corporate existence, (vi) books and records, (vii) subsidiary guarantors (requiring any subsidiary that guarantees indebtedness under any Material Credit Facility to guarantee the obligations under the note facility), and (viii) pari passu ranking of obligations.<sup>20</sup> Each of these affirmative covenants covers the issuer and the issuer’s subsidiaries, and several are subject to a Material Adverse Effect limitation. By comparison, the LMA Forms’ affirmative covenants consist of only (i) compliance with laws and (ii) authorizations covenants.<sup>21</sup> Both of these covenants are limited to the issuer and guarantors. Under Clause 24.2 of the LMA Forms, an issuer may request that any of its subsidiaries become additional guarantors; however, there is no absolute requirement that any subsidiary become a guarantor. Whereas Model X Form 2 requires an issuer to obtain and maintain all necessary authorizations to conduct business or own properties, the LMA Forms require the same only to the extent required to enable each obligor to perform its obligations under the relevant financing documents.

Additionally, each of the LMA Forms contains a placeholder for the inclusion of a “most favored lender” clause.<sup>22</sup> This type of provision typically provides that if the issuer grants a more favorable covenant or event of default to another creditor, it must also offer the same term to the noteholders or lenders under the applicable LMA Form. There is no specific recommended language in the LMA Forms; however, the Users Guide does outline some important issues to consider if such a provision is to be inserted, including the types of financings that will be caught by this provision (e.g., all bank facilities, debt in excess of a certain threshold amount), the types of provisions that will be covered by this provision (e.g., only financial covenants, all negative covenants, certain events of default) and the effect if any financing with more favorable terms is repaid or such more favorable terms are relaxed.<sup>23</sup> The Model X Forms do not contain a form of “most favored lender” covenant; however, they are commonly included in cross-border transactions, and the scope and terms are often negotiated on a deal-by-deal basis.

## 6. NEGATIVE COVENANTS

Both the Model X Form 2 and LMA Forms include the following negative covenants: (i) Merger, Consolidation, etc. (Merger), (ii) Line of Business (Change of Business), and (iii) Liens (Negative Pledge). Model X Form 2 also includes covenants relating to transactions with affiliates and compliance with

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17. Clauses 19.1 and 19.3 of the LMA Forms.

18. Clauses 19.1 and 19.3 of the LMA Forms. Compare Section 7.1(b) of the Model X Forms.

19. Clause 19.4(b) of the LMA Subscription Agreement.

20. Section 9 of the Model X Forms.

21. Clauses 21.1 and 21.2 of the LMA Forms.

22. Clause 21.8 of the LMA Forms.

23. Clause 4.3(k) of the Users Guide.

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economic sanctions laws that do not appear in the LMA Forms. Differences between the two forms as to the three mutual covenants are as follows:

## 6.1: Merger

The merger covenant in the LMA Forms prohibits any member of an issuer's group from entering into a merger or any similar transaction, except as permitted by the covenant relating to disposals of assets.<sup>24</sup> In contrast, Model X Form 2's merger covenant prohibits only those transactions involving the issuer or any subsidiary guarantor. Model X Form 2 does permit merger transactions involving the issuer or subsidiary guarantors upon fulfillment of certain conditions (although a merger involving the issuer may result in a change of control put).<sup>25</sup>

## 6.2: Line of Business

The line of business covenant in the LMA Forms applies to any substantial change to the business of the issuer, on an individual basis, and/or the group, as a whole. Model X Form 2's line of business covenant applies only to the group as a whole.<sup>26</sup>

## 6.3: Liens

Both the LMA Forms and the Model X Forms contemplate that the parties will negotiate certain exceptions to the negative pledge covenant.<sup>27</sup> However, the LMA Forms do specify several categories of permitted liens that are common in bank and private placement financing transactions, but are not explicitly identified in the Model X Forms (e.g., existing scheduled liens, liens on acquired assets or assets of an acquired subsidiary not created in contemplation of the acquisition of such assets or subsidiary and that are discharged within a certain period following such acquisition, bank netting, and set-off arrangements, and other similar ordinary course liens). In addition, there are three notable differences between the LMA Forms and the Model X Forms:

- Model X Form 2 contemplates the general lien basket potentially growing over time, given that it is usually based on a percentage of assets (or a percentage of net worth), whereas the LMA Forms appear to envisage permission for a fixed amount of secured debt,<sup>28</sup>
- Model X Form 2's lien basket includes a cap based on the aggregate amount of "Priority Debt," which is typically comprised of both (i) secured debt of the issuer and its subsidiaries and (ii) unsecured debt of non-guarantor subsidiaries (debt of non-guarantor subsidiaries would presumably be regulated by a separate negotiated covenant in the LMA Subscription Agreement or LMA Facility Agreement), and
- the LMA Forms do not include any "anti-Cookson" protection, which would require the privately placed notes or loans to be secured equally and ratably with the issuer's primary credit facility if any liens were subsequently granted by the issuer or any subsidiary to secure such primary credit facility.

## 7. EVENTS OF DEFAULT AND ACCELERATION

Model X Form 2 and the LMA Forms differ in their treatment of several events of default. Among them are the following:

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24. Clause 21.5 of the LMA Forms.

25. Section 10.2 of Model X Form 2. The requirements include the successor being organized in a "Permitted Jurisdiction" and assuming the obligations of the predecessor, delivery of an opinion regarding the enforceability of the assumption and appointment of a process agent. Compare Clause 21.5 of the LMA Forms.

26. Section 10.3 of Model X Form 2.

27. Clause 21.3(c)(ix) of the LMA Forms and Section 10.5 of the Model X Forms.

28. Compare Section 10.5 of the Model X Forms with Clause 21.3(c)(x) of the LMA Forms.

## 7.1: Cure Periods

The LMA Forms do not contemplate any cure period for a payment default, unless such failure to pay results from an administrative or technical error or a material disruption in the financial markets or in the issuer's treasury or payment operations.<sup>29</sup> The Model X Forms provide a five-business-day cure period for any payments of interest or tax indemnity amounts. There is no cure period for payments of principal or make-whole amounts.<sup>30</sup> The cure periods for covenant defaults (including delivery of notice of a default or event of default) are left open for negotiation in the LMA Forms, except for a breach of a financial covenant default (which has no cure period). The Model X Forms contemplate no cure period for a failure to deliver a notice of a default or event of default and for certain identified covenants (usually financial covenants and other key negative covenants). There is a 30-day cure period for all other covenant defaults under the Model X Forms.

## 7.2: Material Adverse Change

There is a placeholder event of default in the LMA Forms for a "Material Adverse Change," with no accompanying text.<sup>31</sup> There is no such default under the Model X Forms and it is uncommon to see this type of event of default in the US private placement market.

## 7.3: Obligor Ceases to Be Subsidiary

The LMA Forms include an event of default if an obligor is not, or ceases to be, a subsidiary of the issuer.<sup>32</sup> No such event of default exists in the Model X Forms (although the disposition of an obligor is often regulated in US private placement documentation through a change of control put right, the merger covenant, and/or the sale of assets covenant).

## 7.4: Pension Plan Event or Underfunding

The LMA Forms do not include any event of default associated with any pension plan event, prohibited transaction, or pension underfunding, whereas Model X Forms include extensive events of default for both US and foreign pension plans.<sup>33</sup>

## 7.5: Individual Right to Accelerate

The LMA Forms provide for an alternative in which an individual investor could accelerate its notes upon the occurrence of any Event of Default, not just a payment default.<sup>34</sup> The Model X Forms provide for an individual investor's right to accelerate its notes upon the occurrence of a payment default.<sup>35</sup>

# 8. TAX INDEMNITY

## 8. 1: General

Generally speaking, the tax indemnity language in Clause 12 of each of the LMA Forms puts more risk on an investor than the Model X Forms. For example, the Model X Forms provide that an investor is entitled to the benefits of the tax indemnity as long as (i) the investor has no "connection" with the jurisdiction in

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29. Clause 22.1 of the LMA Forms.

30. Sections 11(a) and 11(b) of the Model X Forms.

31. Clause 22.12 of the LMA Forms.

32. Clause 22.9 of the LMA Forms.

33. Section 11(k) of the Model X Forms.

34. Clause 22.13 of the LMA Subscription Agreement.

35. Section 12.1(c) of the Model X Forms.



question, (ii) the investor files any form the issuer asks it to file in the relevant taxing jurisdiction, and (iii) the issuer is not obligated to pay more than it would have had to pay if the investor had been organized in the United States or another specified jurisdiction (generally the jurisdiction of an original investor if that jurisdiction is not the United States) and had been eligible for the benefits of any double tax treaty that may exist. The tax indemnity applies even if there is no double tax treaty or if the double tax treaty provides for a reduction, but not the elimination, of taxes payable on interest. The Model X Forms also excuse the filing of forms if they would “impose any unreasonable burden (in time, resources or otherwise) on such holder or result in any confidential or proprietary income tax return information being revealed.”<sup>36</sup>

The LMA Forms, by contrast, do not require payment of the gross-up if the investor is not a “Qualifying Holder,” unless there is a post-closing change of law.<sup>37</sup> A “Qualifying Holder” means a holder of notes that is, among other things, a bank subject to taxation in the UK, a company resident in the UK for tax purposes, or a resident of a jurisdiction that has a double taxation treaty with the UK “which makes provision for full exemption from tax imposed by the United Kingdom on interest” (emphasis added). There is no provision that excuses an investor from cooperating with the issuer to obtain an exemption from withholding tax.<sup>38</sup> It is also not clear whether the gross-up applies if any such exemption is not obtained, although it appears that the investor’s obligation is limited to cooperation and that the issuer bears the risk if the exemption is not obtained.

## 8.2: Change of Payment Office

If, following the closing, the issuer moves its payment office to a jurisdiction with which the investor has a “connection” and, as a result, withholding tax is applied, the Model X Forms still require payment of the gross-up.<sup>39</sup> There is no such provision in the LMA Forms.

## 8.3: Tax Credits

Both the LMA Forms and the Model X Forms require payment of any tax credit to the issuer.<sup>40</sup> However, the Model X Forms only require an investor to pay over a tax credit to the issuer “to the extent that it can do so without prejudice to the retention of the amount of such refund,” and the amount it pays over is the amount that it “shall, in its sole discretion, determine to be attributable to the relevant Taxes or deduction or withholding.” The Model X Forms also go on to provide that nothing shall “interfere with the right of the holder of any note to arrange its tax affairs in whatever manner it thinks fit” and, finally, provide that the investor does not have to pursue a refund for the benefit of the issuer “in priority to other claims, reliefs, credits or deductions available to it.”

## 8.4: FATCA

The tax indemnity in the LMA Forms does not provide an indemnity for FATCA taxes (although it does contain a number of FATCA provisions that, generally speaking, permit withholding unless a party is exempt from FATCA). FATCA is not specifically addressed in the current Model X Forms because the indemnity does not apply to US taxes.

## 8.5: Tax Prepayment

Both the LMA Forms and the Model X Forms contain a tax prepayment provision that contemplates that an issuer may prepay or offer to prepay the notes and/or loans, as applicable, under the relevant

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36. Section 13(b) of the Model X Forms.

37. Clause 12.2(d)(i) of the LMA Forms.

38. Clauses 12.2(g)(i) and 12.2(h) of the LMA Forms.

39. Section 13(b)(i) of the Model X Forms.

40. Section 13(e) of the Model X Forms and Clause 12.4 of the LMA Forms.

agreement if it becomes obligated to make any additional payments on the notes or the loans under the tax indemnity provisions as a result of any withholding or deductions for or on account of any taxes imposed by any applicable taxing authority.<sup>41</sup> However, there are three important distinctions:

- (a) a post-closing change of law must have triggered the tax indemnity obligation;
- (b) Each of the Model X Forms contains bracketed language that contemplates that the tax indemnity amount required to be paid by an issuer must exceed a specified threshold before it triggers a right of the issuer to prepay the notes; and
- (c) The Model X Forms contemplate payment of a “Modified Make-Whole Amount” in connection with a tax prepayment. The Modified Make-Whole Amount is calculated in the same manner as the Make-Whole Amount, except that there is a higher contemplated reinvestment yield (typically T+100, instead of T+50) that reduces the amount of the Make-Whole payable in connection with such prepayment.

## 9. MISCELLANEOUS

### 9.1: Transfer of Notes

Under the Model X Forms, notes are freely transferable by a holder to any other holder, subject only to delivery to the issuer of a written instrument of transfer executed by the holder, accompanied by certain information regarding the transferee of such note and surrender of the original note being transferred (or a lost note affidavit and indemnity if the note has been lost).<sup>42</sup> The LMA Forms,<sup>43</sup> consistent with bank loan market practice, provide the option for either (a) the consent of the issuer to be required as a pre-condition to a transfer or (b) a five-day consultation period with the issuer before a transfer can be effected.<sup>44</sup> If the consent option is selected, the consent of the issuer may not be unreasonably withheld or delayed and the issuer will be deemed to have consented if the issuer does not expressly object to the transfer within five business days of the transfer request. No such consent or consultation is required if the transfer is to another existing holder of notes/loans, an affiliate of a holder, or a Related Fund of any holder or if such transfer is made at a time when an Event of Default is continuing.

### 9.2: Reallocation of Payments

Clause 26 of each of the LMA Forms contains mechanics for reallocation of payments among holders of the notes or loans, as applicable, if any such holder receives a payment in excess of the amount to which it is entitled under the terms of such LMA Form. A holder that is determined by the “Majority Holders” (or “Majority Lenders,” as applicable) to have received an excess amount shall, within three business days, pay to the other holders an amount equal to each such holder’s pro rata share of such excess amount. No such redistribution is required if (i) such payment was received or recovered as a result of a holder taking legal action against the issuer or other relevant obligor and such holder had notified the other holders of such action and the other holders had an opportunity to participate in such action but declined to do so, or (ii) such holder, after turning over such excess payments to the other holders, would not have an enforceable claim against the relevant obligor. No such reallocation provision is included in the Model X Forms.

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41. Section 8.3 of the Model X Forms, Clause 6.6 of the LMA Subscription Agreement, and Clause 7.4 of the LMA Facility Agreement.

42. Section 14.2 of the Model X Forms.

43. Clause 23.1 of the LMA Forms.

44. Clause 23.2 of the LMA Forms.

## 9.3: Investor Representations

Under the LMA Subscription Agreement, each investor is required to represent that it has complied and will continue to comply with all applicable provisions of the Financial Services and Markets Act of 2000, as amended, with respect to anything done by it in relation to the notes in, from, or otherwise involving the United Kingdom.<sup>45</sup> Given that the LMA Forms were developed for the European private placement market, there are no ERISA representations or provisions contemplated by the LMA Forms as there are in the Model X Forms.<sup>46</sup>

## 9.4: Amendments and Waivers

Similar to the Model X Forms, the LMA Forms generally default to the requirement that any term of the Finance Documents may be amended or waived only with the consent of the Majority Holders/Majority Lenders (as applicable). There are specific carveouts in Clauses 34.2 and 34.3 of the LMA Subscription Agreement for matters that require 100% consent, which include:

- any change to the definition of "Majority Holders,"
- an extension of any date of payment (note that the Model X Forms require a 100% vote for any change to the time of any payment),
- a reduction in the margin or amount of any payment of principal, interest, fees, or commissions payable under the Finance Documents,
- any change to the issuer or the guarantors (other than as contemplated by Clause 24 of the LMA Subscription Agreement, which provides for mechanics for adding subsidiary guarantors at the election of the issuer and the release of guarantors subject to consent of all holders),
- any change to any provision that expressly requires the consent of all holders,
- any change to Clause 3.3 (Holders' Rights and Obligations), Clause 6.3 (Change of Control Redemption), Clause 6.5 (Partial Redemption), Clause 23 (Changes to the Holders), Clause 26 (Sharing among the Holders), Clause 34 (Amendments and Waivers), Clause 38 (Governing Law), or Clause 39.1 (Jurisdiction),
- any change to Clause 6.10 (Make-Whole Amount/Prepayment Fee), if applicable,
- any change in the nature or scope of the guarantee and indemnity in Clause 17 (Guarantee and Indemnity), and
- any change to any other applicable clauses that may be included.

Clause 33.2 of the LMA Facility Agreement contains similar provisions. We note that the LMA Forms would permit amendments to the illegality prepayment provision, the optional prepayment provisions, and the tax indemnity prepayment provision with majority consent (as opposed to the Model X Forms, which require 100% consent for any amendment to the prepayment provisions), so long as any such amendment does not extend the date of any payment or reduce the amount thereof. Additionally, the tax indemnity, the remedies provisions, the payment defaults, the confidentiality provisions, and the currency of payment provisions all require 100% consent to amend under the Model X Forms, but only a majority consent under the LMA Forms.

Clause 34.3 of the LMA Subscription Agreement provides that no amendment to Clause 3 (Issue and Subscription of the Notes) or Clause 4 (Closing) and any defined terms used in such clauses may be effected without the consent of each purchaser of the notes. This closely follows the Model X Forms,

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45. Clause 27.4 of the LMA Subscription Agreement.

46. Section 6.2 of the Model X Forms. There are also no ERISA representations or warranties from the issuer; see Clause 18 of the LMA Subscription Agreement.

except that the Model X Forms additionally provide that no amendment or waiver of the issuer's representations and warranties or the Purchasers' representations and warranties will be effective as to such Purchaser without its written consent.

## 9.5: Governing Law

The LMA Forms provides that they will be governed by English law.<sup>47</sup> While the Model X Forms indicate that they will be governed by New York law,<sup>48</sup> industry practice is to have the transactions governed by either New York law or English law, as appropriate.

## 9.6: Jurisdiction

The LMA Forms provide for the exclusive jurisdiction of English courts.<sup>49</sup> The Model X Form provides for the non-exclusive jurisdiction of New York courts, whether state or federal.<sup>50</sup>

## 9.7: FASB ASC Topic 825-10-25—*Fair Value Option/International Accounting Standard 39—Financial Instruments: Recognition and Measurement*

The LMA Forms do not contain the Model X Form provision stating that any election by the issuer to measure any financial liability using fair value as permitted by FASB ASC Topic 825-10-25 or IAS 39, as applicable, shall be disregarded for purposes of determining the issuer's compliance with its financial covenants.<sup>51</sup> FASB ASC Topic 825-10-25 and IAS 39 provide an option for a borrower to elect to account for certain assets and liabilities (including stocks, bonds, loans, and interest rate hedges) at fair value, rather than at historical cost. The impact on covenant compliance can be dramatic. The debt of a borrower, when incurred, is assumed to have a fair value equal to the purchase price for such debt (i.e., the par value of the debt incurred (assuming that there is no original issue discount)). Under FASB ASC Topic 825-10-25 and IAS 39, the borrower could make a fair value election with respect to such debt and mark the debt to market based on its fair market value (often determined by the price at which the debt is trading). If the borrower subsequently is in financial trouble and its debt is trading at less than par, the amount of debt on its balance sheet would be written down to its fair value. Further, the write-down of its debt would flow through to the borrower's income statement as an addition to net income. The result is that a distressed borrower would actually find it easier to comply with its financial covenants. The Model X Form language protects against this and additionally requires a reconciliation between compliance certificate financial covenant calculations and the financial statements in cases where the issuer has made the election to measure financial liabilities using fair value under FASB ASC Topic 825-10-25 or IAS 39.<sup>52</sup>

## 9.8: Equal Remuneration

Section 18.2(b) of the Model X Forms provides that the issuer will not directly or indirectly pay any remuneration, whether by way of supplemental interest, fees, or otherwise, or grant any security or provide any other credit support, to any holder of a note as consideration for or as an inducement to the entering into by such holder of any waiver or amendment, unless such remuneration is concurrently paid, or security is concurrently granted, or other credit support is provided, on the same terms ratably to each holder of a note, even if such holder did not consent to such waiver or amendment. This requirement is not included in the LMA Forms.

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47. Clause 38 of the LMA Subscription Agreement and Clause 37 of the LMA Facility Agreement.

48. Section 23.6 of the Model X Forms.

49. Clause 39.1 of the LMA Subscription Agreement and Clause 38.1 of the LMA Facility Agreement.

50. Section 23.7 of the Model X Forms.

51. Section 23.2 of the Model X Forms.

52. Section 7.2(a) of the Model X Forms.

## 9.9: Consent in Contemplation of Transfer

Section 18.2(c) of the Model X Forms provides that any consent given by any holder of a note that has transferred or agreed to transfer its note to (i) the issuer, any subsidiary or any affiliate of the issuer or (ii) any other Person in connection with, or in anticipation of, an acquisition of, tender offer for or merger with the issuer and/or any of its affiliates, in connection with such consent shall be void. This language is intended to prevent the scenario where a holder of notes agrees to give a consent to waive defaults, strip covenants, etc. in exchange for an agreement by the issuer to purchase such holder's notes or otherwise take the holder out and leave the other holders in a substantially less favorable position. This protection is not built into the LMA Forms.

## 9.10: Guarantees

Clause 17 of the LMA Forms includes a form of guarantee to be provided by each subsidiary guarantor. Clause 24 of the LMA Forms provides for mechanics for an issuer, at its election, to add additional subsidiary guarantors or request the release of subsidiary guarantors upon the terms provided therein. The Model X Forms contemplate the execution of a separate guaranty agreement by each subsidiary of the issuer that guarantees or otherwise becomes liable in respect of indebtedness under any "Material Credit Facility."<sup>53</sup>

## 10. CONCLUSION

As market participants become more familiar with the LMA Forms, we expect that we may start to see more deals coming to market in which European issuers are seeking to use the LMA Forms (and, in particular, the LMA Subscription Agreement) as a starting point for documentation, either because the provisions are more closely aligned with their existing bank credit facility or simply because they may be more familiar with the LMA standardized documents. In cases where US-based investors are participating in these transactions, they will need to be careful to ensure that these documents address issues unique to US investors, as well as other key terms that are customary in the US private placement market.

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53. Section 9.7 of the Model X Forms.

# Morgan Lewis

## Contacts

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