

Proposed Changes to LSTA Distressed Trading Documentation

Proposed Buy-In/Sell-Out Provisions

It is anticipated that in the coming weeks, the LSTA will revise the Standard Terms and Conditions for Distressed Trades (the “**Distressed Confirm**”) to include Buy-In/Sell-Out (“**BISO**”) provisions similar to those already included in the Standard Terms and Conditions for Par/Near Par trades.

The BISO provisions address counterparty risk for the failure to settle bank debt trades. Currently, if a counterparty refuses to settle a trade, there is little or no recourse for a performing party beyond litigation. The BISO provisions outline a procedure by which a performing party may terminate its obligations under a Distressed Confirm and effect a cover transaction in respect of the Debt.

Some of the noteworthy proposed BISO provisions are:

- Fifty Business Days after the Trade Date, if the Buyer and Seller cannot settle the trade due to the failure to perform, the performing party may send the nonperforming party a BISO Notice.
- A BISO Notice is a written notice (email is sufficient) from the performing party to the nonperforming party. The BISO Notice contains a statement by the performing party that the performing party is ready, willing and able to settle the trade and that the performing party intends to terminate its obligations under the Confirmation and effect a cover transaction in respect of the Debt, unless the nonperforming party can cure.
- The nonperforming party has twenty Business Days following the delivery of the BISO Notice to settle the trade (the “**Cure Period**”).
- If the nonperforming party is the Seller, the Seller must perform its Settlement Delivery Obligations within the Cure Period. Settlement Delivery Obligations include the delivery of the Settlement Documents and Predecessor Transfer Documentation in “reasonably acceptable form.” We believe this is an important part of the provision for our buy-side clients, as Seller should not be able to deliver substandard settlement documentation to Buyer in order to satisfy its obligations under this provision.
- The delivery of signature pages to the transaction documents is not a prerequisite to serving a BISO Notice, as the performing party has represented in the BISO Notice that the performing party is ready, willing and able to settle the trade.

- A failure to receive necessary third-party consents required under the Credit Agreement or other time period when the administrative agent is not processing assignments (such as a “credit freeze”) would not constitute a failure by the Seller or Buyer to perform its Settlement Delivery Obligations.
- The BISO provisions will not apply to trades that settle on Proceeds Letters.
- If parties have partially settled a trade prior to the BISO Trigger Date, the BISO provisions will apply to the portion of the Debt for which the trade has not been settled.

Revisions to the LSTA Bilateral Netting Agreement

The LSTA is also publishing a revised Distressed Bilateral Netting Agreement to include the claw back right from Section 6(b) of the Distressed Confirm. This revision allows the Seller to claw back interest that the Seller credited to the Buyer, but that was ultimately not received by Seller from the Borrower for trades that settled on a “Settled Without Accrued Interest” basis. The claw back interest includes the amount equal to the portion of such interest and accruing fees that were not paid to the Seller plus interest that would accrue for each day on such amounts at the Federal Funds Rate. The revision also includes survival language that allows the rights and obligations of the Seller and Buyer under the Netting Agreement to survive and remain in full force and effect.

We continue to participate in the LSTA committee meetings with respect to these new provisions, and are available to discuss any questions you may have with respect to your individual trades.

If you have any questions or need additional information, please feel free to contact any member of our Corporate Restructuring and Bankruptcy Department.

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This memorandum provides general information on legal issues and developments of interest to our clients and friends. It is not intended to provide legal advice. Readers should seek specific legal advice before taking any action with respect to the matters we discuss here. Should you have any questions or wish to discuss any of the issues raised in this memorandum, please call your Kramer Levin contact.

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