



MAYER|BROWN

CAPITAL MARKETS
KNOW-HOW SERIES #17

REPACKAGINGS ARE BACK – PART 1: FUNDAMENTALS OF REPACKAGINGS

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ANNA PINEDO
Partner
New York

PATRICK SCHOLL
Partner
Frankfurt

ED PARKER
Partner
London

AGENDA

1. Introduction to Repackagings
2. Typical Structures
3. Structural Aspects
4. Key Legal Considerations
5. Benefits and Risks of Repack Programmes





01

INTRODUCTION TO REPACKAGINGS

REPACKAGINGS – DEFINITION

- A structured finance technique of creating new, tailored debt securities or other financial instruments ("repack notes" or "repack certificates") mirroring the cash flows of an existing asset or pool of assets ("repack asset").
- A special purpose vehicle ("SPV") – insolvency remote – acts as issuer and acquires the asset (directly or indirectly).
- Accordingly, investors take the – usually untranched – benefit as well as credit or market risk of the repack assets without directly investing in these.
- In principle, economically similar to a derivative (total return swap), but – theoretically – without additional counterparty credit risk.





REPACKAGING PRINCIPLES

- Insolvency remote SPV as Issuer (often orphan SPVs)
- More often than not untranching repack notes (not subject to EU Securitisation Regulation)
- Often collateralised by the repack asset
- May or may not be subject to credit risk of arranger/originator/asset seller
- Limited recourse (to be distinguished from dual recourse)
- Non-petition clause (waiver of filing for insolvency)
- Repack notes are usually transferrable notes or transferable loans (for example Schuldschein loans)
- Ring-fencing in case of repack programmes
 - Contractual ring-fencing → different, insolvency-proof pledge series
 - Corporate (or: structural) ring-fencing → compartments or subsidiaries



PURPOSES

- Creating specific investment opportunities for investors without directly investing in the repack asset – often a tailored investment product
- Not necessarily a risk transfer product only, but could also be structured as a credit risk transfer or synthetic risk transfer
- Elimination/replacement of credit risk of traditional debt/structured products issuers
- Elimination of specific adverse characteristics of the repack asset that investors dislike and replacement with characteristics that investors prefer
 - exchange of a variable interest rate (repack asset) for a fixed interest rate (issued note)
 - exchange of an unfavorable currency (repack asset) for a desired currency (issued note)



DISTINCTION

Repackagings are to be distinguished from:

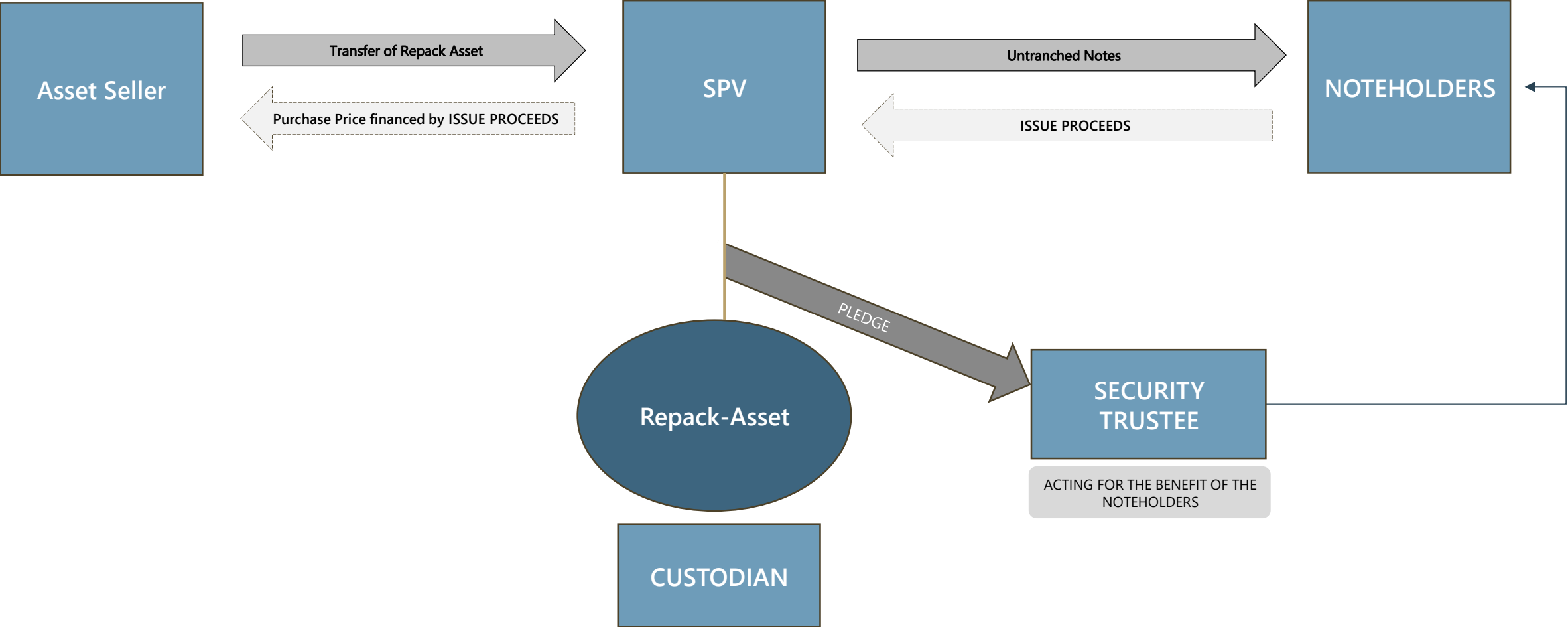
- Total Return Swaps / Credit Derivatives / Credit Linked Notes
- Secured Notes (Guaranteed MTNs)
- (regulated) Covered Bonds
 - Based on certain statutory law protections in an issuer insolvency (e.g. statutory segregation of assets), e.g. EU Covered Bond Directive
 - Dual recourse liabilities
 - Limited eligible assets as cover pool (just as collateral, not as payment reference)
- Securitisation positions (ABS, RMBS, CMBS, CLOs)
 - Securitised assets in tranchised securities

02

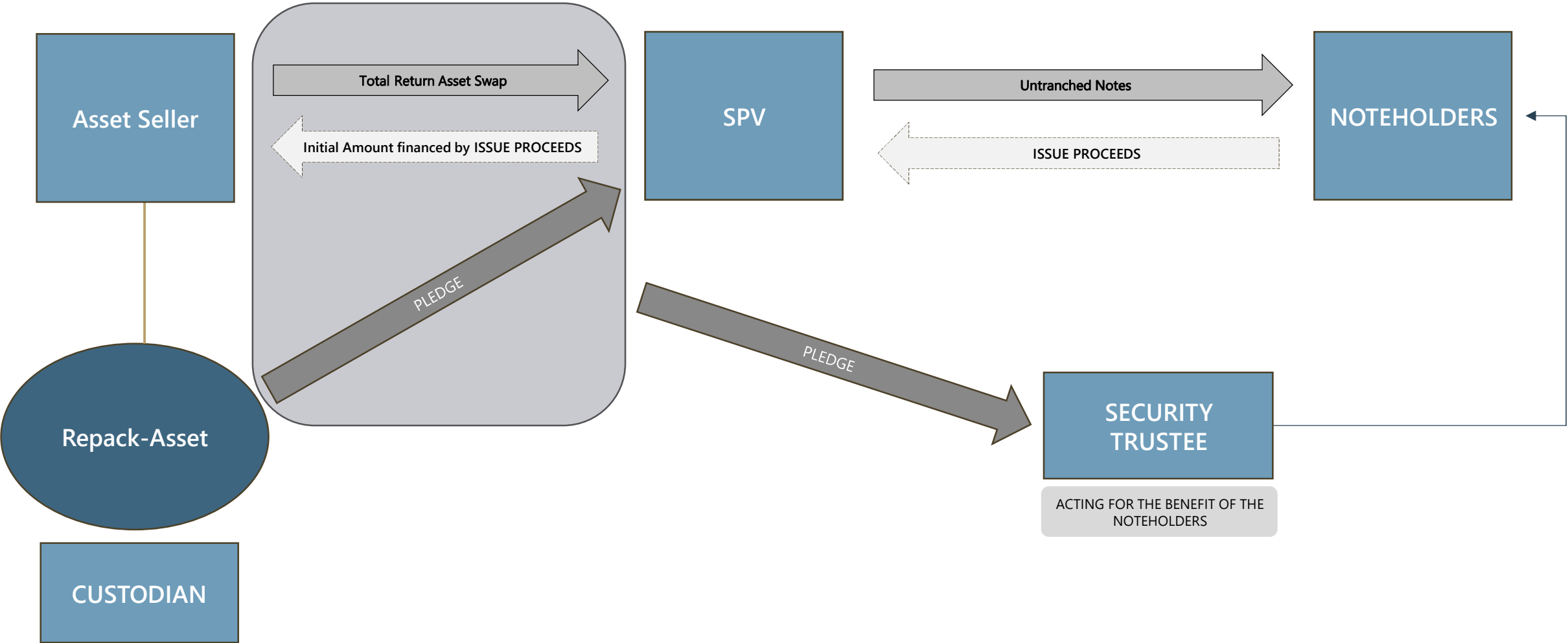
TYPICAL STRUCTURES



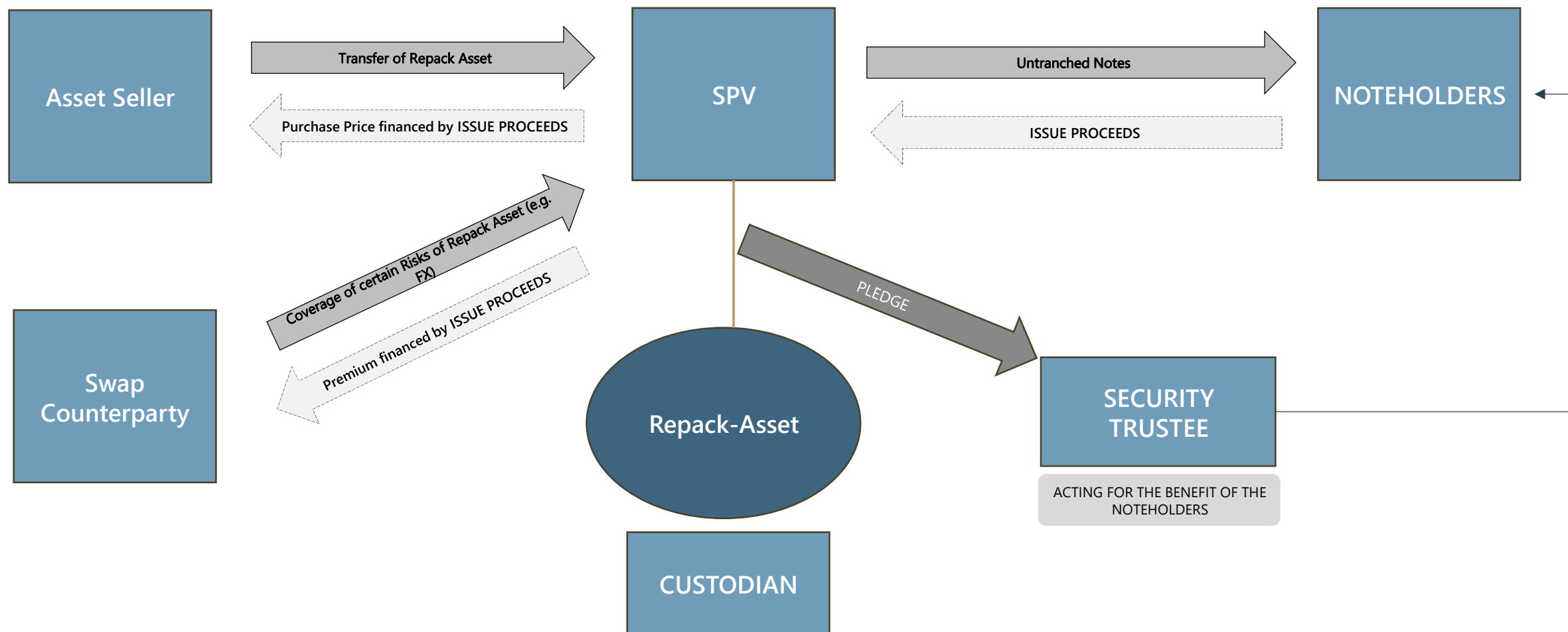
BASIC STRUCTURE I (ASSET BASED):



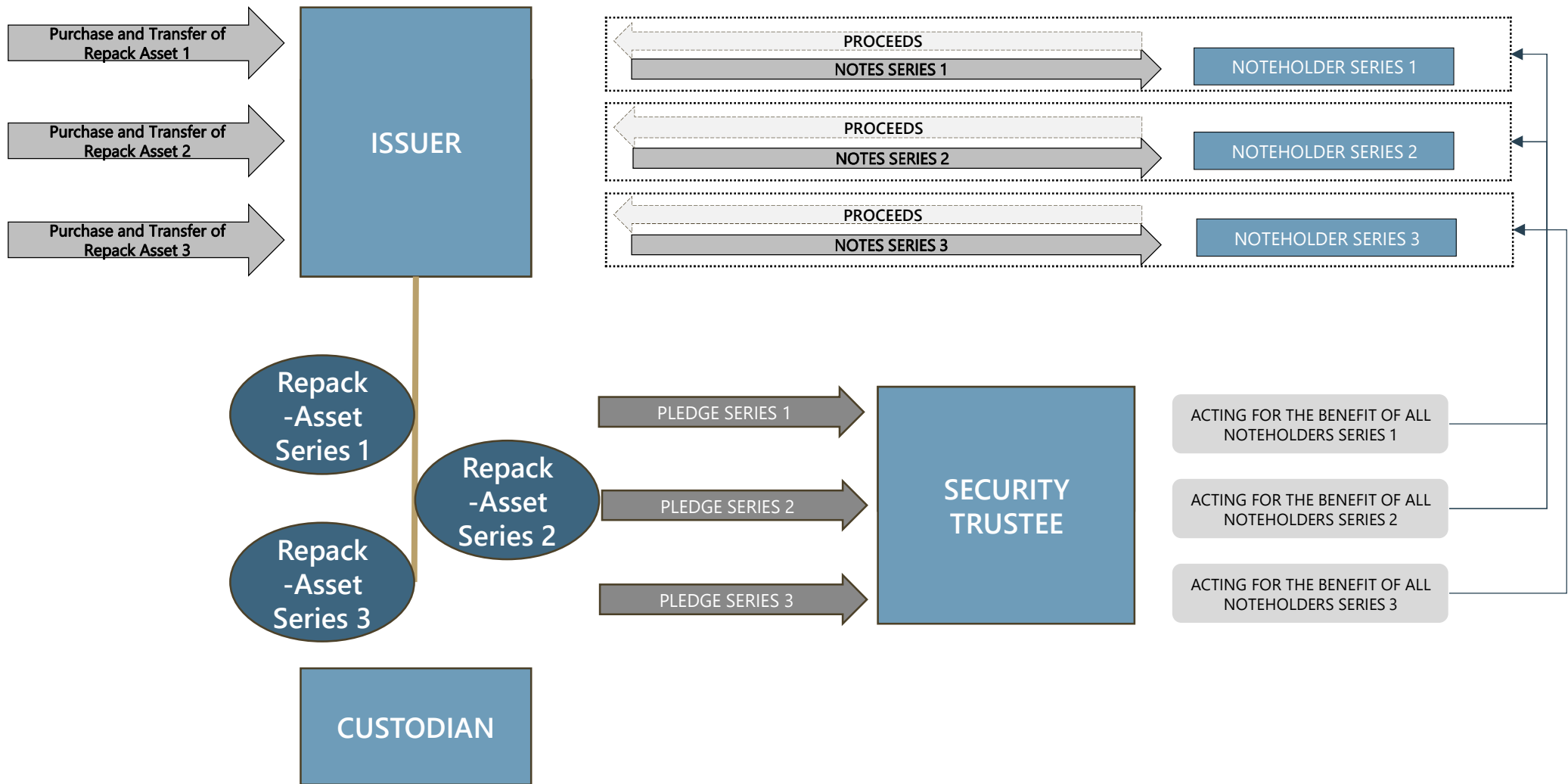
BASIC STRUCTURE II (HEDGE BASED):



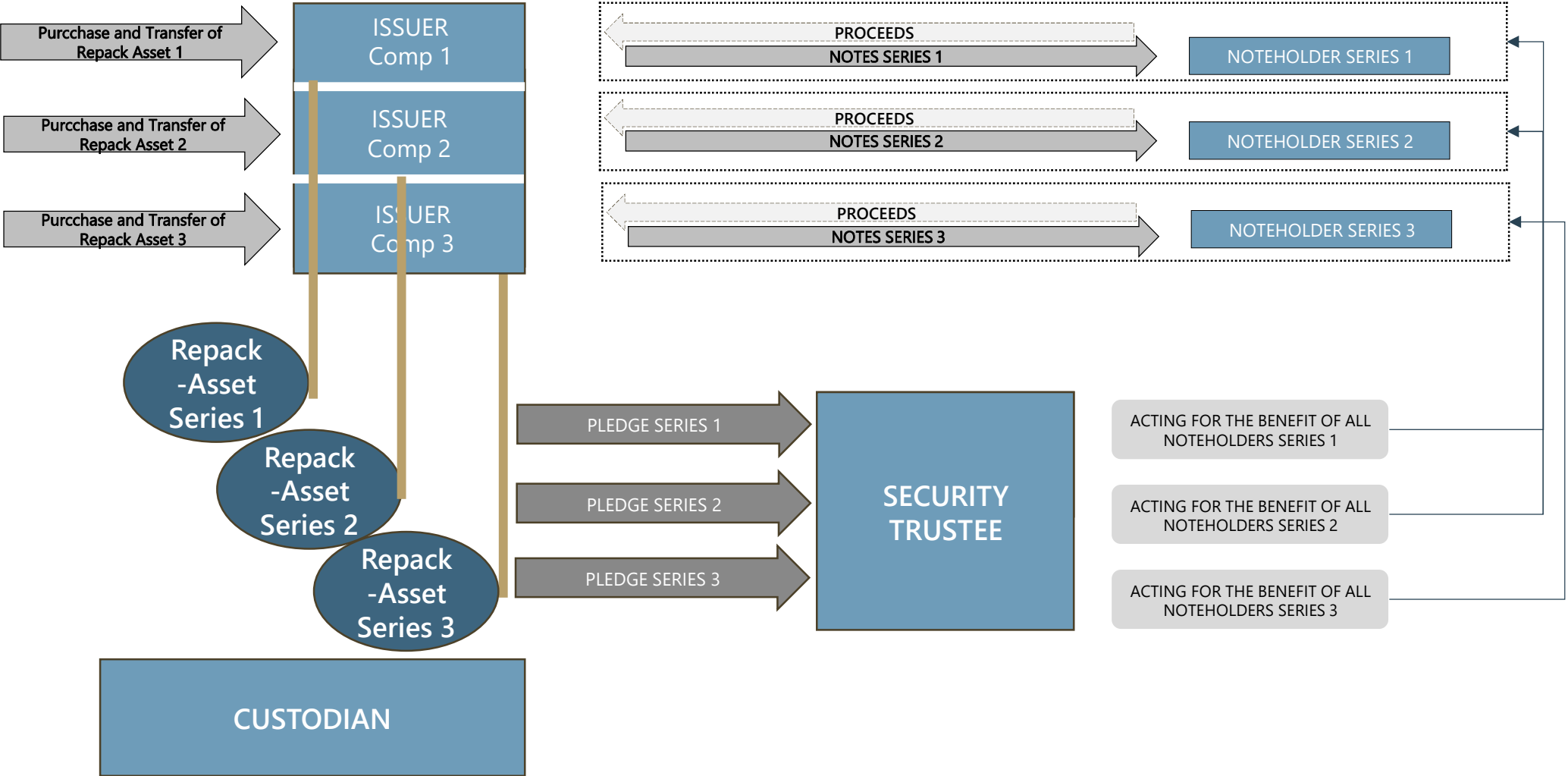
BASIC STRUCTURE III (ASSET BASED WITH RISK HEDGE):



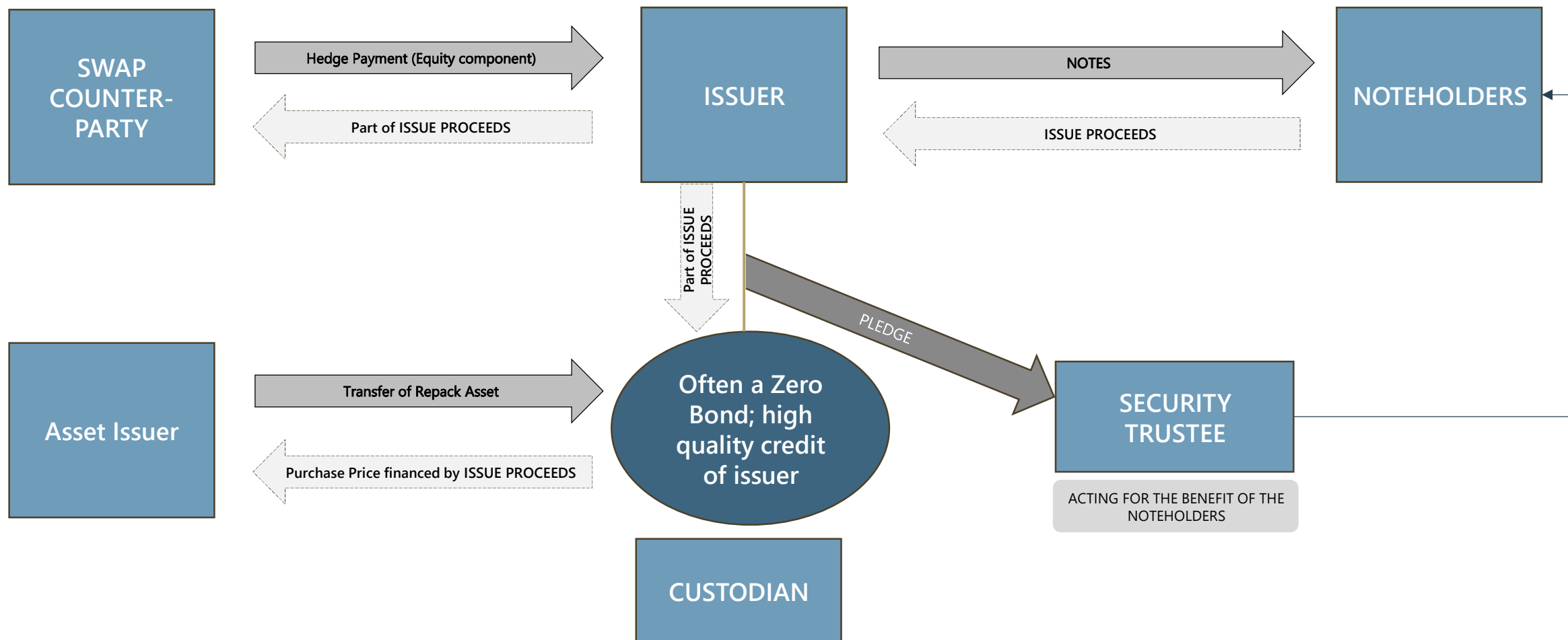
BASIC STRUCTURE IV: PROGRAMME STRUCTURE (CONTRACTUAL RING FENCING)



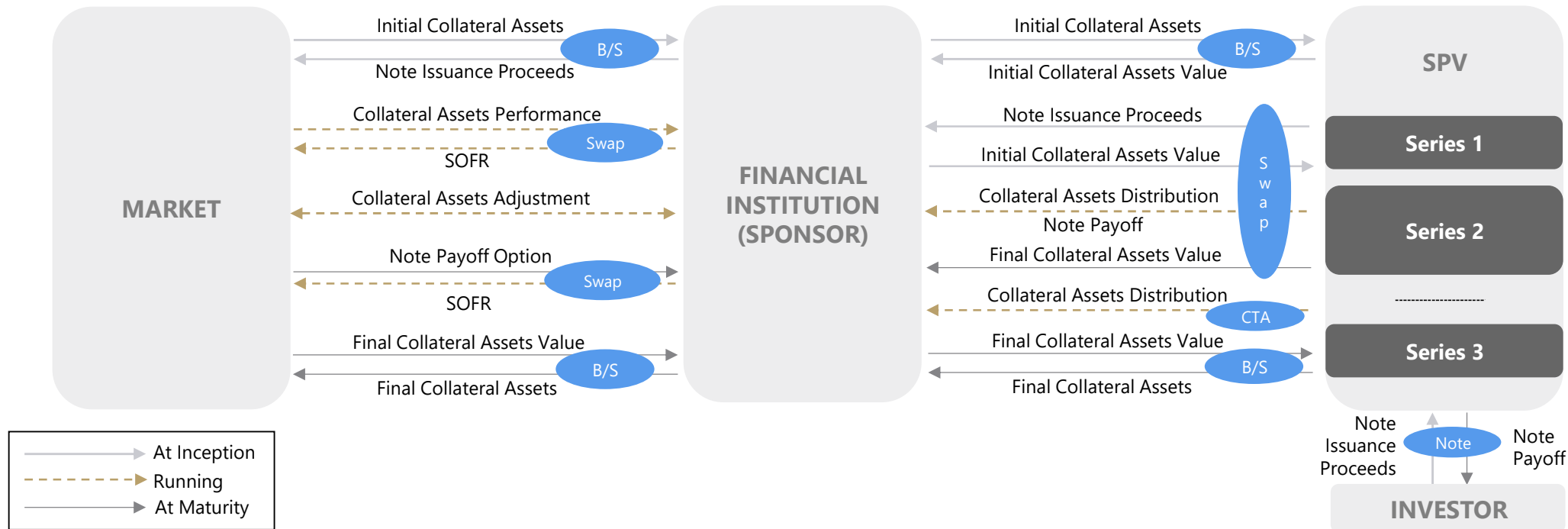
BASIC STRUCTURE V: PROGRAMME STRUCTURE WITH COMPARTMENT SPV



CLASSIC RETAIL REPACK STRUCTURE FOR STRUCTURED PRODUCTS IN GERMANY:



US SERIES TRUST



1. Eligible Collateral Assets: equities, mutual fund shares, hedge fund shares, bonds (including contingent convertible bonds, ABS, etc.)
2. Each series/compartments/collateral pool is segregated but multiple series of notes may share the same collateral pool
3. For secured notes, the investor does not bear credit risk on the collateral assets and in case of default, the collateral assets will be replaced
4. For repack notes, the investor does bear credit risk on the reference bonds and in case of default, the notes will be early-terminated and the investor will receive the recovery value of the reference bonds
5. For collateral assets adjustment, the sponsor may enter into stock lending, repo, and/or reverse repo transactions with the SPV
6. SPV should be de-consolidated with the sponsor



TYPICAL REPACKAGING STRUCTURES

Parties

- **Issuer:** Issues the notes, acquired the repack asset and provides the collateral.
- **Corporate Administrator:** Manages the SPV (administrative function).
- **Noteholders:** End investor of the Notes.
- **Arranger/Dealer:** Structures the issuance, manages the issuance process, and distributes the notes to investors.
- **Swap Counterparty:** Swaps certain risks of the repack asset against payment of a certain premium.
- **Custodian:** Opens and maintains the accounts/custody locations in which the repack asset will be transferred and pledged to the Security Agent/Trustee.
- **Manager/Administrator of Repack Assets:** Manages the re-pack assets in case of a dynamic portfolio of Repack Assets or in case of corporate actions/substitutions.
- **Security Agent (synonymous: Trustee, Collateral Agent):** Holds the collateral on behalf of investors, monitors compliance, and enforces rights if a default occurs.
- **Paying Agents:** Distributes payments to the noteholders via the clearing system, including any enforcement proceeds from the enforcement of collateral.
- **Selling Agents:** Can be involved in the enforcement process by the Security Agent.



TYPICAL REPACKAGING STRUCTURES

Types of Repack Assets

- Equities (high price volatility)
 - Bonds
 - Funds
 - Derivatives/Swaps
 - Securities Lending Agreements
 - Loan claims (collateralised/guaranteed)
 - Commodities
 - Emission Allowances
 - New: Crypto assets
 - Portfolio of assets (actively and passively managed)
 - Index replicating AMC (actively managed certificates)
- Theoretically any assets can be used, including illiquid assets.

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STRUCTURAL ASPECTS



COLLATERALISATION VS NON-COLLATERALISATION

The (non-) collateralisation depends on the type of structure chosen:

- When arranging a repackaging programme that relies on **contractual ring fencing**, the involvement of a Security Agent is essential.
- When arranging a repackaging programme that relies on **corporate ring fencing**, the involvement of a Security Agent may not be necessary.

This structuring consideration is crucial, as the involvement of a Security Agent inevitably leads to additional counterparty risk (see next slide).

MANAGING COUNTERPARTY RISKS

Swap Counterparty

- One-sided collateral structure, i.e. variation margin to be provided by swap counterparty only, possible.
- Swap counterparty often secured by repack assets
 - Ranking of swap counterparty subject to regulatory compliance

Custodian / Security Trustee

- Back-up arrangements allows for efficient replacement (in case of trigger events)
- Insolvency remote holding of repack assets (segregation; right of separation in case of insolvency)

Asset Seller

- Commingling risks (right of separation requires that assets or monies are still distinguishable in the insolvency mass)

ENFORCEMENT EFFICIENCY

In the event of a performance event of the SPV/Issuer (e.g., payment default), the Security Trustee is responsible for liquidating the repack assets ("enforcement process"); in doing so, it typically uses a Selling Agent.

Enforcement efficiency requires the following conditions:

- Pre-programmed enforcement principles and allocation of responsibilities are beneficial for enforcement efficiency
- Reduce discretion of Security Trustee to a minimum
- Instruction rights of noteholders are usually less important in repackagings (since there is only one class of issued repack notes)
- Fire sales of the repack assets after reaching long-stop-date
 - Problem: Liquid vs. non-liquid repack assets
- Last resort: physically delivery of repack assets and open market sale

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KEY LEGAL CONSIDERATIONS



LEGAL ASPECTS (EUROPE)

Securitisation Framework (EU Securitisation Regulation)

- Covered by the scope of EU Securitisation Regulation, provided that
 - Limited Recourse
 - Issuance of at least two *tranche* instruments (notes, loans)
 - "tranche": contractually established segment of credit risk associated with an exposure

Investment Law (AIFMD)

- Covered by the scope of investment law, provided that SPV qualifies as an alternative investment fund
 - i.e., is an collective investment undertaking, including investment compartments thereof, which (i) raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and (ii) does not require authorisation as undertaking for collective investment in transferable securities (UCITS)
 - Distinction SPV vs. fund (both as: *vehicles*): interpretation according to national law specifics of the jurisdiction in which vehicle is based can be relevant
 - Exception in AIFMD for Securitisation SPV



LEGAL ASPECTS (EUROPE)

General Civil Law

- Is the repack asset even eligible as collateral / for a pledge to the security trustee/SPV; is there a requirement of transfer of possession?
- Alternatively: Transfer of ownership by way of collateral?
- Formal requirements (e.g., notarisation requirements for transferring of shares)?

Insolvency Law

If the repack assets qualify as "financial collateral arrangements" within the meaning of the Directive (EC) 2002/47, **special insolvency law** applies within the EU, according to which the following special features apply:

- Limitation of clawback rights
- No enforcement right for the insolvency administrator



LEGAL ASPECTS (EUROPE)

Accounts, KYC, EUA Registry and Jurisdictions

- Account openings and KYC proceedings; cash management services (regulatory aspects)
- Specific aspects for Repackagings with EU Emission Allowances:
 - Which registry? Netherlands, Lux, Ireland? Can an SPV open an account?
 - Can you take security over EUAs? In Netherlands, you cannot, but in Luxembourg you can.
 - Are EUAs, client assets under CASS Rules?
 - Stichting structure allows creation of quasi-security
 - Concerns about position limits
 - Total return swaps on Structured Notes



LEGAL ASPECTS (US)

- Structure: often US financial institutions will choose to rely on a foreign (non-US domiciled) vehicle; when relying on a US vehicle for issuance, it will usually be structured as a trust. The trust may be a Delaware single purpose trust, or a master or series trust. From time to time, bankruptcy concerns have been raised regarding series trusts.
- Securities exemption: typically, offerings are made in reliance on the Rule 144A exemption, with offshore sales made in reliance on Regulation S
- Regulatory considerations: a number of regulatory considerations should be vetted in connection with any repack that will be offered and sold to US persons. We will discuss these in detail during our US-focused session. In brief, we can summarize as including the following:
 - Investment Company Act exemption: given the trust (or other issuance vehicle) is a passive vehicle it will generally require an exemption from registration under the Investment Company Act



LEGAL ASPECTS (US) (CONT'D)

- Risk retention requirements: unlike the EU approach wherein tranching may be the most significant factor in assessing whether risk retention applies, an analysis will need to be conducted for each vehicle and often for each compartment or series
- Commodity pool related issues: depending on the assets of the trust, it may be the case that an exemption from the commodity pool definitions will be required; similarly, the sponsor will want to avoid being considered a commodity pool operator and any adviser will want to avoid being considered a commodity trading adviser
- Volcker Rule issues: financial institutions, which are usually the sponsors of repack vehicles, will want to be comfortable that the structures do not give rise to Volcker Rule issues. In particular, that the vehicle is not a covered fund
- Accounting considerations: while not strictly “legal,” accounting considerations—whether the entity is consolidated or not—will be a significant consideration



CORE DOCUMENTATION (STAND ALONE)

- Notes documentation
- SPV domiciliation and administration agreement
- Arranger/Dealer Agreement (if a dealer is involved)
- Prospectus or Information Memorandum
- Issuance and Paying Agency Agreement / Trust Deed
- Asset Purchase Agreement or Asset Swap
- Hedging Documentation (if risk hedged)
- Custodian Documentation
- Security Documentation (Pledge / Deed of Charge / other)
- Collateral Agency/Security Trustee Agreement
- Collateral Administration/Management Agreement
- Enforcement/Selling Agent Agreement



CORE DOCUMENTATION (PROGRAMME – MODULAR STRUCTURE) (COMMON IN EUROPE)

- **Programme Agreement:**

Programme Agreement can be based on a modular structure and with the following modules:

- Conditions Module
- Trust Module
- Custody Module
- Agency Module
- Swaps Module.

- **Constituting Instrument/Issue Deed/Trust Instrument:**

- Constituting Instrument (also sometimes called a Trust Instrument) will be issued on a per trade basis.
- Constituting Instrument will make necessary trade specific amendments to the Modules, it will also set out the Issue Terms.

- **Advantages:**

- Allows multiple SPVs in different jurisdictions to use the same documentation.
- E.g. If a Bank establishes SPVs in Ireland, Luxembourg, Cayman and the Netherlands, it need only prepare an Information Memorandum for each SPV, together with a short form Programme Agreement, which incorporates the same Modules. The Programme Agreement can also make any jurisdiction specific tweaks.



PROSPECTUS AND LISTING OBLIGATIONS

- Prospectus obligation in case of Public Offer of Securities (EU/UK)
- Prospectus obligation in case of Regulated Market Listings (EU/UK)
- Information Memorandum in case of qualified investor offerings only
- In case of an MTN listing, a prospectus obligation could apply, subject to the rules of the relevant market
- Additional contents of prospectuses in respect of the repackaging
 - Additional Risk factors
 - repack asset
 - hedging risk
 - in respect of the security interests/insolvency protection/avoidance risks
 - factors in connection with an enforcement
 - Additional descriptions on
 - repack asset
 - collateralisation structure and collateral agency/trustee functions
 - enforcement trigger, enforcement actions and use of enforcement proceeds
 - involved parties and legal arrangements



GOVERNING LAW SELECTION

- Free choice of law in respect of Notes documentation
 - Subject to local law market standards
 - Usually free choice of law in respect of repack asset purchase or swaps
 - Security Agreements are subject to the laws governing the creation of the collateral
 - Governing law of Custody and Collateral Agency Agreements might depend on location of Custodian and their internal policies
- Possible to apply multiple laws

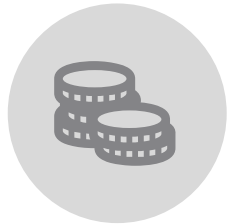


05

BENEFITS AND RISKS OF REPACK PROGRAMMES



BENEFITS OF OF REPACK PROGRAMMES



Flexibility: Ability to issue a variety of note types, currencies, and maturities



Efficiency: Streamlined documentation and issuance process



Asset Access: Enables indirect access to specific repack assets for various reasons



Customisation: Repackaging structures can be structured to meet specific investor, legal or tax requirements

RISKS AND CHALLENGES OF REPACK PROGRAMMES



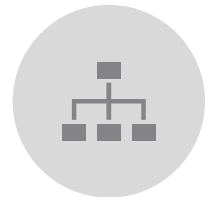
Complexity of structures



Dependence on performance of involved parties



Legal enforceability can be complex, especially with cross-border collateral, differing perfection rules, and the potential for claw-back in insolvency scenarios.



Operational complexity, dependency on custodian risks and risks in respect of the security trustee



Performance risks in respect of security trustee



Litigation risks in case investors challenge actions by trustees.

THANK YOU



PARTNER

ANNA PINEDO

CORPORATE & SECURITIES,
BANKING & FINANCE, AND
CAPITAL MARKETS

NEW YORK +1 212 506 2275
APINEDO@MAYERBROWN.COM



PARTNER

DR. PATRICK SCHOLL

LEADER OF GERMAN CAPITAL MARKETS,
FINANCIAL SERVICES REGULATORY, AND
REGULATORY OFFERINGS

FRANKFURT +49 69 7941 1060
PSCHOLL@MAYERBROWN.COM



PARTNER

ED PARKER

LEADER OF DERIVATIVES & STRUCTURED
PRODUCTS, CDOS AND CLOS, DERIVATIVES,
AND EMERGING MARKETS

LONDON +44 20 3130 3922
EPARKER@MAYERBROWN.COM

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The team consists of experienced lawyers as well as young, ambitious and inquisitive talents. This also makes it clear to the clients how important it is to the partners to provide well founded training for the up and coming talent. In addition, all team members are incredibly friendly, so working together is a lot of fun, even beyond the technical side.

THE LEGAL 500 DEUTSCHLAND (Client)



The image features a blurred background of stacked coins. Overlaid on this is a complex financial chart with multiple candlesticks in red and teal, and several yellow and blue trend lines. Numerical values are scattered across the chart, including 54.26, 62.78, 66.01, 60.52, 62.5, 79.32, 98.71, 95.06, 84.0, 78.92, and 60.39. The Mayer Brown logo is centered in the middle of the image.

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