Trust Indenture Act

Here's the deal:

- The Trust Indenture Act of 1939 regulates the offer and sale of certain debt securities.
- For offerings of registered debt securities, an indenture must be qualified under the Trust Indenture Act as a condition of effectiveness of the related registration statement.
- The form of indenture and the Form T-1 must be included in the registration statement at the time of effectiveness.
- The Trust Indenture Act requires certain prospectus disclosure about the debt securities in registered offerings.
- Most offerings of debt securities that are exempt from registration under the Securities Act of 1933 are also exempt from the Trust Indenture Act requirements.

What's the Deal?

The Trust Indenture Act of 1939 (the "Trust Indenture Act" or the "TIA")[1] is the federal statute regulating the offer and sale of certain debt securities. The TIA, which is closely integrated with the Securities Act of 1933 (the "Securities Act"), protects certain rights of security holders, imposes minimum obligations on trustees and obligors, and confers on trustees the powers and resources needed to meet obligations to investors. All of these provisions result from the process of indenture qualification.

In registered offerings, compliance with the TIA requirements is a condition to the Securities and Exchange Commission's (the "Commission" or "SEC") order of effectiveness for a Securities Act registration statement relating to debt securities. Certain offerings exempt from registration under the Securities Act are subject to the TIA's requirement of qualification.

As first enacted, the qualification process required the recitation of prescribed statutory terms within the indenture, the contract defining the rights of security holders. As amended in 1990, the TIA now creates the rights and duties originating in such terms directly through qualification. Even though these mandates become effective on qualification by operation of law, the universal practice remains to include the prescribed provisions in the text of qualified indentures.

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[1] 15 U.S.C.A. §§ 77aaa–77bbbb (2022).

Which securities are covered by the TIA?

The TIA applies only to debt securities and interests in debt securities. (Interestingly, the terms "debt securities" and "equity securities" appear nowhere in the law.)

The TIA does not apply to stock. Section 304(a)(1) limits the statute's application to:

- any "note, bond, debenture, or evidence of indebtedness, whether or not secured";
- any "certificate of interest or participation in" such debt securities; or
- any "temporary certificate for, or guarantee of" such debt securities or certificates of interest.

Rights and duties created by Trust Indenture qualification

Under Section 318(c) of the TIA, the following TIA provisions apply to every qualified indenture, whether or not recited in the indenture:

- Section 310 - Eligibility and disqualification of trustee;
- Section 311 - Preferential collection of claims against obligor;
- Section 312 - Bondholder's lists;
- Section 313 - Reports by indenture trustee;
- Section 314 - Reports by obligor; evidence of compliance with indenture provisions;
- Section 315 - Duties and responsibility of the trustee;
- Section 316 - Directions and waivers by bondholders; prohibition of impairment of holder's right to payment; and
- Section 317 - Special powers of trustee; duties of paying agents.

If a provision of the indenture limits, qualifies, or conflicts with the duties imposed by the TIA, the requirements of the TIA control,[2] which is to say that the TIA automatically invalidates contractual provisions removing or limiting mandatory terms.

Provisions unregulated by the TIA

Business provisions of an indenture are unregulated. Section 318(b) of the TIA permits a qualified indenture to contain any provisions not in contravention of its terms, in addition to the provisions specifically authorized by the statute. The TIA imposes no controls on such things as interest rates, financial covenants, maturity dates, or the definition of default.

Which securities are exempt from qualification?

Section 304 of the TIA exempts from qualification certain securities. These include:

- Securities issued in an amount of not more than $50 million during a 12-month period,[3] such as securities issued under Rule 504 under the Securities Act;

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2 TIA, Section 318(a).

3 TIA, Section 304(a)(8) and Rule 4a-1 under the TIA.

- Securities issued under Regulation A;[4]
- Securities issued under an indenture in an amount not exceeding $10 million at any time;[5]
- Most securities exempt under Section 3(a) of the Securities Act, including government and bank securities exempt under Section 3(a)(2) and commercial paper exempt under Section 3(a)(3);[6]
- Securities issued by a foreign government;[7] and
- Guarantees of the above.[8]

A debt security issued under a bankruptcy plan that matures no later than one year after the effective date of the plan is not subject to the TIA.[9]

Which transactions are exempt from the TIA?

The TIA exempts securities sold in transactions that are also exempt under Section 4 of the Securities Act. Thus, the exemptions for private placements, for offers and sales to accredited investors up to $10 million, and for sales under the crowdfunding exemption up to $5 million are incorporated into the TIA. Likewise, the Securities Act trading exemptions are also exempt from the qualification requirement, meaning that transactions under Sections 4(a)(1), 4(a)(3), and 4(a)(4) are outside the TIA. Finally, offers and sales pursuant to Section 4(a)(7), covering certain private resales, are not subject to TIA's qualification requirement. The sum result of these exemptions is that the qualification requirement of the TIA only applies to distributions by the issuer or for affiliates.

Exemptions by SEC order

Section 304(d) authorizes the Commission to exempt from one or more of the provisions of the TIA, conditionally or unconditionally, any persons, registration statements, indentures, securities, or transactions. Upon application by an interested person, exemptions may be made in individual cases by an SEC order. Upon the Commission's own motion, any exemptions may be granted through rules, subject to the customary public interest and investor protection standards.

Rules 4d-7 and 4d-8 under the TIA prescribe the procedures for an exemptive application under Section 304(d). Basically, an application must contain a statement of the relevant facts, including a justification for the exemption requested and a discussion of any benefit expected for security holders, trustees, and/or obligors.

Regulation S, Rule 144A, and the TIA

The TIA's provisions are directed at offerings in the United States. Regulation S recognizes that Securities Act registration requirements do not apply to offers and sales made exclusively outside the United States. Adopting the regulation, the SEC stated that it also would not take any enforcement action under the TIA if

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4 TIA, Section 304(d) and Rule 4a-2 under the TIA. Regulation A Tier 2 offerings are limited to $75 million. Securities Act Rule 251(a)(2).
5 TIA, Section 304(a)(9) and Rule 4a-3 under the TIA.
6 Section 304(a)(4) of the TIA.
7 Section 304(a)(6) of the TIA.
8 Section 304(a)(7) of the TIA.
9 11 U.S.C. Section 1145(d).

offers and sales are made offshore in compliance with the safe harbor provisions of Rule 903 or 904 without qualification.[10] Rule 144A offerings to qualified institutional buyers are also exempt from the TIA qualification requirements under Section 304(b) as transactions exempt from Securities Act registration under Section 4. Because these debt securities are "restricted securities," as that term is defined in Securities Act Rule 144(a)(3), they generally may not be publicly resold upon issuance without registration.

What are the trustee eligibility requirements under a qualified indenture?

Section 310(a) of the TIA provides that under every indenture that is qualified, or to be qualified, there must always be at least one institutional trustee that shall have a combined capital and surplus of at least $150,000.[11] The institutional trustee must be a corporation organized and doing business under the laws of the United States, of any state or territory, or of the District of Columbia. The institution must be authorized by those laws to exercise corporate trust powers, and must be subject to supervision or examination by federal or state authority.[12] A subsidiary of a foreign company is eligible it is organized and doing business in the United States.[13]

What are the TIA qualification procedures?

Registration under the Securities Act and qualification under the TIA are closely coordinated. Section 309(a)(1) of the TIA provides that the indenture will be deemed to have been qualified when the related Securities Act registration statement becomes effective. Along with the Securities Act registration statement, the obligor qualifying its debt securities must file with the Commission:

- a statement of eligibility and qualification of the indenture trustee, usually on Form T-1;[14]
- a copy of the indenture, including a table of contents;[15] and
- a cross-reference sheet showing the location in the indenture of the mandatory and permissive TIA provisions.[16]

In addition, the prospectus filed under the Securities Act must contain a description of the debt securities being registered and of the indenture.

Form T-1 is the form that qualifies the trustee under the indenture. Form T-1 is used by banks and trust corporations named as trustees. Section 310(a)(1) of the TIA requires that, if, as is typically the case, there is only one indenture trustee, it must be a corporation. Form T-1 must be filed as Exhibit 25 to a registration statement that includes a class of debt securities. The Form T-1 must have been filed when the registration statement for that class of debt securities becomes effective (TIA § 309(a)(1)).

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10 Offshore Offers and Sales, Securities Act Rel. No. 33-6863 (Apr. 24, 1990), C.C.H. Fed. Sec. L. Rep. ¶ 84,524, at p. 80, 682. *See also* TIA C&DI 201.01.

11 TIA, Section 310(a)(2). Most indentures include a much higher capital requirement.

12 TIA, Section 310(a)(1).

13 Division of Corporation Finance, *Trust Indenture Act of 1939 Interpretations* ("TIA C&DI") 105.01.

14 TIA, Section 305(a)(1); TIA Rule 5a-1(a).

15 Regulation S-K Item 601(b)(4)(iv)(A).

16 Regulation S-K Item 601(b)(4)(iv)(B).

If a single trustee will serve under two indentures being qualified with the same registration statement, only one Form T-1 needs to be filed. However, the cover page of the T-1 should state that there are two indentures.[17] Otherwise, if different classes of debt securities are represented by separate indentures, there should be a Form T-1 filing for each such class.[18]

Timing of qualifying indentures – Forms S-3/F-3 compared to S-3ASR/F-3ASR

For Forms S-3 or F-3, a class of debt securities cannot be added by means of a post-effective amendment. The Form T-1 must be included as an exhibit at the time that the registration statement becomes effective. The indenture cannot be qualified by means of a post-effective amendment.[19] The TIA does not contemplate post-effective amendments.

For automatic shelf registration statements (S-3ASR or F-3ASR), if a class of debt securities is included in the original registration statement filing, unless qualification for the trustee is deferred under Section 305(b)(2), the Form T-1 must generally be included as an exhibit to that filing. However, for ASRs, a class of debt securities can be added by means of a post-effective amendment. The ASR is effective as to the newly-added class of debt securities at the time of the filing of the post-effective amendment. Consequently, a Form T-1 must be filed as an exhibit to the post-effective amendment and will be effective for the new class of debt securities at the time of the filing.

A Form T-1 cannot be incorporated by reference into a new shelf registration statement from an issuer's previous shelf registration statement.[20] However, an existing previously filed indenture, or form of indenture, can be incorporated by reference into the new shelf registration statement.

If, at the time of effectiveness (original filing or post-effective amendment for ASR; original filing or pre-effective amendment for S-3/F-3), the indenture for a class of registered securities, or a form of indenture, and a matching Form T-1, are not included or incorporated by reference as an exhibit to the registration statement, there may be a 10-day delay in the offering.

Where Form T-1 is filed on a delayed basis in a shelf offering, it must be separately filed through EDGAR as form type "305B2," and not filed as a post-effective amendment to the registration statement or on a Form 8-K incorporated by reference into the registration statement.[21] Filing Form T-1 under form type 305B2 should be avoided, as Form T-1 will become effective ten calendar days after the filing unless acceleration is requested.[22] This delay runs counter to the purpose of shelf registration statements, which is to give the issuer the ability to quickly take advantage of market conditions. A post-effective amendment or Form 8-K will not work in this situation.[23, 24]

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17 TIA C&DI 219.01.

18 TIA C&DI 101.04.

19 SEC Release 33-8591 at n. 527, TIA C&DI 201.02.

20 TIA C&DI 108.02.

21 Division of Corporation Finance, *Trust Indenture Act of 1939 Interpretations*, Sec. 206.01, 220.01 (Mar. 30, 2007), <www.sec.gov/divisions/corpfin/guidance/tiainterp.htm>.

22 TIA C&DI 103.01.

23 TIA C&DI 206.01.

24 In the unusual situation where an individual trustee is acting as a co-trustee with an institutional trustee, a Form T-2 would be used to qualify the individual trustee.

WHAT'S THE DEAL?

An indenture filed with most shelf registration statements is generally open ended, meaning it may provide a generic, non-specific description of the securities, such as "unsecured debentures, notes or other evidences of indebtedness," which are to be issued in series.[25]

What are the requirements of Form T-1?

Form T-1 calls for disclosures relating to the following:

- Item 1 - general information;
- Item 2 - affiliations with the obligor;
- Item 3 - voting securities of the trustee;
- Item 4 - trusteeships under other indentures;
- Item 5 - interlocking directorates and similar relationships with the obligor or underwriters;
- Item 6 - voting securities of the trustee owned by the obligor or its officials;
- Item 7 - voting securities of the trustee owned by underwriters or their officials;
- Item 8 - securities of the obligor owned or held by the trustee;
- Item 9 - securities of underwriters owned or held by the trustee;
- Item 10 - ownership or holdings by the trustee of voting securities of certain affiliates or security holders of the obligor;
- Item 11 - ownership or holdings by the trustee of any securities of a person owning 50 percent or more of the voting securities of the obligor;
- Item 12 - indebtedness of the obligor to the trustee;
- Item 13 - defaults by the obligor;
- Item 14 - affiliations with the underwriters;
- Item 15 - foreign trustee; and
- Item 16 - list of exhibits.

If the obligor is not in default, the applicant need only provide the information required by Items 1, 2, 15 and 16, where applicable.

When are Forms T-3 and T-6 used?

When no Securities Act registration statement is to be filed, such as in the case of exchange offers exempt under Section 3(a)(9), TIA Section 307(a) prescribes the procedures for qualification of the indenture. The application for qualification of the indenture must be filed by the issuer on Form T-3. The trustee's statement of eligibility and qualification, generally filed on Form T-1, must also be separately filed, as well as all other items required under Section 305(a) for qualification when a Securities Act registration statement is required. Form T-3 is to be signed on behalf of the issuer by a duly authorized person.

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[25] TIA C&DI 201.04.

WHAT'S THE DEAL?

Form T-3 requires disclosure regarding:

- the issuer's form of organization and the state under whose laws it is organized;
- a list or diagram of the issuer's "affiliates";[26]
- a list of directors, executive officers, and principal (10% or more) shareholders;
- names and addresses of past and prospective underwriters;
- a table showing the issuer's capital structure and amounts of each class of securities authorized and outstanding;
- an analysis of certain indenture provisions, as required by Section 305(a)(2);
- the name and address of other obligors on the indenture securities; and
- various exhibits, including the indenture and a cross reference sheet from it to the TIA's provisions, any prospectus sent to security holders, the issuer's charter and bylaws, and the relevant court or administrative order where an exemption from Securities Act registration has been claimed under Securities Act Section 3(a)(10). Offering materials that are required to be filed as an exhibit may be filed in definitive form when acceleration of the Form T-3 is requested.[27]

Required prospectus disclosure under the TIA and Regulation S-K

Section 305(a)(2) of the TIA requires the issuer to include in the registration statement an analysis of a number of indenture provisions. However, Item 202 of Regulation S-K supersedes Section 305(a)(2) in part. Instruction 3 to the item states, in part: "Section 305(a)(2) of the TIA … shall not be deemed to require the inclusion in a registration statement or in a prospectus of any information not required by this Item." The regulatory modification means that a description of debt securities conforming to Item 202 satisfies the disclosure requirements of the Securities Act and the TIA, including Section 305(a)(2). An additional incentive to comply with Section 305(a)(2) of the TIA in an underwritten offering of debt securities is that the underwriting agreement includes an issuer representation that the prospectus complies as to form with the Securities Act and the TIA.

Supplemental indentures – when is qualification required under the TIA?

Supplemental indentures are generally entered into when an issuer offers a new series of debt securities pursuant to an open-ended indenture, with the debt securities being registered on a shelf registration statement. Supplemental indentures may also be used to make changes to the rights of debt security holders. Supplemental indentures to a qualified indenture normally do not need to be separately qualified; however, there are a few situations where such qualification is required:

- Supplemental indentures modifying terms of securities outstanding under previously qualified indentures making changes so significant that they are deemed to involve the offering of a new security and, therefore, the obligor either registers the transaction under the Securities Act or relies upon a Securities Act exemption for which there is no corresponding TIA exemption.

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[26] As defined in TIA Rule 0-2(b).

[27] TIA C&DI 201.05.

  - If the modifications do not result in the offering of a new security, and the offering is ongoing, the supplemental indenture may be filed as an exhibit to a Form 8-K if the offering is on Form S-3 (in the same manner as specified for underwriting agreements), or in an automatically effective, exhibit only post-effective amendment filed pursuant to Rule 462(d). For automatic shelf registration statements, the post-effective amendment would be filed pursuant to Rule 462(e). If the offering has terminated, the amended indenture should be filed as Exhibit 4 to the company's next report required to be filed under the Securities Exchange Act of 1934 (the "Exchange Act"). [28]

- A supplemental indenture providing for the substitution of a new obligor need not be qualified under the TIA if the substitution takes place pursuant to a provision of the old indenture and is not subject to the approval or consent of security holders. If approval by debt holders must be solicited, the sale of a new security is deemed to occur and therefore**,** a Securities Act registration statement should be filed and the indenture under which the new security is to be issued must be qualified.[29]

The SEC requires that all qualified indentures contain a provision that any supplemental indenture will comply with the provisions of the TIA.[30]

What are the duties of an obligor under a qualified indenture?

The TIA imposes upon each obligor duties to security holders and to the indenture trustee:

Bondholder lists. Section 312(a) requires each obligor to furnish current bondholder lists to the trustee. At stated intervals of not more than six months, and at such other times as the trustee may request in writing, each obligor is required to furnish or cause to be furnished to the trustee all information possessed by itself and its paying agents as to the names and addresses of the security holders. Customarily, indentures peg the date for furnishing bondholder lists to the semi annual interest payment dates.

Copies of Exchange Act reports. Under Section 314(a)(1) of the TIA, each obligor must file with the trustee copies of all reports required by Section 13 or Section 15(d) of the Exchange Act. Sometimes indentures call for the reports to be sent to the trustee within 15 days after they are required to be filed with the Commission. Other indentures call for the reports to be sent to the trustee within 15 days after they are actually filed with the Commission. Many indentures include a provision whereby the issuer's Exchange Act periodic reports will be deemed delivered to the trustee and the holders under the indenture at the same time as these are filed with the Commission.

Courts have held that Section 314(a)(1) does not impose an independent obligation that Exchange Act periodic reports be filed on time. The section merely requires that the obligor file with the trustee those reports that it has in fact filed with the Commission. Thus failure to file a timely annual report on Form 10-K, quarterly report on Form 10-Q or current report on Form 8-K is not a breach of the TIA or of an indenture

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28 See TIA C&DI 102.01

29 TIA C&DI 101.03.

30 SEC Manual – Trust Indenture Act of 1939 at p. 157 (June 1958).

covenant that generally requires compliance with the TIA. It is only a breach of a covenant if the indenture language sets a time frame for filing or transmission of periodic reports to the trustee.[31]

Compliance certificate. Section 314(a)(4) requires each obligor to furnish the trustee at least annually a certificate regarding the obligor's compliance with all conditions and covenants under the indenture. A brief certificate from the obligor's principal executive officer, principal financial officer, or principal accounting officer as to his or her knowledge of the obligor's compliance satisfies the requirement. Compliance is to be determined without regard to any grace period or notice requirement provided under the indenture, the same manner in which default is determined for purposes of triggering the conflict of interest provisions under Section 310(b) of the TIA.

Conditions precedent to request for action by the trustee. Under Section 314(c), whenever the obligor requests the trustee to take any action under the indenture, such as authenticating and delivering securities, releasing or substituting (or both) mortgaged property, or satisfying and discharging securities, the obligor must furnish the trustee with evidence that all relevant conditions precedent have been met. The evidence, detailed by Section 314(c), must consist of both a certificate by officers specified in the indenture, and an opinion of counsel (who may be counsel for the obligor). In some situations, an accountant's certificate must also be furnished.

Section 314(e) specifies the form that opinions relating to any indenture covenant or condition must take. Each certificate or opinion must include a statement that the person making it has read the relevant covenant or condition. It must contain a brief statement as to the nature and scope of the examination or investigation on which the person's statements or opinions are based. It must recite that, in the opinion of the person making the certificate, he has made an examination or investigation that is adequate to permit him to express an informed opinion. Finally, the certificate must indicate whether or not, in the opinion of such person, there has been compliance with the relevant condition or covenant.

What are the duties of a trustee prior to a default?

The TIA imposes certain minimal duties on the indenture trustee prior to any default by the obligor. The trustee must provide annual reports and periodic reports on certain developments to indenture security holders and to give notice to the security holders of all defaults known to the trustee within ninety days of their occurrence. Unless provided to the contrary in the indenture, the trustee's liability is limited to the performance of the duties specified in the indenture. Section 313 requires the trustee to:

- transmit annual reports and periodic reports on certain developments to the indenture security holders;
- file a copy of each report with every exchange on which the securities are listed; and
- file a copy of each report with the Commission.

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[31] *Affiliated Computer Servs. Inc. v. Wilmington Trust Co.*, 565 F.3d 924 (5th Cir. 2009); *UnitedHealth Group, Inc. v. Wilmington Trust*, 548 F.3d 1124 (8th Cir., 2008); *American Stock Transfer & Trust Co. v. Par Pharmaceutical Companies*, 2009 U.S. Dist. LEXIS 52602 (SDNY, June 19, 2009); *Finisar Corp. v. U.S. Bank Trust National Assoc.*, 2008 U.S. Dist. LEXIS 65329 (ND CA, Aug. 25, 2008); *Cyberonics, Inc. v. Wells Fargo Bank National Association*, 2007 U.S. Dist. LEXIS 42779 (SD TX, June 13, 2007).

WHAT'S THE DEAL?

The annual report is required in any of the following circumstances:

- any change in the trustee's continuing eligibility and qualification under Section 310;
- the creation of, or any material change in, a relationship which, under Section 310(b), would constitute a conflict of interest after default by the obligor on the indenture securities;
- the character and amount of any advances the trustee has made that may result in a claim by the trustee prior to the claims of the indenture security holders on property or funds held by the trustee, if the amount of such advances remaining unpaid equals more than 0.5% of the indenture securities outstanding;
- the principal, interest rate, maturity date, and collateral for all other amounts owed to the trustee on the date of the report by the obligor on the indenture securities, subject to certain exceptions;
- any changes in the property and funds physically in the trustee's possession;
- any change to any release, or release and substitution, of property subject to the lien of the indenture, not previously reported;
- any additional issue of securities not previously reported; and
- any other action taken by the trustee in performing its duties under the indenture that it has not previously reported, which in its opinion is material, except any action concerning a default, the notice of which has been or is to be withheld under an indenture provision authorized by Section 315(b) of the TIA.

Section 313(c) prescribes the required manner of transmitting reports to the security holders. The reports must be mailed to all registered holders who have, within the past two years, filed their names and addresses with the trustee for that purpose. The annual reports must also be mailed to everyone on the bondholders list furnished to the trustee pursuant to Section 312(a). Because Section 313(c) specifically requires these reports to be transmitted by mail, the Commission's policies on electronic delivery of documents to investors do not apply.

If the indenture securities are listed on the New York Stock Exchange, the NYSE requires the issuer to instruct the trustee to give immediate notice to the exchange of:

- any change or removal of deposited collateral;
- acceleration of maturity by the trustee;
- issuance or authentication of duplicate bonds;
- cancellation, retirement, or other reduction in the amount of bonds outstanding; and
- any call for redemptions, including sinking fund requirements.[32]

The issuer of notes listed on the NYSE must give the NYSE at least five business days' notice of any change of a trustee for such notes.

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[32] NYSE Listed Company Manual, Sec. 603.02 (June 1983).

What are the duties of a trustee after a default?

The TIA imposes an enhanced duty of care and skill on trustees after default and gives trustees adequate powers to carry out their duties. Section 315(c) provides that the trustee, in case of default (as defined in the indenture), must exercise the rights and powers vested in it by the indenture, and must use the same degree of care and skill in their exercise as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.

The trustee's enhanced duties are triggered only by a default as defined in the indenture. Thus, where the indenture defines an event of default as occurring only upon notice and the running of a grace period, the enhanced duty is not imposed before those conditions occur. Also, as permitted by the Commission, indentures usually provide that the trustee remains under this enhanced duty only while the event of default continues. Once the event of default is cured or waived, the trustee may act as in the pre-default period. For the trustee to effectively protect indenture security holders, it must have authority to pursue on their behalf claims against the obligor. Section 317(a) assures that the trustee has sufficient enforcement powers.

Section 317(a)(2) of the TIA authorizes the trustee, both before and after default, to file proofs of claim and other papers in connection with claims by the trustee or bondholders in any judicial proceeding relating to the obligor, its creditors, or its property. This provision is necessary to assure that courts will not take the position that only the security holders themselves have the right to file claims. Section 317(a)(1) gives the trustee authority to recover judgment in its own name as trustee of an express trust against the obligor in case of default in payment of principal when due, or in case of a default in payment of interest, after any grace period provided by the indenture. Again, this provision is necessary to assure that courts will not require suits for payment to be brought only by the security holders directly.

What are the post-default obligations of a trustee-creditor?

Subject to certain exceptions, Section 311 of the TIA requires that if the indenture trustee is, or becomes, a creditor of the obligor within three months prior to, or after, a failure by the obligor to pay principal or interest as it becomes due, then unless and until the default is cured, the trustee must set aside in a special account for the benefit of both the trustee individually and the security holders various amounts received by the trustee. The three-month period runs from the date of non-payment of principal or interest, even if the indenture otherwise provides a grace period before non-payment becomes an event of default.

If the trustee is required to account to the security holders, the funds and property held by the trustee in the special account must be apportioned so that the trustee and the security holders realize the same percentage of their respective claims. The amounts which the trustee must hold in the special account are:

- all reductions in indebtedness effected after the beginning of the three-month period that are valid against the obligor and its other creditors;[33] and
- all property received after the start of the three-month period as:
    - security for the trustee's claim;

[33] TIA, Section 311(a)(1).

- in satisfaction or settlement of the claim, or otherwise as to the claim;[34] or
- any proceeds from the sale of such property.[35]

Are there trustee conflicts of interest that may result in disqualification?

Section 310(b) of the TIA lists prohibited conflicts of interest of a trustee. If a default has occurred, the trustee must, within 90 days after it ascertains that it has a prohibited conflict of interest, either eliminate the conflict or resign. The prohibited conflicts of interest are:

- such trustee is trustee under another indenture under which any other securities, or certificates of interest or participation in any other securities, of an obligor upon the indenture securities are outstanding;
- such trustee or any of its directors or executive officers is an underwriter for an obligor under the securities;
- such trustee directly or indirectly controls or is directly or indirectly controlled by or is under direct or indirect common control with an underwriter for an obligor under the securities;
- such trustee or any of its directors or executive officers is a director, officer, partner, employee, appointee or representative of an obligor under the securities, or of an underwriter for such an obligor who is currently engaged in the business of underwriting;
- at least 10% of the voting securities of such trustee is beneficially owned either by an obligor under the securities or by any director, partner or executive officer of the obligor;
- at least 20% of the voting securities of such trustee is beneficially owned, collectively, by any two or more obligors under the securities or any director, partner or executive officer of the obligor;
- at least 10% of the voting securities of a trustee is beneficially owned either by an underwriter for any such obligor or by any director, partner, or executive officer of the obligor, or is beneficially owned, collectively, by any two or more such persons;
- the trustee is the beneficial owner of, or holds as collateral security for an obligation of, an obligation which is in default; or
- unless expressly permitted under Section 311(b) of the TIA, the trustee is (or becomes) a creditor of the obligor.

A trustee's resignation is effective upon appointment of a successor and the successor's acceptance of appointment. Pursuant to Section 310(b) of the TIA, the obligor must take prompt steps to have a successor appointed.

If the trustee fails to resign, it must notify the security holders of this within ten days after the expiration of the 90-day resignation period in the manner and to the extent provided in Section 313(c) of the TIA. Finally, any person who has owned the securities for at least six months may petition a court for removal of a trustee

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34 TIA, Section 311(a)(2).
35 TIA, Section 311(a)(2).

that has not eliminated a prohibited conflict of interest, and for appointment of its successor, if the trustee has not submitted its required resignation after the security holder has requested it in writing.

Dual trusteeships

Trustees may be prohibited from serving as the trustee under more than one of an issuer's indentures. This does not apply where the securities are not of the same class – i.e., an issuer can have the same trustee for senior and subordinated indenture securities. Similarly, the same trustee can be the trustee on the issuer's and its subsidiary's securities, provided that neither the parent or the subsidiary are guaranteeing the other entity's securities.[36]

Trustee affiliations with underwriters

Section 310(b)(2) of the TIA prohibits the trustee or any of its directors or executive officers from being an underwriter for the obligor. This prohibition is not limited to an underwriter for the indenture securities but also extends to any person who, within the prior one-year period, was an underwriter of any security of the obligor still outstanding when the determination of underwriter status is made.

The term "underwriter" is defined more narrowly in one respect under the TIA than in the Securities Act. Unlike Securities Act Section 2(a)(11), TIA Section 303(4) does not include persons involved in a distribution on behalf of affiliates of the issuer in the definition of "underwriter." Section 310(a)(5), however, as a condition of eligibility separately prohibits the trustee from being an affiliate of the issuer.

Drafters of prospectuses for offerings of registered debt securities should disclose, in the section on the description of the debt securities that discusses the trustee, any existing Section 310(b) conflicts of interest that may cause the trustee to resign. These normally include dual trusteeships, underwriter affiliations and the trustee being a creditor of the issuer.

Trustee as creditor of issuer

Under Section 310(b) of the TIA, a conflict of interest exists if, after a default, the trustee is or becomes a creditor of the issuer. A common cause of this creditor relationship may be the issuer having drawn on the trustee's credit facility. Debt securities issued under an indenture are excluded from this potential conflict of interest under Section 310(b)(10) and Section 311(b)(1).

How can bondholders enforce indenture provisions?

The TIA provides for direct action to be taken by the security holders to enforce their rights, such as requirements that facilitate communications between bondholders and guarantee the bondholder's right to sue for principal and interest, and permissive provisions that authorize bondholders to postpone interest payments, waive past defaults, direct the trustee in conducting remedial proceedings, and remove the trustee. The TIA also includes protective provisions to prevent small numbers of bondholders from acting contrary to the best interests of bondholders in general.

Section 312(b) contains provisions that facilitate communications among security holders. Under Section 312(b), certain action must be taken by the institutional trustee after it receives a written application from three or more security holders stating that they desire to communicate with other indenture security holders

[36] See TIA C&DI 106.01.

as to their rights. The security holders' application must be accompanied by a copy of the proxy or other communication that they propose to transmit to other bondholders. It must also be accompanied by reasonable proof that each applicant has owned a security for at least six months prior to the application.

When the institutional trustee receives this application, within five business days it must (at the trustee's election) either afford the applicants access to the security holder lists that it is required to maintain under the provisions of Section 312(a) or furnish information that will lead to the trustee's mailing of the communication to the indenture security holders.

If the trustee chooses to mail the communication, it must, within the five business-day period, inform the applicants of the approximate number of security holders and the approximate cost of mailing the proposed communication to them. Then, if the applicants furnish the trustee the material to be mailed and make or provide for payment of the reasonable expenses of mailing, the trustee must mail the material with reasonable promptness to all security holders on the list in its possession.

If the trustee believes that the requested mailing would be contrary to the best interests of the security holders, or would be in violation of law, Section 312(b) permits the trustee to temporarily delay mailing and seek a ruling by the Commission. Within five days after the tender by the applicant bondholders of the communication that they desire the trustee to mail, the trustee may mail to the applicants and file with the Commission a written statement specifying the basis of its opinion as to why the mailing would be contrary to the security holders' best interests or in violation of law. After an opportunity for hearing, the Commission may, and if demanded by the trustee or applicants must, enter an order either sustaining or refusing to sustain the trustee's objections. The trustee must mail the material only if the Commission refuses to sustain its objections or if, after sustaining its objections, the Commission later, after notice and opportunity for hearing, finds that the applicants have met the objections.

Communications by bondholders pursuant to the provisions of Section 312(b) may be subject to the Commission's proxy rules under Exchange Act Section 14 if the class of securities is registered under Section 12 of the statute. Section 12 registration is required for any exchange-listed security and to any equity security, which includes debt securities convertible into equity securities, where the issuer's assets exceed $10 and record holders of the class equal at least 500 unaccredited investors or 2,000 persons in all.[37] Section 12 registration subjects the issuer to the Exchange Act's proxy rules in respect of the registered class,[38] which include fraud prohibitions and certain filing requirements.[39]

Right to sue for principal and interest

Section 316(b) guarantees certain rights to each security holder. The rights of any bondholder to receive principal and interest, or to institute suit for their enforcement, on or after the due dates expressed in the

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37 Exchange Act Section 12(g) and Rule 12g-1. Section 12(g) of the Exchange Act and Rule 12g-1 require registration of equity securities if the issuer has total assets exceeding $10 million and the class of the equity securities is held of record by either 2,000 persons or 500 persons who are not accredited investors. "Person" is defined in Section 3(a)(9) of the Exchange Act and "accredited investor" is defined in Securities Act Rule 501(a). Convertible debt is defined as an equity security for these purposes, Exchange Act Section 3(a)(11).

38 Exchange Act Section 14 and Rules 14a-1 to 14a-12.

39 Exchange Act Rule 14a-3(a); Rule 14a-16.

indenture security must not be impaired or affected without the consent of the holder. However, a limited postponement of interest, effected in accordance with Section 316(a)(2), is permitted. In 2022, Section 316(b) was amended to clarify that, in the context of indenture securities for which the rate of interest changes from U.S. dollar LIBOR to CME Term SOFR after June 30, 2023 under Section 104 of the Adjustable Interest Rate (LIBOR) Act, "the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security shall not be deemed to be impaired or affected by any change occurring by the application of section 104 of the Adjustable Interest Rate (LIBOR) Act to any indenture security."

Postponement of interest and waiver of past defaults by vote of bondholders

Section 316(a)(2) permits the indenture to contain provisions authorizing the holders of at least 75% in principal amount of the outstanding indenture securities, or of any outstanding series of securities, to consent to the postponement of any interest payment for a period not exceeding three years from its due date. In computing the requisite 75% vote, securities owned by any obligor or by any person directly or indirectly controlling or controlled by or under direct or indirect common control with any obligor are to be disregarded. In this way, voting by persons with clear conflicting interests is avoided.

Subject to contrary provisions in the indenture, Section 316(a)(1)(B) permits holders of not less than a majority in principal amount of the outstanding indenture securities to consent on behalf of all holders to the waiver of any past default and its consequences. The indenture may permit a majority of any outstanding series of securities to similarly consent to the waiver of past defaults and their consequences on behalf of all holders of the series.[40] In computing the votes needed, securities owned by obligors or their affiliates are disregarded in the identical manner as in voting on interest postponements. The majority's power to waive past defaults is subject to the overriding provision of Section 316(b) assuring each bondholder the right to receive or sue for principal and interest after their respective due dates.

Solicitation of bondholders to consent to interest postponements or waivers of default may be subject to the Commission's proxy rules if the bonds are listed on an exchange or where convertible debentures are involved.

Section 316(c) permits the obligor to set a record date for purposes of determining the security holders entitled to vote on the postponement of interest or the waiver of past defaults. Unless the indenture provides otherwise, the record date is to be the later of (1) thirty days before the first solicitation of security holders or (2) the date prior to the first solicitation when the most recent list of holders was furnished to the trustee pursuant to Section 312.

Are there private rights of action for misstatements or omissions under the TIA?

Section 323(a) of the TIA creates a private right of action for damages. Any person (including an issuer or a trustee) who makes, or causes to be made, a materially false or misleading statement, or who omits any material fact, in any TIA application, report, or document filed with the Commission, is liable to any person who, not knowing of the untruth or omission, in reliance on it purchases or sells a security issued under the indenture to which the application, report, or document relates. TIA Rule 0-11 provides a safe harbor for certain forward-looking statements made with a reasonable basis and disclosed in good faith. Section 323(b) provides that the rights and remedies provided by the TIA shall be in addition to any and all other rights and

[40] "Series" is defined by Section 310(b).

remedies that may exist under the Securities Act or the Exchange Act or otherwise at law or in equity. However, the recovery is limited to actual damages.

Trustee liability

The trustee which fails to carry out its obligations under a qualified indenture may be liable to injured bondholders under state law breach of fiduciary duty or breach of contract claims, or under Section 323(a) the TIA.

Sections 315(d)(2) and (3) of the TIA protects trustees from liability from (i) any good faith errors of judgment made by its own responsible officers, unless it is proven that the trustee was negligent in ascertaining the pertinent facts and (ii) following the directions of holders of a majority of the securities.

A qualified indenture may not include an exculpatory clause. Section 315(d) forbids the inclusion of any provisions relieving the trustee from liability for its own negligent action, its own negligent failure to act, or its own wilful misconduct, subject to certain exceptions.

Jurisdiction and venue for suits involving trustee liability are governed by Section 322(b) of the TIA, which provides that "jurisdiction of offenses and violations under, and jurisdiction and venue of suits and actions brought to enforce any liability or duty created by, this title, or any rules or regulations or orders prescribed under the authority thereof, shall be as provided in [S]ection 22(a) of the Securities Act …." The nationwide service of process provisions in Section 22(a) confer personal jurisdiction over defendants in all federal district courts.

Court costs and fees

Where security holders may bring a direct action to enforce indenture provisions, Section 315(e) deems automatically included in the indenture, unless expressly excluded by language in the indenture, the security holders' agreement to the court imposing on them an undertaking to pay costs. This permits the court, in its discretion, to assess reasonable costs, including reasonable attorney's fees, having due regard for the merits and good faith of the claims or defenses made by the litigant. This provision calling for an undertaking for costs, however, may not apply to a suit instituted by any security holder, or group of holders, who hold in the aggregate more than 10% of the securities outstanding, nor may it apply to a suit by any bondholder for payment of principal or interest, on or after their respective due dates.

Trustee indemnification

In recent years, trustees have expanded their indemnity provisions in the indenture. Generally, the trustee will seek indemnity from the issuer for the trustee's acceptance of the administration of the indenture and the performance by the trustee of its duties. The trustee will seek to have the indemnity provision cover any losses, damages, claims, liabilities or expenses, such as attorneys' fees, incurred by the trustee.

The trustee will also seek to include provisions whereby the issuer will defend any claim made against the trustee in connection with the administration of the indenture. The issuer will also be responsible for the fees of trustee's counsel hired in connection with any claim made against the trustee, subject to certain exceptions.

Recent attempts to use Section 316(b) to prevent out-of-court restructurings

The interpretative battle over the question whether Section 316(b) protects a debt holder's legal right to payment as opposed to the practical ability to recover reached a head in *Marblegate Asset Mgmt., LLC v. Educ.*

Mgmt. Fin. Corp.[41] Marblegate focused on whether Section 316(b) provides narrow protection against a majority amendment of certain "core terms" as opposed to providing broad protection for holders against nonconsensual debt restructurings.

Education Management LLC ("EDM") had approximately $1.5 billion of debt outstanding, of which $1.3 billion was secured debt under a credit agreement and $217 million were unsecured notes. The notes were guaranteed by Education Management Corp. ("EDMC"), EDM's parent (the "Parent guarantee"). The indenture provided that the Parent guarantee can be released if a majority of bondholders consented or if the secured lenders released EDMC's guarantee of the secured credit agreement. The indenture was qualified under the TIA, so Section 316(b) applied.

In May 2014, EDMC was in financial distress and needed to restructure. Bankruptcy restructuring was not a viable option. EDMC negotiated a restructuring agreement with an *ad hoc* group of creditors (who held about 80.6% of the secured debt and 80.7% of the unsecured notes) and came up with two options.

Option 1, a restructuring, required unanimous creditor support. Under Option 1, $150 million of revolving loans would be repaid. The remainder, $1.1 billion of secured debt, would be exchanged for $400 million in new term loans and preferred stock convertible into 77% of EDC common stock (resulting in a 54.6% recovery). Bondholders would receive equity convertible into 19% to 23% of common stock (resulting in a 32.7% recovery). The current shareholders would receive 4% of the EDMC common stock.

Under Option 2, an intercompany sale, majority creditor support would be required. The secured lenders would release the guarantee of the credit agreement, triggering release of the Parent Guarantee; foreclose on substantially all of the assets of EDMC and subsidiaries; and convey the foreclosed assets back to a new subsidiary of EDMC, which would distribute new debt and equity to consenting holders.

The non-consenting holders would receive no distribution. They would retain their notes without modification. The non-consenting holders would still have a claim against the original issuer (now without any assets because of the foreclosure and asset transfer) and without any claim against EDMC (because of the parent guarantee release).

All of EDMC's creditors agreed to Option 2 in the exchange offer, except for Marblegate, which sought a preliminary injunction to block the intercompany sale. In *Marblegate Asset Mgmt. v. Educ. Mgmt Corp.*[42] ("Marblegate I"), Marblegate, the sole holdout, sued to enjoin the intercompany sale claiming that it violated Section 316(b). The district court denied the plaintiff's motion for a preliminary injunction. But, the plaintiffs demonstrated a likelihood of success on the merits that the intercompany sale would violate Section 316(b). The district court stated that "[p]ractical and formal modifications of indentures that do not explicitly alter a core term 'impair or affect' a bondholder's right to receive payment in violation of the TIA only when such modifications effect an involuntary debt restructuring."

The intercompany sale occurred, the foreclosure sale took place, the new EDMC subsidiary was capitalized with EDMC's old assets, and consenting bondholders participated in the debt for equity exchange. Marblegate continued to hold out and the parties went back to court to decide whether the release of the

41 846 F.3d 1 (2d Cir. 2016).

42 75 F. Supp. 3d. 592 (S.D.N.Y. 2014).

parent guarantee should be permanently enjoined. In *Marblegate Asset Mgmt., LLC v. Educ. Mgmt. Corp.*[43] ("Marblegate II"), the district court decided that the release of the parent guarantee would violate Section 316(b). The question before the court was "does a debt restructuring violate Section 316(b) of the TIA when it does not modify any indenture term explicitly governing the right to receive interest or principal on a certain date, yet leaves the bondholders no choice but to accept a modification of the terms of their bonds? Examining the text, history, and purpose of the TIA, the Court concluded that the answer is yes." The court held that an out-of-court restructuring that involved the elimination of a parent guarantee and a significant asset transfer was impermissible under Section 316(b). An appeal to the Second Circuit followed.

The Second Circuit, in *Marblegate Asset Mgmt., LLC v. Educ. Mgmt. Fin. Corp.*[44] ("Marblegate III"), vacated Marblegate II and rejected the district court's broad reading of Section 316(b). The Second Circuit concluded that Section 316(b) only prohibits "non-consensual amendments to an indenture's core payment terms" and not the practical ability to receive payment. The "core terms" were characterized as the principal and interest owed and the maturity.[45] The court stated that "the core disagreement in this case is whether the phrase 'right … to receive payment' forecloses more than formal amendments to payment terms that eliminate the right to sue for payment."[46]

Although the court noted that the text of Section 316(b) is ambiguous and lends itself to multiple interpretations,[47] the court refused to adopt Marblegate's broad reading of the term "right" in Section 316(b), because including the practical ability to collect payment "leads to both improbable results and interpretative problems."[48] "[I]nterpreting 'impaired or affected' to mean any *possible* effect would transform a single provision of the TIA into a broad prohibition on any conduct that could influence the value of a note or a bondholder's practical ability to collect payment."[49]

In *CNH Diversified Opportunities Master Account, L.P. v. Cleveland Unlimited, Inc.,*[50] pursuant to an out-of-court bond restructuring, plaintiff minority bondholders sought payment on their notes after the trustee, at the direction of the majority bondholders, "strictly foreclosed" and purported to cancel the plaintiffs' notes. The plaintiff bondholders had not consented to the strict foreclosure and sued, based on Section 6.07 of the indenture provision, which tracked Section 316(b) of the TIA. Plaintiffs argued that their rights to payment and interest, and their right to bring suit to enforce those payment rights, had been terminated without their consent.[51] Under *Marblegate*, according to the plaintiffs, the strict foreclosure could not be used to extinguish their rights to sue the issuer.

The New York court noted the Second Circuit's rejection of the argument that Section 316(b) protects a bondholder's "practical ability" to recover payment in full. The court distinguished the plaintiffs' argument in *Marblegate* from the plaintiffs' argument in *CNH Diversified*: here, the strict foreclosure had the effect of

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43 111 F. Supp. 3d 542 (S.D.N.Y. 2015).
44 846 F.3d 1 (2d Cir. 2017).
45 846 F.3d 1, 7.
46 846 F.3d 1, 6.
47 846 F.3d 1, 6.
48 846 F.3d 1, 7.
49 846 F.3d 1, 7.
50 2020 WL 6163305 (N.Y. Oct. 22, 2020)
51 *Id*. at 4.

cancelling the plaintiffs' bonds, terminating their legal right to receive payment of principal and interest on the notes.[52] Consequently, based on the *Marblegate* court's analysis of Section 316(b) of the TIA, the court held that the purported cancellation of plaintiffs' notes without their consent violated Section 6.07 of the indenture.[53]

Directions to trustee by bondholders

Subject to contrary provisions in the indenture, Section 316(a)(1)(A) of the TIA permits the holders of not less than a majority in principal amount of the outstanding securities to direct the time, method, and place of conducting any proceeding for any remedy available to the trustee under the indenture or exercising any trust or power conferred on the trustee under the indenture. Under Section 315(d)(3), unless the indenture provides to the contrary, the trustee is protected as to any action taken or omitted in good faith in accordance with the direction of bondholders so given.

In determining under Section 316(a)(1)(A) whether the requisite majority has given directions, securities owned by any obligor, or by any person directly or indirectly controlling or controlled by or under direct or indirect common control with the obligor, are to be disregarded. In determining whether the trustee is protected by Section 315(d)(3), only securities that the trustee knows are owned by the obligor or affiliates need to be disregarded in determining if a requisite majority of bondholders has given directions.

Section 316(a)(1)(A) permits the indenture to provide for directions to be given by a majority vote of any outstanding series of securities. For this purpose, "series" is defined by Section 310(b) to mean any group of securities whose terms permit holders to vote separately to direct the indenture trustee, or to otherwise take action pursuant to a separate vote. However securities that rank equally and are wholly unsecured may not be treated as separate series.

Canadian issuers and the TIA

Rule 4d-9 exempts from many of the TIA's requirements indentures of issuers subject to these Canadian statutes if the securities are registered under the Securities Act on Form F-7, F-8, F-9, F-10, or F-80.[54] However, Sections 310(a)(1), (2), and (5) of the TIA, which set the eligibility criteria for institutional trustees, continue to apply to such indentures. So does Section 316(b), which prohibits impairment, without the security holder's consent, of the right to receive payment of principal and interest when due and to institute suit to enforce such payment.

The Commission adopted Rule 4d-9 as part of its multijurisdictional disclosure system for cross-border offerings by certain Canadian issuers.[55] The Canada Business Corporations Act, which governs indentures of

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52 *Id*. at 8.

53 Although the indenture at issue in *CNH Diversified* was not qualified under the TIA, it "incorporated by reference '[a]ny provision of the TIA which is required to be included in a qualified indenture.'" *Id*. at 1.

54 Effective December 31, 2012, Form F-9 was removed by the Commission. Securities Act Release 33-9245 (July 27, 2011). Rule 4d-9, however, was not updated.

55 Multijurisdictional Disclosure and Modifications of the Current Registration and Reporting System for Canadian Issuers, Securities Act Release No. 6902 (June 21, 1991), C.C.H. Fed. Sec. L. Rep. 84,812; Multijurisdictional Disclosure: Eligibility of British Columbia Trustees and Exemption for British Columbia Trust Indentures from Specific Provisions of the Trust Indenture Act, Commission Rel. No. 33-7002 (June 10, 1993), C.C.H. Fed. Sec. L. Rep. ¶ 85,203.

federally chartered corporations; the Bank Act, which governs indentures for debt securities issued by Canadian banks; the British Columbia Company Act of 1979, which covers indentures of companies incorporated under British Columbia Law; and the Business Corporations Act, 1982 (Ontario), which governs all trust indentures used in connection with debt offerings made by prospectus in Ontario regardless of the law under.

Canadian trusteeships

TIA Rule 10a-5 covers Canadian indenture securities registered under the Securities Act on Form F-7, F-8, F-9, F-10 or F-80.[56] The rule permits trust companies incorporated and regulated under Canadian laws, including its political subdivisions, to serve as sole trustee under a qualified indenture for securities of these issuers, without an order on application under Section 310(a)(1). An eligible trust company must be subject to supervision or examination pursuant to the Trust Companies Act (Canada), R.S.C. 1985, or the Canada Deposit Insurance Corporation Act, R.S.C. 1985. Rule 10a-5 also requires each Canadian trustee relying upon the rule to file on Form F-X an appointment of a person in the United States as agent for service of process.[57]

A Canadian trustee applying solely for permission to act as the institutional indenture trustee must use Form T-6 and complete Item 1, General Information; Item 15, Substantial Equivalency of Trust Regulation in the Foreign Jurisdiction and Eligibility of United States Trustees to Act as Sole Trustees in the Foreign Jurisdiction; and Item 16, List of Exhibits. [Where Form T-6 is also used to ensure that the trustee meets the TIA's eligibility requirements, additional items similar to those called for in Form T-1 must be completed.]

How do fiscal and paying agency agreements differ from indentures?

Regulated entities such as banks and insurance companies issuing debt securities in exempt transactions often use a fiscal and paying agency agreement instead of an indenture. Underwriters are generally comfortable with a fiscal and paying agency agreement for these issuers and transactions.

The main difference between a fiscal and paying agency agreement and an indenture is that the fiscal and paying agent does not have a fiduciary duty to the holders of the debt securities. Holders of the debt securities must act on their own if there is an event of default; i.e., they must accelerate their own note. The fiscal and paying agent will not accelerate a debt security upon the request of a holder. Holders of debt securities issued under a fiscal and paying agency agreement do not have a way to communicate with each other. Fiscal and paying agency agreements are not governed by the TIA, so the TIA's provisions requiring holders' lists to be available are not applicable.

Generally, a note issued under an indenture is a short document, taking most of its provisions from the indenture and only summarizing certain provisions. A note issued under a fiscal and paying agency agreement includes all material provisions, spelling out events of default and voting provisions in detail.

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56 Effective December 31, 2012, Form F-9 was removed by the Commission. Securities Act Release 33-9245 (July 27, 2011). Rule 10a-5, however, has not been updated.

57 Rule 10a-5(d).

Checklist of Key Questions

- ✓ Are the indenture and the Form T-1 exhibits to the registration statement when it becomes effective?
- ✓ Does the prospectus include the disclosures required by the TIA?
- ✓ Are any potential trustee conflicts of interest disclosed in the prospectus?
- ✓ Is the debt security or transaction exempt from the requirements of the TIA?