

PPIA Summer 2014

Proposed Revisions to the Model X
Form No. 2 NPA

Background

- The Transaction Process Management Committee of the ACIC published the final updated Model Form No. 2 NPA on April 15, 2013.
- As a result, many of the changes/updates previously agreed to for the Model Form No. 2 project are proposed to be incorporated into the Model X Form.
- The TPMC published a first draft of the Model X Form revisions on April 15, 2014.
- The TPMC is requesting comments the draft by June 13, 2014.
 - But the TPMC has said that the PPIA will be given additional time to provide any comments we may have as a group.

Members of the TPMC

Co-Chairs:

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Charles Kolin, Greenberg Traurig

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Principal Focus of the Model X Form Updates

1. Delayed Funding Transactions
2. OFAC
3. Addition of Guarantees and Releases
4. Material Credit Facility
5. Exit Consents
6. Country Specific Provisions
7. Open Market Purchases



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MEMORANDUM

Date: April 15, 2014
To: Fellows of the American College of Investment Counsel (“ACIC”)
From: Transaction Process Management Committee
Re: Model X Form No. 2 of Note Purchase Agreement

The Transaction Process Management Committee (“TPMC”) has prepared the attached draft of Model X Form No. 2 of Note Purchase Agreement (“**Updated Model X Form**”) and is distributing the draft to the ACIC Fellows for review and comment.

As you may be aware, the “Model X Form” is the cross-border form of Note Purchase Agreement used for non-U.S. issuers. The current Model X Form used as a basis for documenting cross-border private placement transactions (for NAIC-2 credits) is the Model X Form No. 2 of Note Purchase Agreement (final form dated April 15, 2006) (“**Existing Model X Form**”). The draft of Updated Model X Form once finalized will replace the Existing Model X Form.

Also as you may be aware, last year the TPMC published the final updated Model Form No. 2 of Note Purchase Agreement (final form dated April 15, 2013) (“**Updated Domestic Model Form**”) which is used as a basis for documenting domestic private placement transactions with U.S. issuers (for NAIC-2 credits).¹

As background for your review of the draft of the Updated Model X Form, note that we started with the Existing Model X Form and incorporated the applicable counterpart changes from the Updated Domestic Model Form. We then made certain further updates and changes (as described later in this Memo). For your reference we have attached marked copies of the Updated Model X Form, showing changes to both the Existing Model X Form and the Updated Domestic Model Form.

As you may recall, the more material changes to the Updated Domestic Model Form included:

- Delayed funding modifications (Sections 4.2, 7.1, 7.2, 7.3, 9, 10, 17.1 – 17.3 and associated definitions).
- Foreign Assets Control and similar regulations (Sections 5.8(b), 5.16, 9.1, 10.4 and associated definitions).
- Audit opinion delivered with annual financial statements must be without a “going concern” qualification and without any qualification or exception as to scope of the

¹ The domestic Model Form for NAIC-1 credits was also finalized and published by the TPMC last year. Model Form No. 1 of Note Purchase Agreement (final form dated April 15, 2013).

audit (Section 7.1(b)).

- Notice of resignation or replacement of the Company's auditors (Section 7.1(g)).
- Reconciliation between compliance certificate financial covenant calculations and the financial statements in cases where the Company has made the election to measure financial liabilities using fair value under FASB ASC Topic 825-10-25 (Section 7.2(a)).
- Electronic Delivery of financial statements, audit opinion, other information and compliance certificates, including by email, Company website or IntraLinks and similar websites (Section 7.4).
- Offer of Prepayment Flexibility/Amendment voting, which provides for a super-majority of holders (66-2/3%) to permit offers of purchase of the Notes by the Company pro rata to the holders of all Notes and on the same terms and conditions (Sections 8.5, 17.1(c) and 17.2(c)).
- Addition of Subsidiary Guarantors based on a Subsidiary guaranteeing or otherwise becoming liable (as a borrower, co-borrower or otherwise) in respect of any indebtedness under a "Material Credit Facility" (Section 9.7). See below for description of the definition of "Material Credit Facility".
- "Anti-Cookson" provision requiring that the Notes be secured if the Company uses its priority debt basket to secure indebtedness under a "Material Credit Facility" (Section 10.5).
- Confidentiality provisions of Note Purchase Agreement control in the event of any confidentiality undertaking (pursuant to IntraLinks, another secure website or otherwise) that differs from the confidentiality provision of the Note Purchase Agreement (Section 20).
- Neutralization on measuring financial liabilities using fair value under FASB ASC Topic 825-10-25 for purposes of determining compliance with the covenants of the Note Purchase Agreement (Section 23.2).
- For purposes of the Subsidiary Guarantor and "Anti-Cookson" provisions (as described above), the definition of "Material Credit Facility" includes the Company's and its Subsidiary's existing agreements evidencing debt for borrowed money and any other agreements evidencing debt for borrowed money entered into after the date of Closing that equal or exceed a certain Dollar threshold (to be negotiated on a deal by deal basis), in each case including any renewals, replacements or refinancings thereof.

In addition to including the changes above from the Updated Domestic Model Form, we have also provided for the following further updates and changes in the Updated Model X Form:

- Provision for inserting a “Legal Entity Identifier” (LEI) of the Company when and if required by any applicable national or global financial regulator with respect to financial transactions consisting of the issuance of securities. (Footnote 1).
- Rules of construction with respect to successors and assigns, amendments to agreements and laws, shorthand of typical contractual phrases (*e.g.*, “including without limitation” to “including”). This has the result of shortening the overall length of provisions, streamlining the more cumbersome phrases and creating uniformity throughout the document. (Sections 1 and 23.4).
- Foreign Assets Control and similar regulations with respect to the representation and warranty, covenant and new offer of prepayment right.
 - With respect to the representation and warranty, while we have, for the most part, maintained the substance of the Updated Domestic Model Form, we have streamlined the provision (including removing somewhat duplicative provisions, moving the bulky definitions to Schedule A and grouping the reps by subject matter). (Section 5.16 and associated definitions).
 - With respect to the covenant, this has been modified to (i) focus more on US Economic Sanctions matters (leaving local law matters to the compliance with law covenant); (ii) remove references to noteholder legal compliance (incorporating those into the put right described in the next bullet point), thereby having the covenant focus on violations of, and sanctions imposed under, US Economic Sanctions as may be applicable to the Company; and (iii) provide for an MAE standard with respect to the Company’s investments in, and engagement in dealings and transactions with, Persons in violation of, or which could result in sanctions under, US Economic Sanctions. (Section 10.4 and associated definitions).
 - The form provides for a noteholder put right (at par) triggered as a result of a noteholder or any of its affiliates being in violation of, or subject to sanctions under: (1) US Economic Sanctions, resulting from (a) the Company or its Controlled Entities becoming a Blocked Person or (b) the Company or its Controlled Entities having investments in or engaging in dealings and transactions with any Blocked Person, or (2) any State law resulting from the Company or its Controlled Entities appearing on a State list. Note that the noteholder put right generally follows practice that has developed in USPP cross-border transactions over the last year (although we note that there has not been a consistent form used among attorneys in the market). The one significant variance from current market practice is that the noteholder put right is not limited to situations where a violation occurs as a result of a change in law. (Section 8.4 and associated definitions).

The foregoing was a result of lengthy discussion and compromise attempting to reach a balanced position whereby the interests of noteholders are still fully

protected but addressing the concerns of foreign issuers being subject to compliance with US Economic Sanctions (where the non-US issuer is not otherwise subject US Economic Sanctions). For example, this balance was struck by inserting an MAE standard in the covenant, thereby making the covenant more of a commercial matter (*i.e.*, non-compliance having a material adverse effect on the Company) and separately providing for noteholder legal compliance through the addition of a put right triggered by the actions of the Company putting the noteholder in violation of or subject to sanctions under applicable law.

- For those private placement transactions that are structured under the safe harbor of Reg D (Rule 506), as opposed to reliance on the more traditional Section 4(a)(2) of the Securities Act, we have provided for a representation by the Company that goes to the “Bad Actors” provisions of Rule 506 which would have the effect of disqualifying the offering of Notes from reliance on Rule 506. (Footnote 16).
- Subsidiary Guarantor release provision subject to the satisfaction of customary terms and conditions. Following the addition of the Subsidiary Guarantor provision in the Updated Domestic Model Form we have noted that it is common to also include a counterpart release provision. Given this reality it made sense to include a release provision in the Model Form that has been generally accepted in the private placement market and which investors are comfortable with. (Section 9.7(b)).
- With respect to the “No Exit Consent” provision (*i.e.*, the counterpart provision to the “open market” repurchase right), in addition to invalidating any consent given by a noteholder with respect to an amendment or waiver of the Note Purchase Agreement in return for a repurchase of its Notes by the Company, its Subsidiaries or Affiliates, any such consent shall also be invalidated if given to any other Person in connection with, or anticipation of, an acquisition of, tender offer for or merger with the Company. This change arose as a result of a couple cases in 2012 where in connection with an acquisition of an issuer the acquirer attempted to purchase the Notes and remove the covenants from the Note Purchase Agreement as to any remaining noteholders. (Section 18.2(c)).

In addition, note that the TPMC is also undertaking the development of a “Cross-Border Reference Manual” which will supplement the Model X Form with respect to commonly used provisions in certain jurisdictions (*e.g.*, United Kingdom HMRC Form US/Company 2002 and HMRC DT Treaty Passport Scheme as used in Section 13 (Tax Indemnification) of the Model X Form). We expect an initial draft to come out during the 2014 calendar year.

After finalizing the Updated Model X Form, the TPMC will conform where appropriate Model X Form No. 2 and make any necessary conforming changes to the domestic Model Forms No. 1 and No. 2.

We ask that you please provide any comments you may have to a member of the Transaction Process Management Committee by **June 13, 2014**. Note that the draft of the Updated Model X Form is also being shared with other constituents in the USPP market, such as the PPIA

and investment bankers and advisors. We are also soliciting their comments on the form. We also request that you share this comment draft with any and all colleagues in your respective institutions and law firms, and solicit their comments and suggestions. Thank you for your participation.

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Attachment

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