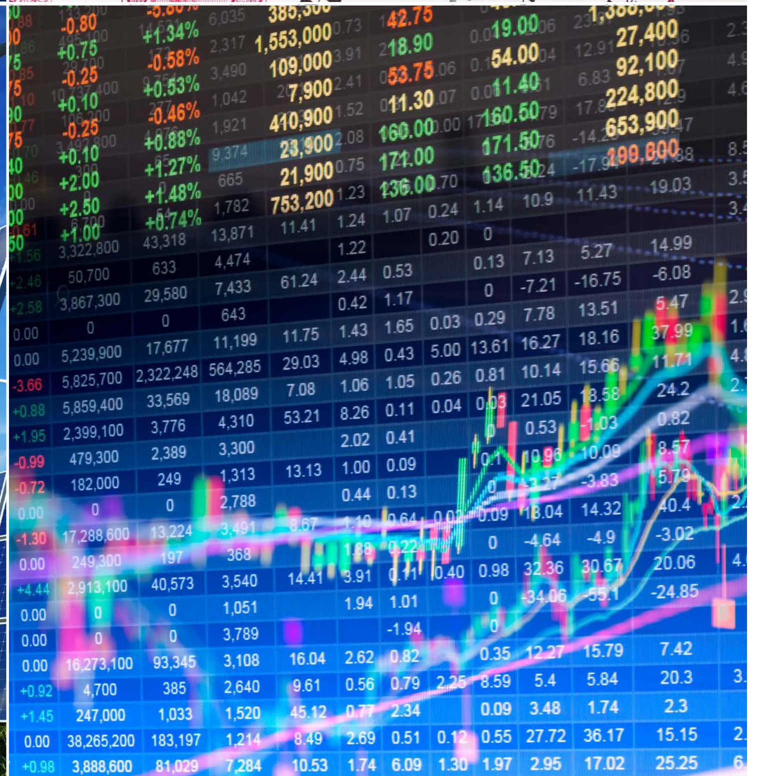
“Fair Value” and “Fair Value to the Obligor”

The Mysteries of TIA Section 314(d) Under the Utility Mortgage Bond Indenture

By J. Anthony Terrell



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The mortgage bond indenture (herein called a "Mortgage") under which many electric and gas utility companies in the United States issue debt securities (herein generically called "bonds") may be one of the most unloved instruments in all corporate finance. Many of them were written nearly one century ago, in formal, legalistic language (hardly "plain English"). Mortgages contain complex provisions relating to, among other things (1) the release of property from the lien of the Mortgage and (2) the use of property held by the company as a basis for the issuance of bonds, the release of other property from the lien of the Mortgage and the withdrawal of cash held by the trustee under the Mortgage (each of the uses of property listed in this clause (2) being called an "Authorized Purpose"). Of particular interest, and the subject of this note, are the requirements for certification of fair value in connection with these operations. These provisions reflect specific requirements of the Trust Indenture Act of 1939 (the "TIA"). Accordingly, this note will commence with a brief discussion of the TIA.

Trust Indenture Act of 1939

The TIA, one of the federal securities laws administered by the Securities and Exchange Commission (the "SEC"), was enacted for the purpose of protecting holders of debt securities that are offered and sold in public offerings (and hence are registered under the Securities Act of 1933). Holders of debt securities do not have the benefit of laws that set forth their rights and remedies, as stockholders have the benefit of state corporation laws. Among other things, the TIA requires that debt securities that are publicly offered be issued under an indenture that sets forth the rights and remedies of the debtholders and appoints a trustee to act for the benefit of the debtholders and enforce their rights and remedies. Importantly, these indentures are deemed by operation of law to contain certain provisions of the TIA, and, thus, in the event of a conflict between such provisions of the TIA and those of an indenture, the provisions of the TIA prevail.

Under Section 314(d)(1) of the TIA, when property is to be released from the lien of a Mortgage, the obligor on the bonds is required to furnish to the trustee a certificate or opinion of an engineer, appraiser or other expert (an "Expert"), who, under certain circumstances, must be independent, as to the "fair value" of the property to be released. This "fair value" is eventually reported to the bondholders. The TIA contains no definition of the term "fair value", and there is no legislative history on point.

Under Section 314(d)(2) and (3) of the TIA, when property is being subjected to the lien of a Mortgage (or otherwise certified to the trustee) as the basis for an Authorized Purpose, the obligor on the bonds is required to furnish to the trustee a certificate or opinion of an Expert, who, under certain circumstances must be independent, as to the "fair value to [the] obligor" of such property. As with the term "fair value", the TIA contains no definition of the term "fair value to [the] obligor", and there is no legislative history on point.

In June 1958, the Staff of the SEC published a manual (the "Staff Manual") setting forth the position of the SEC and the Staff as to various issues that arise under the TIA[1]. The Staff Manual was prepared to provide guidance to members of the Staff when reviewing draft indentures to determine whether or not they comply with the provisions of the TIA. The Staff noted the different terms "fair value" and "fair

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[1] SEC, Manual: Trust Indenture Act of 1939, at 88, 91, 93 and 99 (June 1958), https://www.sechistorical.org/collection/papers/1950/1958_0601_TrustManual_r.pdf [https://web.archive.org/web/20121202175222/http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/papers/1950/1958_0601_TrustManual_r.pdf]

value to [the] obligor" used in the respective provisions of the TIA and, without offering any definitions, stated:

> It is supposed that this distinction is based upon the theory that the sales price is governed by public demand, whereas the purchase price may be governed by the needs of the obligor. This distinction should be preserved in the indenture.[1]

In the absence of definitions of such terms and instructive legislative history, this note will briefly explore the meanings of the terms "fair value" and "fair value to the obligor" in other contexts and suggest interpretations thereof as used in the TIA and Mortgages subject thereto. Many Mortgages contain a definition of "fair value" that ordinarily contains a list of factors that may be considered in determining fair value. Since the TIA itself contains no definition, while these definitions may provide guidance, they should not be viewed as limiting the meaning of the term, however they are written.

It should be noted at this point, however, that the TIA does not require that the amount of "fair value" or "fair value to [the] obligor" be used in any calculation under a Mortgage or in any other substantive way. Rather, the only requirement under the TIA is that these amounts be certified to the trustee and, in the case of property released from the Mortgage, annually reported to the bondholders. That said, most Mortgages, especially older Mortgages, do require that these amounts be taken into account to some extent. In particular, when property is being used as the basis for an Authorized Purpose, the quantum of value assigned to such property under most Mortgages (before application of any funding or collateral ratio) is ordinarily the lower of cost and "fair value to [the] obligor".

Fair Value

The first place to look for the meaning of the term "fair value" would be Topic 820 – Fair Value Measurement of the Accounting Standards Codification ("ASC") of the Financial Accounting Standards Board ("FASB"). ASC 820 defines fair value, establishes a hierarchical framework for measuring fair value and requires disclosures about fair value measurement. ASC 820-10-05-01. Generally, ASC 820 applies when another ASC Topic requires or permits fair value measurements or disclosures about the same. ASC 820-10-15-1. ASC 820 is not required to be applied to assets of the character included in utility plant accounts or otherwise generally subject to the lien of a Mortgage. Moreover, ASC 820 "is not intended to establish valuation standards or affect valuation practices outside of financial reporting." ASC 820-10-05-1B. However, ASC 820 may provide useful guidance.

ASC 820-10-20 defines "fair value" as:

> the price that would be received to sell an asset…..in an orderly transaction between market participants at the measurement date.

ASC 820 emphasizes several points in explaining "fair value", including:

- "fair value" is the "exit price", not the "entry price", so that the reporting entity's entry price (or cost) is not relevant (*see* ASC 820-10-05-1B, 820-10-30-2 and 820-10-35-9A);
- it should be assumed that the asset is, and will be, used at its "highest and best use", so that the reporting entity's planned use of the asset is not relevant (*see* ASC 820-10-05-1C and 820-10-35-10);

- after analyzing the markets in which an asset could be sold and participants in those markets, the reporting entity should project a hypothetical transaction and determine what a market participant, after such market participant considers the various characteristics of the asset and uses various valuation methodologies, would pay for the asset and hence what the reporting company would receive (*see* ASC 820-10-35-2B); and

- while the reporting company's "exit price" and it's "entry price" may be the same in many cases, in some cases the "exit price" (i.e. "fair value") is not the same as the "entry price" and the reporting entity could have to recognize an initial gain or loss on its financial statements upon acquisition of the asset (*see* ASC 820-10-30-3 and 6).

ASC 820 establishes a hierarchy that categorizes into three levels the inputs used to measure fair value, as follows:

- Level 1 Inputs – quoted prices in active markets for identical assets;

- Level 2 Inputs – inputs other than quoted prices within Level 1 that are observable for identical or similar assets; and

- Level 3 Inputs – unobservable inputs for the asset using the best information available in the circumstances, which might include the reporting entity's own data in addition to available data that other market participants might use.

See ASC 820-10-35-37. Generally, the inputs that would relate to most assets of the character that ordinarily would be subject to the lien of a Mortgage, particularly bondable property, would likely be categorized in Level 3. ASC 820-10-50 requires disclosures regarding fair value measurements, including particularly the inputs and valuation techniques used to arrive at the fair value measurements and the uncertainties in such measurements.

While ASC 820 refers to the "measurements" of fair value throughout, it should be noted that the "objective of a fair value measurement" is "to <u>estimate</u> the price at which an orderly transaction to sell the asset…would take place between market participants at the measurement date." ASC 820-10-05-1B (emphasis added). It is noteworthy that, while ASC 820 may contemplate a more precise "measurement" of fair value in the case of assets for which there are Level 1 inputs, it clearly acknowledges the impossibility of giving more than a "estimate" of fair value in the case of assets for which there are only Level 3 unobservable inputs.

It is necessary to explore the likely meaning of "fair value" in 1939, at the time the TIA was enacted, before ASC 820 or its predecessor, SFAS 157, was in effect. Unfortunately, there was no specific accounting standard containing a definition at that time. However, the United States Supreme Court provided a definition in *Smyth v. Ames*, 169 U.S. 466 (1898), holding that the rates established by an agency of the State of Nebraska that could be charged by a railroad company had to be determined by reference to the "fair value" of the company's property devoted to public use. Specifically, the Court stated:

> We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in

> order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property.

Id. at 546-7,

The holding in *Smyth v. Ames* is best known in the context of determining the "rate base" of public utility companies, as discussed below under "Fair Value to the Obligor". However, the definition of "fair value" contained therein, although somewhat circular, was consistent with the reflection by some companies of current values in financial statements in the United Kingdom and the United States. See Omiros Georgiou & Lisa Jack, *"In pursuit of legitimacy: A history behind fair value accounting",* 43 The British Accounting Review, 311-23 (2011).

In 1913, the Interstate Commerce Act of 1887 was amended by the Valuation Act of 1913 to require the Interstate Commerce Commission to "investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act." In particular, the commission was to "ascertain and report in detail as to each piece of property…the original cost, the cost of reproduction new, the cost of reproduction less depreciation" and, as to real property, "the original cost of all lands…and the present value of the same". *Id.* The language of this statute appears to be consistent with, although not as exhaustive as, the litany in *Smyth v. Ames.*

In the 1930s, with the enactment of the federal securities laws and the establishment of the SEC, the financial statements were increasingly based on historical cost rather than fair value. As noted by Professor Stephen A. Zeff of Rice University:

> From its founding, the SEC rejected any deviation from historical cost accounting in the body of financial statements. This position was a reaction to a widespread practice during the 1920s (prior to federal regulation) wherein listed companies would revalue their assets upward, often based on questionable evidence of market value. The abuse of this discretion, especially in the public utility field, was alleged to have misled investors when judging the values of their shares prior to the crash of 1929. The SEC was determined not to allow a repetition of this abuse of judgment. The SEC's unyielding policy on historical cost accounting persisted until 1978, when, for the first time, it proposed a requirement that oil and gas reserves be periodically revalued, with the change taken to earnings.

Stephen A. Zeff, *The Evolution of U.S. GAAP: The Political Forces Behind Professional Standards*, The CPA Journal, Jan. 2005 Issue, at 20.

Of particular interest is the report to Congress, dated March 12, 1935, by the National Power Policy Committee which discussed public utility holding companies and advocated the break-up of most holding companies and the regulation of those that were permitted to continue to exist. Among other things, the report noted the pyramiding of the capitalization of the underlying utility companies through multiple layers of holding companies and the overvaluations permitted by fair value accounting. The report notably stated:

> While Federal legislation does not try to regulate intrastate consumers' rates, it can help create conditions under which State legislation can establish rate structures based upon an objective and administratively workable standard of "prudent investment" in the properties rather than upon the grossly unfair and unreliable variables of "fair value" and "reproduction cost".

S.Rep.No. 74-621, at 57 (1935)

Following the aforesaid report, on August 26, 1935 Congress enacted the Public Utility Holding Company Act of 1935, which adopted many of the measures recommended therein. It would appear from legislative history, that, while there was no specific definition of "fair value" in any statute or accounting standard, the term "fair value" was used with the same meaning as it was given in *Smyth v. Ames*, certainly with respect to the inclusion of reproduction cost or present value as a factor to be considered in addition to original cost. See also *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104 (1939).

The definitions of "fair value" in *Smyth v. Ames* and ASC 820 are certainly different on their face. Moreover, ASC 820 would not be required to be applied to utility plant assets of the character that would ordinarily be bondable under a Mortgage. However, there is a commonality between the two definitions − *Smyth v. Ames* requires the consideration of current values and reproduction costs and ASC 820 is focused on the "exit price" in current market transactions, which would presumably require consideration of current values and costs. This is consistent with the requirement under Section 314(d)(1) of the TIA to furnish a certificate or opinion as to the "fair value" of an asset when it is to be released from the lien of a Mortgage – carved out of the mortgaged property and presumably disposed of by the obligor.

Fair Value to the Obligor

Sections 314(d)(2) and (3) of the TIA refer to "fair value to [the] obligor", not "fair value", as does Section 314(d)(1). Consistent with the interpretation of this distinction in the Staff Manual, noted above, it would appear that, as opposed to the price that might be paid by another party if the property were to be disposed of in a current market transaction (that is, the "exit price"), "fair value to [the] obligor" is focused on the value of the property in the hands of the obligor itself. Accordingly, certain factors considered in estimating "fair value" may not ordinarily be germane in estimating "fair value to [the] obligor". For example, while the potential resale value of all or part of the mortgaged property may well be important to bondholders when they are evaluating their security or actually exercising remedies, it may not be relevant to the value of the property in the conduct of the business operations of the obligor.

As a preliminary matter, when property has recently been acquired by a company, it would seem that, barring unusual circumstances, the "fair value to [the] obligor" (that is, the acquiring company) of such property should approximate the cost thereof:

- would a company ordinarily be willing to pay more for an item of property than it is worth to the company or more than it would have to pay to other sellers, if any, of similar property, if any (although, depending on the circumstances, it might be reasonable for a company to pay more than some other third party might be willing to pay)?

- would a seller ordinarily be willing to sell an item of property for less than the price at which it could sell the property to other buyers or less than the price at which other sellers, if any, sell similar property, if any?

It is not sufficient, however, to assume simplistically that "fair value to [the] obligor" is the same as cost since it must be stated after the conduct of a reasonable "examination or investigation", as required by Section 314(e) of the TIA and the corresponding provisions of the Mortgage. Accordingly, further inquiry is necessary. Property that may be used for an Authorized Purpose under a typical Mortgage is generally the type of property that is included in the utility plant accounts of the company under generally accepted accounting principles and the Uniform Systems of Accounts of Federal Energy Regulatory Commission under the Federal Power Act and the Natural Gas Act. Assuming no regulatory commission concludes that the investment in an item of property was not prudent in any respect or unauthorized, the full cost of the property (including capitalized allowance for funds used during construction) ordinarily should be included in the company's "rate base" for ratemaking purposes, and, as such, the company should be able to recover its investment in such property and a return thereon. Under these circumstances, it would appear that the "fair value to [the] obligor" of such property at any time would be the amount in respect of such property that is included in rate base at that time.

With respect to property newly acquired and included in a recent rate case, the amount included in rate base should ordinarily be that same as original cost, as shown in the utility plant accounts. While construction work in progress ("CWIP") would ordinarily not be included in rate base in most jurisdictions until the facility is placed in service, CWIP should nevertheless be bondable prior to that time, with a "fair value to [the] obligor" presumably equal to original cost, as shown in the utility plant accounts.

If an item of property is used as a basis for an Authorized Purpose at some time after the acquisition or construction thereof, the amount included in rate base would be net of accumulated depreciation, consistent with the utility plant accounts. That net amount would be the remaining amount of investment in that item of property that the company would then be able to recover and on which it should be able to earn a return. It would appear logically that, at that point in time, the "fair value to [the] obligor" of that item of property would also be net of accumulated depreciation. This is not just of academic interest since, as noted above, the bonding base under most Mortgages is the lower of cost and "fair value to [the] obligor", so that the principal amount of bonds that can be issued on the basis of an item of property declines as the amount included in rate base in respect of that property declines due to depreciation.

For a utility company subject to ASC Topic 980 – Regulated Operations, the "fair value to [the] obligor" of all of the company's bonded and bondable property as a whole (including CWIP)[2] as of any time could be estimated by taking the amount of net utility plant shown on the company's most recent balance sheet and

- adjusting such amount to reflect additions and retirements of such property after the date of such balance sheet and

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[2] Certifications as to all of a company's bonded and bondable property would ordinarily be required only under non-traditional Mortgages that permit Authorized Purposes and releases in amounts determined by reference to the extent of over-collateralization.

- making any other adjustments that would be necessary to arrive at the amount in respect of such property included, or reasonably expected to be included, in rate base (but ignoring components of rate base, positive or negative, that do not directly relate to that property such as, for example, working capital, deferred taxes and regulatory assets or liabilities).

Any amount in respect of such property disallowed from rate base due to, for example, imprudence would likely also have been written off from the balance sheet as an impairment under ASC 980. On the other hand, for the avoidance of doubt, it would appear that property reflected in net utility plant that is not yet included in rate base, such as CWIP, property held for future use and property subject to "phase-in" or similar plans, should, subject to the terms of a particular Mortgage, nevertheless be included in bonded and bondable property as to which "fair value to [the] obligor" would have to be estimated.

It should be noted that there are different theories as to how rate base should be determined. In most states, rate base is based on original cost. However, in a few states rate base is based on fair value, following the theory adopted by the U.S. Supreme Court in *Smyth v. Ames, infra*. This decision was the subject of much criticism over several decades, particularly as to the apparent circularity of determining fair value of the rate base and then setting rates that will, of themselves, determine the fair value of the enterprise. This circularity was pointed out by the Supreme Court in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) in which the Court abandoned the fair value doctrine espoused by *Smith v. Ames*, in favor of an "end result" approach more or less based on original cost, for purposes of ratemaking under the Federal Power Act, stating famously:

> … "fair value" is the end product of the process of ratemaking, not the starting point as the Circuit Court of Appeals held. The heart of the matter is that rates cannot be made to depend upon "fair value" when the value of the going enterprise depends on earnings under whatever rates may be anticipated. (*Id*.at 601)

Thus, in determining "fair value to [the] obligor" by reference to the amount in respect of an asset, or group of assets, included in a company's rate base, consideration should be given to the basis on which the value of rate base is determined in each relevant jurisdiction. That said, several studies have indicated that the higher rate base determined by the fair value methodology is often matched by a lower rate of return on rate base, with the result that the earnings of the company are largely the same in either case -- which might suggest that "fair value to [the] obligor" should be the same in either case. See Russell Ernst, "*Rate Base: Shining Light on a Topic That Continues to Fuel Discussion"*, Regulatory Research Associates, Regulatory Focus, (February 2017); Walter J. Primeaux et al.,*"Fair Value Versus Original Cost Rate Base During Inflation"*, 5 The Energy Journal, No. 2, 93 (1984); and Craig Petersen, *"The Effect of 'Fair Value' Rate Base Valuation in Electric Utility Regulation"*, 31 The Journal of Finance, Vol. No. 5, 1487 (1976).

There may be an argument that the amount included in rate base, being net of accumulated depreciation, may understate the "fair value to [the] obligor" of an item of property if, and to the extent that, the useful life of the property assumed for purposes of depreciation is shorter than the actual useful life of the property. For example, if an item of property were fully depreciated, for both accounting and ratemaking purposes, but had actual useful life remaining, the property would appear to have economic value since it would still be performing its function, even though its owner would no longer be recovering an ordinary return on investment. It would be up to the management of the company to find a way to unlock that value (a question that is beyond the scope of this note) and up to the Expert to determine the "fair value to [the] obligor" at that point in time for purposes of a Mortgage.

Of course, a realization of the remaining value of the asset could result in claims by customers for reimbursement of excess depreciation expense as well as claims by taxing authorities for recapture of depreciation. In any case, however, a determination that an asset that has been fully depreciated but is still being operated profitably has a "fair value to [the] obligor" of zero would appear to be questionable.

In order to determine the "fair value to [the] obligor" of any asset or group of assets, or all a company's bonded and bondable property as a whole, it would be necessary for the Expert to consider all relevant facts and circumstances in each case, including those discussed above. However, two propositions appear to emerge from the foregoing analysis that might be useful for planning purposes:

- the "fair value to [the] obligor" of property should only rarely, if ever, be less than the amount in respect of such property included in rate base or, in the case of property that is not yet, but is reasonably expected to be, included in rate base, the amount in respect thereof included in net utility plant; and

- the "fair value to [the] obligor" of property that is (or was) included in rate base could in theory exceed the amounts in respect of such property currently included in rate base in circumstances that allowed such value to be realized outside of the ordinary cost − of − service ratemaking process, subject to potential claims for reimbursement or recapture.

Non-Utility Obligors; Deposited Securities

The foregoing discussion of "fair value to [the] obligor" is directed at utility companies whose rates are regulated and determined by reference to "rate base". These companies primarily use additional property as a basis for Authorized Purposes. Section 314(d)(3) of the TIA is, of course, not limited to such companies, and "fair value to [the] obligor" of additional property must be determined under secured indentures whether or not the obligor is rate-regulated. While the same general principles would apply, the determination of "fair value to [the] obligor" may be more challenging in the absence of a benchmark like "rate base" to consider. Due to the multitude of different types of business enterprises that could be subject to Section 314(d)(3), this note will not attempt to analyze the different factors that should be considered for companies outside the rate-regulated utility sector.

In addition, some secured indentures provide for the use of securities deposited with the trustee as a basis for Authorized Purposes. Section 314(d)(2) generally requires a certificate or opinion as to the "fair value to [the] obligor" of such deposited securities (other than securities secured by a lien prior to the lien of the indenture upon property subject to the lien of the indenture). It is conceptually difficult to see how deposited securities could have a "fair value to [the] obligor" less than the base quantum of value attributed thereto under the provisions of the indenture (before the application of any funding or collateral ratio). The "fair value to [the] obligor" of deposited securities might also take into account the guidance provided by ASC 820. Further speculation on this issue is beyond the scope of this note.

Definitive Amount vs. Maximum or Minimum

As noted above, Section 314(d) requires an Expert to deliver a certificate or opinion as to "fair value" or "fair value to [the] obligor", as the case may be. Questions frequently arise as to whether, under Section 314(d)(1), the Expert may state that the fair value is not more than a specified amount and whether, under Section 314(d)(2) or (3), the Expert may state that the "fair value to [the] obligor" is not less than

a specified amount. In either case, the bondholders would seem to be protected by the statement of such maximum or minimum amount. However, these questions were specifically addressed in the Staff Manual, and the Staff concluded that, in each case, the TIA should be interpreted as written and the statement of a definitive amount should be required. *See* Staff Manual*, infra,* at 82.

Notwithstanding the language of the TIA and the published views of the Staff, some qualified Mortgages permit the statement of a maximum or minimum amount in lieu of a definitive amount, and some Mortgage trustees are willing to accept Experts' certificates that only state such a maximum or minimum amount. As noted, this would not appear to be to the detriment of the bondholders. However, this would also not appear to comply technically with the TIA which, of course, overrides the provisions of a Mortgage.

Except perhaps in the case of assets for which information of the character of Level 1 Inputs is available, it is not possible to determine fair value as a definitive amount. This was recognized in ASC 820-10-05-1B, quoted above in part, which acknowledges that fair value measurement provides only an "estimate", and in ASC 820-10-50, referred to above, which requires disclosures regarding valuation inputs and techniques and uncertainties in fair value "measurements". That said, ASC 820 ultimately does require the reporting entity to arrive at definitive amounts for purposes of the financial statements themselves, leaving the disclosures to be made in the explanatory footnotes.

A way to deal with the uncertainties in certificates or opinions as to "fair value" and "fair value to [the] obligor" under the TIA might be to follow the approach of ASC 820 by arriving at a definitive amount for purposes of the certificate or opinion itself and then providing disclosure as to the valuation inputs and techniques and measurement uncertainties in the description of the Expert's "examination or investigation" required by Section 314(e) of the TIA, wherein the Expert could, in discussing such uncertainties, make reference to a relevant maximum, minimum or range. There is precedent for the use of this approach.

This note was prepared by J. Anthony Terrell as of September 20, 2022. Mr. Terrell is of counsel to Bracewell LLP, resident in the New York Office. However, the views expressed herein are those of Mr. Terrell and do not necessarily reflect the views of the firm. Mr. Terrell is a member of the American Bar Association and the International Bar Association and various sections and committees of each. This note does not necessarily reflect the positions of any such bar associations, sections or committees.

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