



July 7, 2014

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Re: Model X Form No. 2 of Note Purchase Agreement (Model X NPA)

Dear Charles,

On behalf of the Private Placement investors Association (PPiA), I am submitting for consideration the following comments on the Model X NPA to the Transaction Process Management Committee (TPMC):

1. Swaps. In the case of a transaction involving a swap (foreign currency or interest rate) to be entered into by the purchasers, the swap terms are typically agreed to at the time of pricing. In the experience of most PPiA members, the issuer and the purchasers will enter into an indemnification agreement at the time the swap is executed so that in the event the transaction does not close for any reason, the issuer will indemnify the purchaser for any swap breakage costs. Assuming the transaction does ultimately close and fund, that swap indemnification agreement will be superseded by a similar agreement in the NPA. The PPiA feels it would be beneficial to have this market convention stated in the Model X NPA. Footnotes 40 and 45, in connection with delayed fundings, only speak to the purchaser's option not to fund, not to any potential liability of the issuer for swap breakage in the event the issuer fails to comply with any provision of Section 10 of the NPA. A transaction does not need to involve a separate closing and funding for this swap issue to arise, so those footnotes may not be the appropriate place to address this point, but the PPiA would like to see this comment incorporated into the Model X NPA.
2. Private Letter Ratings. In some recent instances, Moody's has attempted to restrict the ability of an issuer to share Moody's private rating letter/analysis with noteholders. The PPiA would like to see an amendment to the confidentiality provisions of the Model X NPA to specifically reference private letter ratings so that it is clear that the issuer can provide an actual copy of the NRSRO rating letter to each noteholder without requiring a hold harmless letter or any additional confidentiality agreement from holders before the rating letter can be

provided. Further, it should be clear in the Model X NPA that each noteholder is then also permitted to submit the rating letter to any regulatory body having authority over that noteholder.

Additionally with respect to private letter ratings, the PPiA would like to add a reference in Section 7.1 of the Model X NPA requiring the issuer to notify noteholders when the issuer engages an NRSRO for the purpose of obtaining a credit rating, as well as requiring the issuer to provide a copy of the actual rating once it is issued by the NRSRO. There have been several instances where a private placement issuer, in contemplating a public market transaction, acquires public ratings that the private noteholders are not made aware of until the launch of the public bond deal. Yamana Gold is the most recent example. Yamana was unrated at the time of its last USPP transaction, however, it launched a public bond deal on June 25, 2014 that was rated Baa3/BB+/BBB-, by Moody's, S&P and Fitch, respectively. Noteholders received no prior notice of these ratings actions.

3. Officer's Certificate (§7.2). The PPiA requests that language be added to Section 7.2 requiring the issuer to include in the officer's certificate accompanying the delivery of financials (i) a list of all subsidiary guarantors and obligors under any Material Credit Facility (MCF), and (ii) the amount drawn on each MCF as of the date of the certificate. This would serve as a routine check to confirm that the private placement debt remains pari passu with the banks with the same obligors and guarantors (e.g., the company added a guarantor to the bank deal but inadvertently forgets to formally add that guarantor to the private placement) so that the first time a discrepancy is noticed isn't in the middle of a workout.
4. Subsidiary Guarantors (§9.7(b) and fn42). The default in the Model X NPA is that any time the banks release any subsidiary guarantor of an MCF the noteholders will automatically release that subsidiary guarantor as long as noteholders receive the same compensation, if any, that the banks received for their release. The PPiA requests that the Model X NPA language be amended to reflect that this "automatic guarantee release" only applies to guarantors added after the transaction has closed. The PPiA feels that the default in the NPA should be that with respect to the release of an original subsidiary guarantor (i.e., a guarantor at the time the private placement deal closes), there is no automatic release, such that the issuer should be required to obtain consent from Required Holders to release that guarantor.
5. Boilerplate Provisions. The PPiA recommends adding additional boilerplate provisions to the Model X NPA covering market terms that appear in virtually every transaction. For example, Change of Control, Asset Sale, and Priority Debt are practically universal but there is no model form language for these provisions, and other than some footnote references, the Model X NPA is silent on these issues. From the PPiA's perspective, the lack of standardized language can result in (i) no specific discussion of such terms in the legal issues

memo as long as the concept is present in some form in the NPA, and/or (ii) blackline drafts of the NPA where those provisions show up entirely as new language, making it more difficult to detect deviations from what most prospective purchasers would assume is standard language. The PPiA's concern, generally, with the lack of model form language for such provisions is that a deviation in one deal that inadvertently gets incorporated into a final NPA is subsequently used as precedent for the next deal, which then becomes the "new" market.

- a. Change of Control. Footnote 30 merely notes that the Model Form does not include change of control language, and recommends "that the Purchasers consider whether the NPA should also include such provisions" if the issuer's lenders have a change of control. The PPiA believes that this does not go far enough and that the default for the Model X NPA should be to include specific change of control language. We note that the PPiA proposed this same change last year in connection with the Model Form No. 2 revisions, which was rejected; however, the PPiA continues to believe that this is a material provision that has become universal in this market and, therefore, should be incorporated into the Model X NPA.
- b. Asset Sales. In developing model form language regarding asset sale protection, the PPiA believes the calculation should be based on the greater of book value and market value (i.e., the sales price), not merely book value, as is frequently seen. For issuers with significantly depreciated assets or valuable brands where the value is not reflected on the balance sheet, those assets are frequently considered by noteholders to be material assets (and issuer presentations often tout this "hidden" value), yet even if those assets are sold for many multiples of book value, the asset sale covenant will not come into play.
- c. Priority Debt. Priority debt is another market concept where the PPiA believes the lack of model form language has led to an erosion of this protection over time. Historically, the priority debt covenant was a maintenance covenant, not an incurrence test as is being proposed more and more often. The PPiA supports developing model form priority debt language using maintenance rather than incurrence as the default.
- d. Liens (§10.5). The PPiA believes that Section 10.5 is another prime example of an NPA provision where a fairly standard list of lien exceptions has been developed and is routinely accepted by the market. As a result, the PPiA believes that issuers and purchasers will be better served by including a standard list of lien exceptions into the Model X NPA as default language as opposed to the current language that merely notes that parties should "insert any desired exceptions to the prohibition as negotiated". Again, by incorporating model language into the NPA, only specific deviations requested by the issuer will show up in blacklines, which will allow parties to focus their attention only on the exceptions rather than having to parse out any changes proposed to the market terms.


In some cases the comments above would apply equally to the Model Form No. 1 NPA and the Model Form No. 2 NPA, in addition to the Model X NPA, so the PPiA would encourage corresponding amendments on these points to all of the model NPA forms.

Thank you again for allowing the PPiA to submit comments to the TPMC as part of the ACIC's model form update process. The PPiA recognizes the importance of this exercise and the benefits it confers on all participants in the private placement market, and greatly appreciates the efforts of all members of the TPMC.

Please do not hesitate to contact me if you have any comments or questions regarding any of the specific topics discussed above or the position of the PPiA, generally, with respect to the various Model Form NPAs.

Best Regards,

Delaware Investment Advisers

By: 

Name: Bradley S. Ritter

Title: Senior Vice President

cc: PPiA Board of Directors:

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