MAYER • BROWN

September 2016

High Yield Bonds

An Issuer's Guide (4th European Edition)

This guide provides information and comments on legal issues and developments of interest to our clients and friends. It is intended to act as a general guide to the subject matter and is not intended to provide legal advice or be a substitute for specific advice concerning individual situations. Readers should seek legal advice before taking any action with respect to the matters discussed herein.

If you have any questions about high yield bond offerings, please contact the author of this guide.

BERND BOHR

Partner
bbohr@mayerbrown.com

201 Bishopsgate
London EC2M 3AF
United Kingdom

T +44 20 3130 3640
F +44 20 3130 8760

Contents

Page

TRADITIONAL CREDIT FACILITY VS. HIGH YIELD BONDS 1

INTRODUCTION 2

Why High Yield? 2
The Ideal High Yield Bond Candidate 2
Subordination 2
Key Documents 5
Parties 12
Certain Securities Law Considerations 14

THE HIGH YIELD COVENANT PACKAGE 18

General Observations 18
Tenor and Redemption 22
Change of Control And Portability 26
Limitation on Indebtedness 30
Limitation on Restricted Payments 38
Limitation on Liens 44
Limitation on Restrictions on Distributions from Restricted Subsidiaries 48
Limitation on Asset Sales 50
Limitation on Affiliate Transactions 52
Limitation on Designation of Restricted Subsidiaries and Unrestricted Subsidiaries 53
Limitation on Merger, Consolidation and Sale of Substantially All Assets 54
Reporting 55

INDICATIVE TRANSACTION TIMETABLE 56

Pre-Launch 56
Post-Launch 58

GLOSSARY 60

Traditional Credit Facility vs. High Yield Bonds

The following table highlights certain major differences between traditional credit facilities and high-yield bonds.

Traditional Credit Facility	High Yield Bonds
• Maintenance and incurrence covenants	• Less onerous incurrence covenants only
• Typically tenor of 3 – 5 years	• Typically tenor of 5 – 10 years
• Interim payments generally required by banks	• Bullet maturity
• Generally repayable at any time	• Non-call period generally 3 to 5 years and thereafter decreasing prepayment / call premium – typical call features: 5nc2, 7nc3, 8nc4, 10nc5
• Amendments relatively common and uncomplicated	• Amendments require consent solicitation from investors, which can be costly and time-consuming
• Documentation relatively straightforward	• Documentation requires more time and expenses
• Senior and typically secured and guaranteed	• Potentially more flexibility; senior or subordinated and frequently unsecured with only negative pledge
• Floating Rate	• Fixed or Floating Rate (and potentially even PIK Interest)
• Private reporting (monthly or quarterly)	• Public reporting (quarterly)
• Minimal public market awareness	• Creates awareness in public capital markets and benchmark that can facilitate further fund raisings, including possible IPO
• Rating not necessarily required	• Rating required (typically by Moody's and S&P)
• Investors are banks, institutional funds	• Investors are mutual funds, hedge funds, insurance companies, pension funds, private wealth management accounts
	• Potential prospectus liability

Introduction

WHY HIGH YIELD?

Traditional reasons for high-yield offerings include:

- established companies that do not carry (or have lost) an investment grade rating (i.e. rated Ba 1/ BB+ and below by Moody's and S&P, respectively);
- private companies looking to reorganize their capital structure; and
- financings for leveraged buy-outs.

Mutual benefits for issuers and investors include:

- issuers benefit from long-term debt financing with covenants that are typically less onerous than
- the standard covenants included in a typical credit facility; and
- investors benefit from higher interest rates with the added benefit of capital appreciation.

THE IDEAL HIGH YIELD BOND CANDIDATE

Other than investors in investment grade debt that may primarily focus on an issuer's credit profile / metrics (e.g. leverage and credit ratings), high yield bond investors also focus on some of the same factors in making their investment decision as equity investors, such as the issuer's strategy and growth prospects.

The ideal candidate for a high yield bond exhibits some or all of the following characteristics:

- a stable and resilient business model / financial track record and/or growth/recovery story;
- market leading positions and favorable industry trends / growth prospects;
- an experienced management team with a proven track record;
- solid cash generation and future deleveraging potential;
- financing needs of at least €150 million to €200 million and with limited bank financing available; and
- the proceeds of the offering are to be used for refinancing of existing indebtedness, acquisition financing or (defined) general corporate purposes.

SUBORDINATION

High yield bonds are generally structured to be junior to bank debt, i.e. they will either be expressly subordinated ("**Subordinated Notes**") or effectively subordinated (but still referred to as "**Senior Notes**"). A vast majority of high yield bonds in Europe are marketed as "Senior" notes.

There are three potential forms of subordination:

- "express" contractual subordination;
- structural subordination; and
- "effective"/lien subordination.

Only Subordinated Notes have express contractual subordination provisions, while structural or lien subordination may be a feature of both Senior Notes and Subordinated Notes. One popular structure involves the issuance of "senior" secured notes and entry into a "**super senior**" secured revolving credit facility, where the obligations under both the notes and the facility are secured equally with first-ranking security over certain assets of the Issuer, but where any obligations under the facility (and other potential "super priority" obligations, such as certain priority hedging obligations and/or cash management liabilities) are satisfied first with any enforcement proceeds in accordance with the terms of the Intercreditor Agreement. See also "–Key Documents–Intercreditor Agreement" below. Subordination may allow the Issuer to incur more debt cost-effectively than it could if all its indebtedness were senior.

Contractual Subordination

High yield bonds may be expressly subordinated by contract, which means that:

- upon a bankruptcy or liquidation of the Issuer, the holders of the bonds agree not to be paid until any senior debt is paid in full; and
- the holders of the bonds agree to pay to holders of any senior debt any amounts received until the senior debt is paid in full.

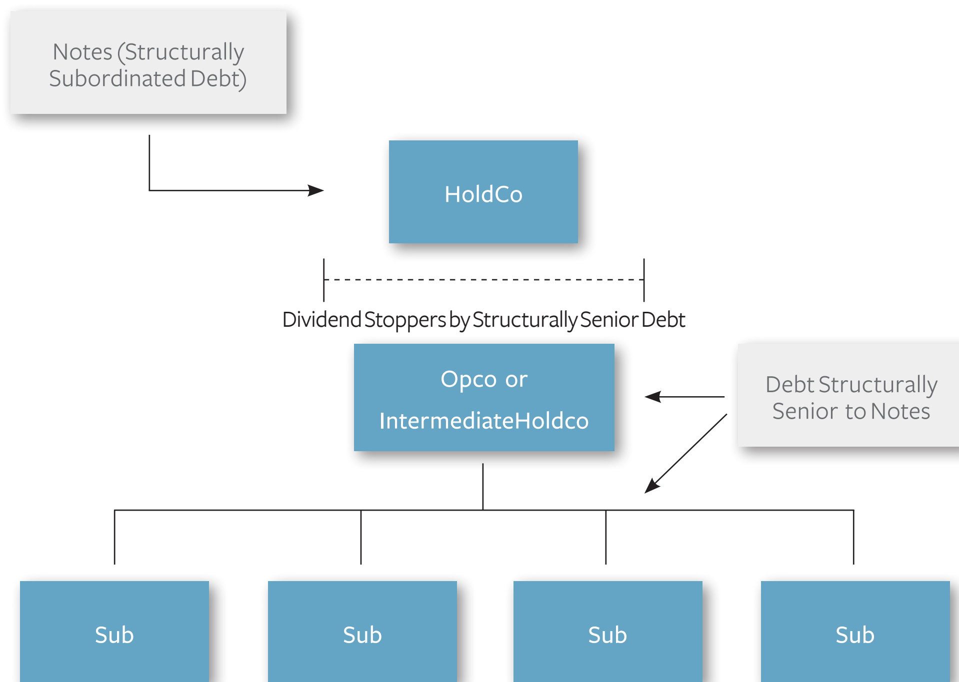
One way to achieve this result is the inclusion of so-called "**payment blockage provisions**" in the relevant documentation, whereby upon a default under the senior debt, no payments are permitted to be made on subordinated debt for a specified period of time.

In addition, the relevant documentation will include so-called "**standstill provisions**" whereby holders of the subordinated debt must give notice to the senior lenders and wait for a certain period of time before accelerating the subordinated debt.

In the case of contractual subordination, it is possible to specify exactly which other indebtedness the bonds are subordinated to and they need not necessarily be subordinated to all other debt.

Structural Subordination

In the most common form of structural subordination, the high yield bonds are issued by a (top-level) holding company, whereas structurally senior debt is issued by a (lower-level) operating company further down the group structure where the operations and assets of the group are located. This senior debt will likely have restrictions on payments to the holding company from the operating company, i.e. so-called "**Dividend Stoppers**". See also "The High Yield Covenant Package–Limitation on Restricted Payments" below.



In this structure, the subordinated debt is "structurally" subordinated because the holders of the HoldCo debt have no direct access to the assets or cash of OpCo. Instead, the only claim HoldCo creditors have on assets of OpCo is through the shares of Opco held by Holdco. In a bankruptcy or liquidation of OpCo, this (equity) claim would be junior (i.e. subordinated) to the claims of the creditors of OpCo and its subsidiaries, including the claims of unsecured creditors, such as subordinated debt holders or trade creditors. Stated differently, under applicable bankruptcy or insolvency laws, OpCo would be required to repay all its creditors (including unsecured creditors, such as subordinated debtholders and trade creditors) in full before it would be permitted to distribute any remaining liquidation proceeds to its shareholders (i.e. HoldCo), which could then be used to satisfy obligations under the structurally subordinated debt issued by HoldCo.

To address / mitigate potential structural subordination issues in cases where "senior" notes are being offered to investors, it is customary for other (significant) entities in the Restricted Group (see "Parties–Restricted Subsidiaries vs. Unrestricted Subsidiaries" below) to guarantee the Issuer's obligations under the bonds, which also gives bondholders direct contractual claims against any Guarantors in a potential insolvency. See also "Parties–The Guarantors" below.

Effective/Lien Subordination

To the extend the company's capital structure includes secured debt, bank debt will normally be " first lien debt", i.e. the bank debt (credit facility) will benefit from security interests (e.g. mortgages, pledges, ...) over some or all of the assets of the company and its subsidiaries whereby the bank creditors get paid in full before any other creditors receive any proceeds from the sales of such assets in the case of a bankruptcy or insolvency.

High yield bonds may be either unsecured or secured and may be either first lien or second lien debt. If the high yield bonds are first lien debt, they will share *pari passu* with bank debt in the proceeds from the sale of any collateral, i.e. will not be subordinated to such bank debt with regard to the collateral. If they are unsecured or second lien debt with regard to the same collateral, they would receive proceeds from the sale of the collateral only after the first lien debt has been paid in full, i.e. they would be effectively subordinated to the first lien debt with regard to the collateral. If the high yield bonds are secured, the specific rights of the high yield bondholders vis-à-vis other groups of creditors and the limitations between different groups of secured creditors generally with respect to the collateral are typically spelled out in an Intercreditor Agreement. See "Key Documents–Intercreditor Agreement" below. For more information about the security package if "secured" bonds are being offered, see also "Key Documents–Security Package" below.

KEY DOCUMENTS

A high yield bond offering typically involves the preparation of the following key documents.

Offering Memorandum

The offering memorandum is a disclosure document intended to provide potential investors with all material information necessary to make an informed decision as to whether or not to invest in the bonds. In addition to a description of the terms and conditions of the bonds (typically referred to as the "**Description of the Notes**" or "**DoN**"), the offering memorandum will contain a description of the risks associated with an investment in the bonds, a description of the company's business (including the strengths and strategy of the company) and of the industry and markets in which the company operates, a section entitled "Management's Discussion and Analysis of Financial Condition and Results of Operations" (**MD&A**), historical financial statements, biographies of officers and directors, information about their compensation, information about any significant pending or threatened litigation, a list of material properties, a description of material agreements, a description of the tax consequences of an investment in the bonds under the US federal tax laws and the tax laws of the jurisdiction of the Issuer, a description of certain insolvency law considerations in the jurisdiction of the Issuer and any other jurisdictions in which any collateral may be located and any other material information.

In addition to providing potential investors with information about the proposed offering, the offering memorandum serves to protect both the Issuer and the Initial Purchasers from liability under applicable securities laws for alleged material misstatements or omissions in connection with the offer and sale of the bonds.

The term "**offering memorandum (OM)**" or "**offering circular (OC)**" is typically used in a high yield bond offering instead of the term "**prospectus**" to indicate that the bonds are being offered in a (private) transaction that relies on certain exemptions under applicable securities laws from the requirement to prepare a formal "prospectus" that has been reviewed and/or approved by the relevant securities regulator, as would be required in many jurisdictions (including the United States and the European Union) for a broadly marketed offering to the general public. See also "Introduction–Certain Securities Law Considerations" below.

The offering with be formally "launched" with a "**Preliminary Offering Memorandum**" (also referred to as the "**Prelim**" or "**Red**"), which can be identified through prominent legends on the cover page (in red color) indicating that the document is only a preliminary offering document that is not complete and may be changed. Typically, however, the only information missing from the Preliminary Offering Memorandum / subject to change is information that will only be determined at the "Pricing" of an offering, such as the coupon and aggregate principal amount of the bonds being offered, the gross proceeds of the offering and certain related information. This is because investors in the bonds will be expected to make their investment decision / enter into legally binding agreements to purchase the bonds based on the Preliminary Offering Memorandum and a (short) "**Pricing Supplement**". The Pricing Supplement will contain any previously missing information and will need to be prepared promptly upon Pricing, so it can be sent to investor by the Initial Purchasers together with any trade confirmations as soon as possible following Pricing and execution of the Purchase Agreement. Theoretically, the Pricing Supplement can (and sometimes does) modify and/or supplement other information in the Preliminary Offering Memorandum, for example, to reflect modifications to the proposed bond covenants in response to investor feedback or material recent developments affecting the Issuer during the roadshow or to correct errors that have only been discovered after an offering was launched. However, any such further changes can delay and potentially jeopardize Pricing, especially in volatile market conditions with short marketing windows, and should therefore be avoided, if possible. The Preliminary Offering Memorandum is not just a mere draft document, must be as complete as possible and, in particular, must not contain any untrue statements or omit any material information available at the time of its first use. The "**Final Offering Memorandum**" will only be prepared after Pricing.

In some (relatively rare) cases where the success and timing of an offering may be particularly critical / sensitive, the Issuer and Initial Purchasers may decide to "**pre-market**" the proposed offering and proposed terms of the bonds and/or structure of the offering with a select group of key / anchor investors to obtain (and possibly reflect in the Preliminary Offering Memorandum, in the form of changes of the proposed bond terms, structure or otherwise) feedback from such investors and/or to increase the level of confidence that the offering will be successful if and when it is formally launched / publicly announced. In such cases, the parties will prepare a "**Draft Preliminary Offering Memorandum**" (also referred to as a "**Pink**"), which will be identical to the Preliminary Offering Memorandum the parties would otherwise prepare, except for an additional legend page at the front of the document highlighting the "draft" nature of the document and except for the fact that the "prelim legends" on the cover page will appear in pink (instead of red).

Indenture and Global Notes

If the high yield bonds are governed by New York law, the issuer will be required to enter into a bond indenture (the "**Indenture**). The Indenture is the legal contract entered into among the issuer of the bonds (the "**Issuer**), any guarantors of the bonds (the "**Guarantors**") and a bond trustee (the "**Trustee**"), as trustee for the holders of the bonds from time to time. It contains the key terms of the bonds such as the interest rate, maturity date, pledge, promises,

representations, covenants, and other terms of the bonds. The key terms of the Indenture will be summarized in the offering memorandum in the "Description of the Notes" section. The high yield bonds, when issued, will be represented by one of more "**Global Notes**" that will be issued under the terms of the Indenture and deposited with a custodian for the relevant clearing system(s) through which the relevant bonds will be settled.

If the high yield bonds are governed by a law other than New York law, the Issuer will be required to execute a similar document or series of documents customary for bond offerings under the relevant local law. Instead of entering into an Indenture with a trustee for the holders of the bonds, it may, for example, be customary for the issuer to enter into an "**Agency Agreement**" with a financial institution / fiscal agent that will agree to perform certain functions in connection with the bonds solely as agent for the Issuer, such as paying agent, calculation agent, transfer agent, registrar, exchange agent and/or notification agent, depending on the terms of the relevant notes. In the case of high yield bonds governed by German law, for example, the terms of the bonds will be documented in "**Conditions of Issue**" (*Anleihebedingungen*), which will be attached to the Global Notes, rather than in the body of an Indenture. In addition, the Issuer will separately enter into an Agency Agreement, any Guarantors will enter into a separate Guarantee Agreement and, to the extent relevant, the Issuer's parent company or other (non-guarantor entities) may be required to execute separate Undertakings.

Irrespective of the law governing the terms of the bonds and related documentation, however, most key commercial terms (most notably the covenants) will normally be substantially similar, subject only to certain mandatory provisions of the relevant governing law. See also "The High Yield Covenant Package–General Observations–What law should govern the bonds?" below.

Purchase Agreement and Engagement Letter

The Purchase Agreement is typically entered into very late in the offering process after the Issuer and the investment banks involved in the offering (the "**Initial Purchasers**") have completed the marketing of the bonds (i.e. the "road show") and the offering has "priced", i.e. the Issuer and the Initial Purchasers have agreed the exact principal amount, interest rate, maturity date, call features and certain other commercial terms of the bonds being offered. In connection with high yield offerings, the terms "**Purchase Agreement**" (rather than "**underwriting agreement**" or "**subscription agreement**") and "Initial Purchasers" (rather than "**underwriters**") are typically used to highlight that the bonds are being offered in a transaction that relies on certain exemptions under applicable securities laws. See also "Introduction–Certain Securities Law Considerations" below.

In the Purchase Agreement the Issuer agrees to issue and sell the bonds to the Initial Purchasers and the Initial Purchasers agree to purchase the bonds from the Issuer at an agreed price at Closing. For an indicative timeline and more information about timing of certain steps in the offering process, including "Launch", "Pricing" and "Closing", see "Indicative Transaction Timetable" below. In addition, the Issuer makes numerous representations and warranties, including with regard to its business and the completeness and accuracy of the offering memorandum, and agrees to indemnify the Initial Purchasers for any losses as a result

of a breach of the representations, warranties or undertakings, as a result of any actual or alleged material misstatements or omissions in the offering memorandum or as a result of any failure to issue and deliver the bonds to the Initial Purchasers on the Closing Date.

It is only with the execution of the Purchase Agreement, that the Initial Purchasers become bound to the Issuer, subject to a number of customary closing conditions and termination rights of the Initial Purchasers, to purchase any bonds and pay the agreed purchase price for the bonds at the Closing, i.e. "underwrite" the offering. On the other hand, the Initial Purchasers typically only earn any fees for their services upon completion of the offering at the Closing. Many Purchase Agreements expressly provide for an agreed fee, expressed as a percentage of either the aggregate principal amount of the bonds or gross proceeds from the offering. In some cases, the fee is divided into a base (non-discretionary) component and an incentive (non-discretionary) component. Under some Purchase Agreements, the Initial Purchasers earn their fees from the price difference (the "underwriting spread" or "underwriting discount") between the price they agree to pay the Issuer for the bonds and the public offering price at which the bonds will be (on-)sold by the Initial Purchasers to investors.

Although the Initial Purchasers will not be obligated to purchase any bonds from the Issuer until the Purchase Agreement is executed, the Initial Purchasers will typically insist that the Issuer also execute an "**Engagement Letter**" or "**Mandate Letter**" with the Initial Purchasers at some point prior to the official "Launch" of an offering, i.e. before the transaction is formally announced externally and the Initial Purchasers start approaching investors. The Engagement Letter will typically contain at least the following: (i) a description of the services to be provided by the investment bank(s) signing the engagement letter, (ii) an "exclusivity" provision (i.e. in return for their advice and assistance in connection with the preparation of the offering, the Issuer will guarantee the investment bank(s) signing the Engagement Letter certain formal roles in connection with the proposed high yield offering (or similar financings within a specified period) as well as a minimum percentage of the total fees / "economics", (iii) a description of the proposed fee structure, (iv) an agreement to reimburse the Initial Purchasers for certain expenses (e.g. legal expenses and costs for the roadshow), (v) provisions governing the (confidential) exchange of information and (vi) an indemnification provision substantially identical to the indemnification provision that will later be included in the Purchase Agreement as described above. The prospective Initial Purchasers will typically be interested in executing the Engagement Letter as early as possible in the process, i.e. before they expend significant time and resources and, for example, incur potentially significant legal fees for their own counsel. The Issuer, on the other hand, may have a legitimate interest in preserving at least some flexibility (e.g. to involve other banks or re-assign certain lead roles) by delaying the execution of the Engagement Letter until it has seen the prospective Initial Purchaser(s) "in action" and is better able to assess the quality and level of assistance provided by them during the process, e.g. in drafting the offering memorandum, negotiating the terms of the bonds or guiding the Issuer through the rating agency process. This may be particularly true for first-time Issuers and in situations without (or with only a limited) historic relationship between the Issuer and the prospective Initial Purchasers. At the same time, it may be difficult for the Issuer to expect an investment bank to devote significant resources and attention to its proposed offering over an extended period

without any assurance from the Issuer that it will not be replaced (or its economics significantly diluted) through the involvement of other banks late in the process once most of the preparatory work for the offering has already been substantially completed. For the Initial Purchasers it is also critical that an executed Engagement Letter with appropriate indemnification provisions is in place prior to the "Launch" of the offering when the Initial Purchasers put their reputation behind the Issuer and the offering, i.e. by agreeing to the publication of an offering memorandum with their names on the cover page and by approaching their investor contacts on behalf of the Issuer. The exact time during the offering process at which the Engagement Letter should be signed depends on the specific facts and circumstances and is ultimately a commercial point to be agreed between the Issuer and the Initial Purchasers.

Intercreditor Agreement

The Intercreditor Agreement is entered into at or about the Closing between the main creditors of the Issuer and governs the common terms and relationships among the creditors in respect of the Issuer's obligations. Among other things, the Intercreditor Agreement will contain provisions that limit the ability of creditors to vary their respective rights and address issues such as voting rights, notifications of defaults as well as the order of applying the proceeds of any debt recovery efforts, including from the sale of collateral. To the extent certain groups of creditors are subordinated to other groups of creditors, the Intercreditor Agreement will set forth the terms of subordination and other principles to apply as between the senior creditors and the subordinated creditors. See also "–Subordination–Contractual Subordination" above.

Security Package

If "secured" bonds are to be offered, the lawyers involved in the transaction, including local counsel in every jurisdiction in which any collateral is located, will need to prepare appropriate security documentation (e.g. pledge agreements, mortgage deeds, security assignments, ...). Although mostly "technical" in nature, the preparation of these documents, the completion of any required filings and the preparation and negotiation of related legal opinions under local law can require significant time, effort and expense. If the proceeds of an offering are to be used to refinance other secured debt, it may also be necessary to negotiate and prepare any necessary documentation required for the release of any pre-existing security granted in favor of the creditors that are being repaid.

While the preparation of the security documentation may primarily be a technical exercise that can be largely entrusted to the lawyers involved in the transaction, the Issuer and the Initial Purchasers will need to agree, on a commercial level, the exact scope of the security package. On the one hand, it may appear obvious that at least a significant portion of the assets of the Issuer and its Restricted Subsidiaries should serve as collateral to be able to market a particular bond as "senior secured". The promise of a "comprehensive" security package may also be a significant potential selling point / important as part of the overall marketing message for a particular bond offering. In practice, however, the actual scope of the

security package provided by different Issuers can vary dramatically and will depend on the particular facts and circumstances surrounding each offering, including the identity and business of the particular Issuer and its business, the nature and physical location of the Issuer's assets, prevailing market conditions in the bond markets around the time of the proposed offering, individual preferences and strategic priorities of the Issuer as well as the potentially very significant and sometimes disproportionate expenses (e.g. filing fees, notarial fees, stamp duties and/or local taxes) that may be involved in granting and perfecting a security interest over a particular asset in a particular jurisdiction.

Granting security over certain categories of fixed assets (such as property, plant & equipment), for example, is frequently less sensitive for many Issuers and less disruptive or administratively burdensome than granting security over current assets (such as inventory, raw materials, receivables or cash / bank accounts), which could potentially interfere with supplier or customer relationships or existing or proposed trade financing arrangements, such as existing or future ABS facilities or factoring programs. While it is customary for the Issuer to provide pledges over its shares in all Guarantors for secured high yield bonds in Europe, providing such pledges can be prohibitively expensive in certain jurisdictions, for example, because local taxes triggered by a share pledge may be calculated based on the amount of the secured obligation (i.e. the total principal amount of the bonds) rather than the value of the assets of the relevant Guarantor actually available to back the obligations under its guarantee. In some cases, compromises can be found to ensure that the cost of providing "standard" security is not disproportionate to the corresponding potential benefit to bondholders. For example, it may be possible to reduce the amount of local taxes triggered by granting a particular type of security by capping the amount of the secured obligation.

Ultimately, the scope of the collateral package for a particular offering and the circumstances under which security can potentially be released in the future will reflect the outcome of commercial discussions between the Issuer and the Initial Purchasers and, at least to some extent, a cost-benefit analysis. Of course, it is critical to ensure that the outcome of the commercial discussions is properly reflected / tracked through in the actual security documentation in all relevant jurisdictions (including local language documentation) and the relevant provisions of the Intercreditor Agreement and, if applicable, that boilerplate provisions in other agreements (e.g. in the Issuer's secured revolving credit facility) do not frustrate / override the commercial agreement reached by the parties in their negotiation of the security package for the bonds. To this end and to ensure that the preparation of the security package does not cause any delays or complications, it is important that the parties agree on the appropriate scope of the security package early in the process, give the lawyers and tax advisers sufficient time to properly analyze the relevant implications ahead of the launch of the offering and that the Purchase Agreement provides for a sufficiently long settlement period between pricing and closing to allow the lawyers to actually put the agreed security package in place.

Legal Opinions and Disclosure Letters

Under the U.S. securities laws, the Initial Purchasers can avoid potential liability to investors in the bonds for material misstatements or omissions in connection with the offering process if they can demonstrate that they have conducted a reasonable investigation into the affairs of the Issuer before selling the bonds (so-called "**due diligence defence**"). To support this due diligence defence, the Initial Purchasers, their lawyers and the lawyers of the Issuer in a Rule 144A offering will be required to conduct a thorough review of the affairs of the Issuer, including by reviewing certain legal documents as well as financial and business information of the Issuer and by attending due diligence meetings with the management of the Issuer and the Issuer's auditors.

In addition, the lawyers of both the Initial Purchasers and the Issuer will be required to provide certain legal opinions, for example, with regard to due organization of the Issuerandany Guarantors, due authorization of the bonds, the validity and enforceability of the bond documentation and the security package, no violation of any laws or agreements by which the Issuer is bound, so-called "fair summary" opinions with regard to descriptions of tax and other relevant laws in the offering memorandum and the availability of relevant exemptions under applicable securities laws. In case the bonds will be marketed to investors in the United States, U.S. counsel to both the Issuer and to the Initial Purchasers will also be required to provide so-called "negative assurance letters" / "[Rule]**10b-5 letters**" (in reference to the relevant liability provision under the U.S. securities laws), indicating that, in the course of their work on the offering and as a result of their own investigations, nothing came to their attention to cause them to believe that the offering memorandum was materially incomplete, inaccurate or misleading.

Comfort Letters

Comfort letters are typically provided by the Issuer's auditors at or immediately prior to "Pricing" (i.e. execution of the Purchase Agreement) and are another key component of the due diligence defence of the Initial Purchasers. In the comfort letter, which will follow a standard format prescribed by the relevant accounting body (e.g. Statement of Accounting Standards (SAS) 72 for U.S. comfort letters), the auditors of the Issuer will typically reaffirm their independence and that they stand by their audit opinion on the Issuer's audited financial statements included in the offering memorandum, describe any (review) procedures they have performed on any interim financial information included in the offering memorandum or on any internal management accounts for any "stub periods" between the date of the latest audited or reviewed financial statements of the Issuer and the date of the offering memorandum, describe any additional "agreed upon procedures" they have conducted with regard to the Issuer's financial information included in the offering memorandum and provide "negative assurance" as to the absence of material changes with regard to certain specified financial line items since the date of the most recent financial statements included in the offering memorandum. At closing of the offering, the auditors will provide a so-called "bring-down" comfort letter to re-affirm, as of the closing date, that the original comfort letter is still valid.

PARTIES

The following is just a brief overview of the various entities within the Issuer group that may be involved in a high yield bond offering and of their respective roles within the bond structure.

The Issuer

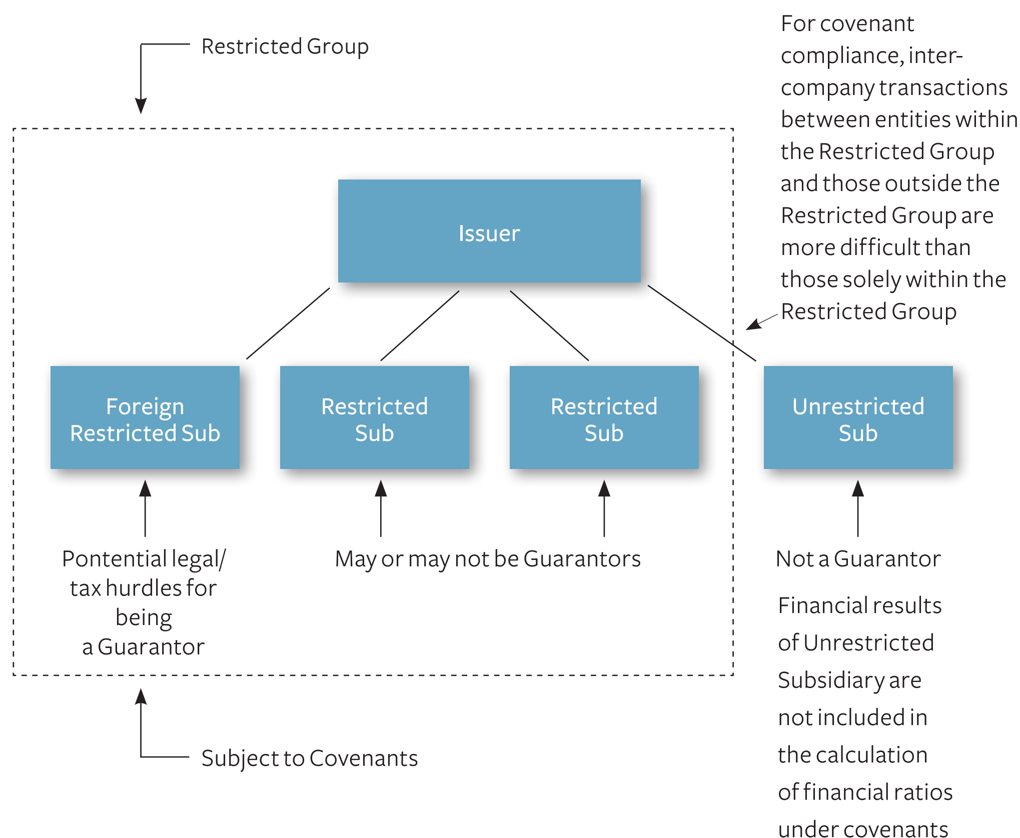
For public companies, the Issuer will likely be the public company itself. For private companies, the identity of the Issuer is less clear. Depending on what the overall capital structure of the company and any existing (senior) bank debt will permit, the Issuer could either be the ultimate parent (holding) company, an intermediate holding/operating company or a lower-level operating company. See also "–Subordination–Structural Subordination" above.

The Guarantors

Frequently, "senior" high yield bonds will be guaranteed by most (if not all) "Restricted Subsidiaries" of the Issuer ("**up-stream guarantees**"). It is also customary in connection with the issuance of secured high yield bonds for the Issuer to pledge its shares in any Guarantors for the benefit of the bond holders and, in many transactions, the Guarantors will also provide asset security for the high yield bonds. This will give holders of the high yield bonds a direct claim against the relevant Guarantors and their assets in an enforcement/insolvency scenario and therefore brings the obligations under the bonds closer to the physical assets of the Issuer group, overcoming some of the structural subordination issues described above. If the Issuer is an entity other than the ultimate parent company of the Issuer group, there may also be a ("**down-stream**") parent guarantee. A high level of "**Guarantor Coverage**", expressed as the percentage of the Restricted Group's consolidated revenues and consolidated EBITDA generated by the Guarantors and the percentage of the total assets of the Restricted Group held by the Guarantors, can be one important component of the overall marketing message for an offering.

In most European jurisdictions, however, subsidiary-parent guarantees, in particular, can be potentially problematic / expose the management and directors of the subsidiary to liability under applicable corporate, fraudulent conveyance, insolvency or similar laws, depending on the extent to which the relevant subsidiary receives any proceeds from the offering or derives any other "corporate benefit" from the offering. In some jurisdictions, guarantees by foreign subsidiaries may also have negative tax consequences. For example, foreign subsidiaries of U.S. issuers usually do not act as Guarantors, because under U.S. tax rules a guarantee by a foreign subsidiary of a U.S. parent company's debt may be deemed a (taxable) dividend, subject to certain exemptions. As a general matter, the Issuer and Initial Purchasers must therefore consult local law experts and tax specialists early in the structuring process with regard to the feasibility of providing guarantees in any particular jurisdictions and/or with regard to appropriate "limitation language" in the relevant guarantees.

Restricted Subsidiaries vs. Unrestricted Subsidiaries



By default, all subsidiaries of the Issuer will be "restricted" in the sense that they are "in the system" (i.e. the so-called "**Restricted Group**"), unless they are specifically designated as "unrestricted".

Being a "**Restricted Subsidiary**" means that:

- all income produced by the relevant subsidiary will count for purposes of compliance with various covenants;
- the relevant subsidiary will be limited in its ability to take actions limited by the covenants; and
- the relevant subsidiary will be free to transact with other Restricted Subsidiaries.

"**Unrestricted Subsidiaries**", on the other hand, are ring-fenced in the sense that they are "outside the system" / the Restricted Group, which means that:

- income produced by the relevant subsidiaries will not count for purposes of compliance with various covenants;
- the relevant subsidiary will not be subject to the covenants and thus not subject to any restrictions on their activities; and
- the relevant subsidiaries will not be free to transact with Restricted Subsidiaries.

Formation or designation of Unrestricted Subsidiaries may be useful, for example, if the Issuer plans a geographic or business line expansion that it plans to fund separately. It is possible to designate a subsidiary as unrestricted at a later date but the requirements for doing so can be onerous. These requirements and the consequences of such designation are described under "The High Yield Covenant Package–Limitation on Designation of Restricted Subsidiaries or Unrestricted Subsidiaries" below.

CERTAIN SECURITIES LAW CONSIDERATIONS

The securities laws of many jurisdictions, in particular the United States, impose various restrictions on publicity and the release of information generally in connection with proposed offerings of securities. "**Publicity**" for this purpose can be construed very broadly and may include any form of communication, whether in written, oral or electronic form, that (i) relates to or concerns the offering, (ii) relates to the performance, assets, liabilities, financial position, revenues, profits, losses, trading record, prospects, valuation or market position of the Issuer, (iii) might affect an investor's assessment of the financial position and prospects of the Issuer, or (iv) other wise has the purpose, or reasonably could have the effect, of "conditioning the market" in a particular jurisdiction (i.e. generating or promoting interest in the offering) or influencing or encouraging an investor's interest in the Issuer or the offering or a decision to purchase the securities in question. Failure to observe these publicity restrictions may result in prospectus publication, registration or similar requirements under the securities laws of various jurisdictions and adversely affect the offering, including by way of delays related to a "cooling off period" that may be imposed after improper publicity under the U.S. securities laws.

In addition, the release of information that is inaccurate, misleading or inconsistent with the offering memorandum to be published in connection with an offering is undesirable, may cast doubt on the accuracy of the offering memorandum and ultimately may result in liability for alleged material misstatements or omissions in the offering memorandum. It is important that all information released in connection with an offering should be verifiably accurate and consistent with the offering memorandum.

To ensure compliance with all applicable securities laws and regulations, the lawyers of the Issuer typically prepare "**publicity guidelines**" at the outset of a proposed offering, which will be reviewed by the lawyers of the Initial Purchasers and must be observed by all offering participants. In order to avoid the legal risks of uncontrolled communication with the public, it is often advisable to appoint one representative of the Issuer to serve as the initial point of contact with the press and securities analysts, and to serve publicity and other broad-based communications during the offering process in order to ensure compliance with the restrictions set out in the publicity guidelines. All representatives of the Issuer and other offering participants who are likely to be approached by, or come in contact with, the press or securities analysts should be familiar with the publicity guidelines and should ensure that no publicity is undertaken or permitted except in accordance with the publicity guidelines.

U.S. Securities Law Considerations

Section 5 of the U.S. Securities Act of 1933, as amended (the "**Securities Act**"), prohibits any sales or offers for sale of securities unless a registration statement (including a prospectus that meets statutory requirements) has been filed with the U.S. Securities and Exchange Commission ("**SEC**") or unless an exemption from such registration is available. Most securities offerings by European issuers are conducted in reliance on one or more exemptions from the registration requirement under Section 5 of the Securities Act. In particular, substantially all high yield bond offerings in Europe are conducted as private placements to institutional investors in certain jurisdictions, including (i) in the United States exclusively to so-called "**qualified institutional buyers**" or "**QIBs**" in reliance on Rule 144A under the Securities Act ("**Rule 144A**") and (ii) outside of the United States in reliance on Regulation S under the Securities Act ("**Regulation S**" or "**Reg. S**").

Rule 901 of Reg. S contains a general statement of the applicability of the registration requirements of the Securities Act. It clarifies that any offer, offer to sell, sale, or offer to buy that occurs "within the United States" is subject to the registration requirements of Section 5 of the Securities Act while any such offer or sale that occurs "outside the United States" is not subject to Section 5. The determination as to whether a transaction occurs "outside the United States" will be based on the facts and circumstances of each case.

Helpfully, Reg. S also contains a number of more specific "safe harbor" provisions, including most notably the safe harbor provided by Rule 903 of Reg. S whereby an offer or sale of a security is deemed to occur "outside the United States" if (i) the offer or sale are made in "**offshore transactions**" and (ii) no "**directed selling efforts**" are made in the United States by the Issuer, the Initial Purchasers, any other distributor, any of their respective affiliates, or any person acting on their behalf. "**Directed selling efforts**" means any activity under taken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the U.S. for any of the securities being offered in reliance on Reg. S, and it is therefore necessary for the U.S. securities lawyers involved in an offering to analyze any relevant activity or communication in terms of its audience, timing and content as well as in light of both the various exceptions included the definition of "directed selling efforts" and the relevant SEC staff positions.

The requirements that offers or sales are made in offshore transactions and not involve any directed selling efforts apply to any offering intended to fall within one of the safe harbors provided by Reg. S. However, in order to qualify for a given safe harbor, certain additional requirements (e.g. the implementation of additional offering restrictions and the imposition of a "distribution compliance period") may have to be met as well. These requirements vary depending principally on the status of the Issuer and are generally least restrictive when it is least likely that securities offered abroad will flow into the U.S. market (Category 1) and most restrictive when adequate information about the Issuer is not publicly available in the United States and existing potential U.S. market interest is sufficient (i.e. there is so-called "**substantial U.S. market interest**" or "**SUSMI**" with respect to the relevant securities) to suggest that offerings of the Issuer's securities outside the United States may not come to rest abroad (Category 3). When adequate information about the Issuer is publicly available in the United States (Category 2), the concerns about securities flowing into the U.S. market are reduced, and the restrictions fall between these two extremes.

Rule 144A provides a safe harbor that permits resales of securities (including resales by the Initial Purchasers in a securities offering) only to qualified institutional buyers in the United States. "**Qualified institutional buyers**" include various enumerated categories of sophisticated institutional investors with at least $100 million of securities of non-affiliates under management as well as SEC-registered broker-dealers owning and investing at least $10 million in securities of non-affiliates. In addition, to be eligible for the Rule 144A safe harbor, purchasers must be notified that a proposed sale is made pursuant to Rule 144A (typically by way of appropriate legends and disclaimers in the offering memorandum) and the relevant securities must (i) not be of the same class as securities listed on a U.S. exchange or quoted on a U.S. automated inter-dealer quotation system, (ii) not be convertible or exchangeable into listed or quoted securities with an effective premium of less than 10%, and (iii) not be issued by an open-end investment company. Finally, holders of the relevant securities and prospective purchasers designated by the holders must have the right to obtain from the Issuer, certain "reasonably current" information about the Issuer. Because resales of securities pursuant to Rule 144A (like any other offers and sales of securities in the United States) are fully subject to the liability / anti-fraud provisions under the U.S. securities laws (including Rule 10b-5 under the U.S. Securities Exchange Act of 1934, as amended (the "**Exchange Act**")), it is market practice to provide disclosure in connection with a Rule 144A offering that is substantially similar to the disclosure required for an SEC-registered offering, both in terms of quality and scope. See also "Key Documents–Legal Opinions and Disclosure Letters" above.

European Securities Law Considerations

Across the European Economic Area (the "**EEA**"), Directive 2003/71/EC (as amended from time to time, including by Directive 2010/73/EU, the "**Prospectus Directive**") has harmonized the requirements for the preparation, approval and publication of prospectuses for securities offered to the public or admitted to trading on a "**regulated market**" situated or operating within a member state of the EEA.

In particular, Article 3 of the Prospectus Directive prohibits offers of securities to the public in any EEA member state that has implemented the Prospectus Directive unless a "prospectus" has been published in, or published elsewhere and notified to, that member state in accordance with the Prospectus Directive. Similarly, EEA member states must ensure that any admission of securities to trading on a "regulated market" situated or operating within their territories is subject to the publication of a prospectus. Pursuant to Article 13 of the Prospectus Directive, no prospectus must be published until it has been approved by the "**competent authority**" of the "**home member state**" of the Issuer. If the debt securities proposed to be issued have a minimum denomination of at least €1,000, the Issuer can choose to have its prospectus approved by the competent authority either (i) where it has its registered office (if an EU entity), (ii) where it is making the offer to the public, or (iii) where it is making an application for admission to trading on a regulated market. The "**competent authorities**" for purposes of the Prospectus Directive include the UK Listing Authority (UKLA) / Financial Conduct Authorit y (FCA) in the United Kingdom, the Commission de Surveillance du Secteur Financier (CSSF) in Luxembourg, the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) in Germany and the Central Bank of Ireland (CBI) in Ireland, to name just a few.

Provided the relevant securities will not be admitted to trading on a regulated market within the EEA, an offer of securities to the public is exempt from the requirement to publish a prospectus in accordance with the requirements of the Prospectus Directive if (i) it is an offer to qualified investors only, (ii) the offer is made to fewer than 150 persons (other than qualified investors) per EEA member state, (iii) the minimum consideration paid by any person is at least €100,000, (iv) the securities are denominated in amounts of at least €100,000 (so-called "**whole-sale debt exemption**"), (v) the total consideration is not more than €100,000, or (vi) the total consideration for securities offered in the EEA is less than €5 million.

Substantially all high yield bonds in Europe are offered in minimum denominations of €100,000 and are listed on "**unregulated markets**" (i.e. "**exchange-regulated markets**") only, in particular on either the Euro MTF Market of the Luxembourg Stock Exchange or the Global Exchange Market of the Irish Stock Exchange. This saves the time and effort involved in getting the offering memorandum approved as a "prospectus" by the competent authority in the relevant EEA member state in accordance with the requirements of the Prospectus Directive, a process which can easily take a month or more from submission of the first draft document, depending on the relevant member state's competent authority. Instead, the offering memorandum will only have to be reviewed by the relevant stock exchange for compliance with the relevant stock exchange listing requirements, which typically generates fewer comments and takes far less time (i.e. just a few days).

The High Yield Covenant Package

This section provides a high-level overview of some of the general principles and key covenants that Issuers will have to understand when negotiating and agreeing a traditional high yield covenant package. However, it is critical that the Issuer's senior management team carefully reviews and analyses (with the support of its legal counsel) the full contractual terms of any high yield bonds as described in the "Description of the Notes" section of the offering memorandum to ensure that the covenant package sufficiently accommodates the specific operational needs of the Issuer.

GENERAL OBSERVATIONS

What are the overall objective and process of negotiating a high yield covenant package?

The overall objective in negotiating a high yield covenant package is to ensure (i) appropriate protections for the future holders of the bonds (i.e. there is little point in negotiating a highly "issuer-friendly" package that may be perceived as "off-market" and therefore may potentially not be acceptable to investors or only in return for a higher coupon) while (ii) preserving the necessary operating and financial flexibility to allow the Issuer to execute its business plan.

To be able to do so, it is critical for all parties involved in the drafting process to analyze and to be fully familiar with the Issuer's existing organization and capital structure and with the Issuer's business and strategy. In particular, it will often save significant time and energy during the negotiation process if the parties take sufficient time at the outset of a transaction to consider and explore all reasonably foreseeable transactions and activities that the Issuer may wish to engage in while the bonds will be outstanding and that might be restricted under the covenants, including (i) any future acquisitions, joint ventures or other investments, (ii) any future financing plans (e.g. equipment financings, sale leaseback transactions, receivable financings or other secured debt transactions), (iii) any debt or debt-like arrangements incurred in the ordinary course of the Issuer's business, (iv) any desire to preserve flexibility to refinance or repay all or a part of the bonds early, (v) any requirements to pay dividends or make other distributions to the Issuer's shareholders, (vi) any plans for potential geographic expansion and/or new lines of business, (vii) any need for letters of credit or other credit enhancements, (viii) any expected intra-group funds flows and (ix) potential related party transactions.

As a practical matter, counsel for the Initial Purchasers typically prepares the first draft of the "Description of the Notes" for the offering memorandum, which will closely track (typically largely verbatim) the relevant contractual provisions that will later be included in the Indenture. Although Issuer's counsel will then take a leading role in "marking up" this initial draft, it is essential that senior management of the Issuer and its financial and accounting staff provide detailed input / are closely involved in this process as outside counsel cannot otherwise be expected to fully anticipate the extent to which it may be critical for the Issuer to preserve operating and financial flexibility in certain areas during the term of the bonds. This is particularly important for first-time issuers in an industry for which time-tested, directly comparable bond precedents are scarce or do not exist at all.

How are high yield covenants different from those contained in a typical credit facility?

Other than a typical credit facility, the Indenture will not include any so-called "**maintenance covenants**" which may require the Restricted Group, for example, to maintain certain ratios or to prevent certain conditions from coming in to existence. Instead, high yield covenants impose restrictions on certain types of activities and, in particular, the transfer of value out of the Restricted Group. These "**negative covenants**" or "**incurrence covenants**" typically will only be triggered upon the taking of specified types of actions by the Issuer or its Restricted Subsidiaries and are basically promises by the Issuer and its Restricted Subsidiaries to refrain from certain acts that could hurt the Issuer's ability to meet its obligations under the bonds. In particular, high yield covenants are designed to (i) prevent the Restricted Group from becoming over-leveraged by either borrowing too much or decreasing its assets without concurrently decreasing its debt, (ii) protect the position of the bondholders in the Restricted Group's capital structure by limiting the ability of the Issuer and its Restricted Subsidiaries to effectively subordinate the bonds through structural or lien subordination, and (iii) preserve the assets of the Restricted Group and the Issuer's access to those assets.

The covenants therefore limit (but not prohibit outright) the ability of the Issuer and its Restricted Subsidiaries, among other things, to:

- incur additional indebtedness;
- pay dividends, invest outside the Restricted Group or make certain other "Restricted Payments" that would result in value leakage out of the Restricted Group;
- grant security interests on their assets (securing indebtedness other than the bonds);
- make sales of assets and subsidiary stock;
- enter into affiliate transactions;
- issue guarantees of indebtedness of other members of the Restricted Group;
- engage in mergers or consolidations or sell substantially all the Issuer's or a Guarantor's assets;
- enter into transactions that would fundamentally alter the ownership structure of the Restricted Group; and
- agree to restrictions on distributions and transfers of assets within the Restricted Group.

Issuers that are finance subsidiaries will further be limited to acting in just that capacity. In the event that secured bonds are offered, it is further common for the security package to include pledges of the capital stock of the Issuer held by a parent/holding company of the Issuer. This is to provide bondholders (and any other senior secured creditors) with a "single point of enforcement" should the Issuer ever become unable to meet its obligations under the bonds, i.e. the ability to sell the Issuer group as a whole, rather than having to rely on asset-level enforcement. In that case it may also be necessary for the relevant parent/holding company to agree to preserve its status as a (mere) holding company in accordance with a "Limitation on Parent Activities" covenant. The purpose of this covenant is to avoid situations where a sale of the Issuer in an enforcement scenario could be complicated or delayed because of potentially competing claims by other creditors (e.g. trade creditors) of the parent company.

How do "baskets" work?

The ability of entities within the Restricted Group to engage in the types of transactions that are restricted by a particular covenant will often depend on capacity available under so-called "**baskets**", i.e. one or more carve-outs which exempt certain categories of transactions (often subject to some form of cap) from the general limitation imposed by the covenant.

While many baskets have traditionally been and, in many cases, continue to be "**hard-capped**" (i.e. expressed as specified fixed amounts in the currency of the bonds), most transactions also feature an increasing number of "**soft caps**" or "**grower baskets**" that are expressed as the greater of a fixed amount and a percentage of either Total Assets or Consolidated EBITDA. These soft caps can reward Issuers for strong financial performance and provide them with flexibility for growth over the lifetime of the bonds, which may be particularly helpful to the Issuer in the case of longer-dated bonds and/or where the Issuer is pursuing a growth strategy. At the same time, grower baskets can be perceived by investors as limiting their potential "upside", because the increased flexibility of the Issuer, for example, to incur more debt and/or make additional "Restricted Payments" outside the Restricted Group may also mean a reduced likelihood that the Issuer will significantly deleverage over the lifetime of the bonds. In addition, it may be more difficult for investors to fully assess, for example, the potential for the incurrence of additional debt or the potential for "value-leakage" in the form of Restricted Payments with grower baskets than with hard-capped baskets. Particularly problematic, from a transparency perspective, can be transactions where the supposed "grower element" of a particular basket gives more flexibility/capacity to the Issuer as of the issue date of the bonds than implied by the fixed element.

While grower baskets in the European market have traditionally referenced (and predominantly continue to reference) a proportion of Total Assets, there has been a growing number of transactions in recent years with grower baskets that are instead capped by reference to a proportion of Consolidated EBITDA. Although EBITDA-based grower baskets may well be appropriate for certain situations and issuers, they are generally considered more aggressive and are more commonly associated with "sponsor deals". This is because EBITDA, a non-GAAP measure, is typically more prone to fluctuations than Total Assets and can be more easily manipulated by management, especially in transactions where the definition of EBITDA may contain particularly aggressive add-backs that may give significant discretion to management to adjust EBITDA, for example, to reflect expected cost-savings and synergies or add back certain business optimization expenses or integration costs.

Certain baskets may grow and get depleted over time (e.g. based on accumulated consolidated net income of the Issuer and restricted payments made, respectively, since the date of issuance of the bonds) and/or be "**refillable**", while other baskets may be "**one-time only**". The Issuer would naturally prefer to be able to refill baskets, for example, as Indebtedness incurred under a particular basket is repaid, and refillable baskets have become common.

In addition to specific baskets for specific categories of transactions, covenants may also contain a so-called "**general**" or "**hell-or-high-water**" basket, which may, for example, permit a limited amount of indebtedness to be incurred for any reason or no reason at all. Issuers should guard this basket particularly carefully, as "hell-or-high-water" events tend to occur far more frequently during the lifetime of the bonds than the parties normally expect at the outset. As a general matter, it will always be more advantageous to the Issuer to rely on a general (i.e. "non-basket") exemption to a covenant for a particular transaction or a basket designed for a specific category of transactions, rather than on a general basket.

How long will the restrictions under the covenants apply?

Generally, the covenants will apply for as long as the bonds are outstanding. Other than with relatively common and uncomplicated waivers or amendments under a traditional senior credit facility, waivers or amendments of the terms of a bond typically require the Issuer to solicit consents from a (qualified) majority or possibly all bond holders, which can be costly and time-consuming. It is therefore particularly important to "get every thing right" at the outset.

However, especially for Issuers on the cusp of investment grade, it has become fairly common to negotiate "**fall away covenants**", i.e. a provision in their bond terms whereby most of the key high yield covenants will automatically "fall away" (or more accurately, be suspended), if and for as long as the bonds receive an investment grade rating from the relevant rating agencies (i.e. typically Moody's and Standard & Poor's) and no default has occurred and is continuing. In that case, only the basic (i.e. less restrictive) covenants customary for investment grade bonds would continue to apply, such as the liens, mergers, change of control and reporting covenants.

What law should govern the bonds?

High yield bonds originally developed in the United States and most traditional "high yield" bonds (including high yield bonds issued by European issuers) continue to be governed by New York law, although there is a growing body of precedents for "local law" governed high yield bonds in certain jurisdictions (most notably German law governed high yield bonds by German issuer). However, there is a broad universe of sub-investment grade or unrated bonds issued under documentation that is more commonly associated with investment grade bonds (e.g. English law governed Eurobond-style documentation) and lacks some or all of the standard "high yield" covenants described below. Sometimes these bonds are labeled as "high yield lite".

Although New York law will be the default position for true "high yield" bonds in most situations, to the extent an Issuer has a strong preference for its bonds to be governed by the laws of another jurisdiction, the parties should discuss the legal and practical feasibility and implications of any such request at the outset of a transaction. Whether or not it is feasible and/or advisable to have the high yield bonds of a particular issuer be governed by a law other than New York law will depend on a variety of factors, including "marketability" considerations and the target investor audience for the particular offering. Because true high yield bonds are traditionally New York law governed, international high yield investors are familiar and comfortable with New York law and the jurisdiction of the courts in New York to decide disputes under the bonds. This may not be the case for many "local" jurisdictions. Due to the long history of high yield bonds and well established case law in New York, New York law does offer the real advantage over many "local laws" that it is "tried and tested" and therefore offers greater legal certainty to both the Issuer and investors, in particular in case it ever becomes necessary to restructure the bonds. On the other hand, many non-U.S. issuers may be reluctant to agree to the jurisdiction of the New York courts to decide potential future disputes with holders of their bonds and may generally be more familiar and comfortable with their own, local law. Of course, the choice of a governing law other than New York law and the jurisdiction of any local courts must not mean that investors give up protections that are standard under New York law governed high yield bonds or that it will be more difficult (either as a matter of law or in practice) for investors to enforce their rights under the bonds.

Irrespective of which law governs the bonds, the substance and wording of the typical high yield bond covenants as described below will be substantially similar, and it should therefore normally be possible to switch (i.e. change the governing law) without too much extra work at a later stage in the offering process, i.e. without the need to broadly revisit previously agreed commercial points. However, common provisions that may need to be modified / be impacted by (mandatory) statutory local law provisions, depending on which law governs the bonds, include provisions dealing with events of default and collective decisions by bond holders, for example, to call the bonds following an event of default, to grant waivers or agree to amendments of the terms of the bonds. Those mandatory local law provisions relating to the process for calling bond holder meetings, quorum requirements and approval thresholds, for example, may differ significantly from relevant US statutory provisions and/or market practice.

TENOR AND REDEMPTION

Among the key commercial decisions the Issuer will be required to make and that will typically feature prominently even in its initial discussions with prospective Initial Purchasers, are the decision which bond tenor(s) it wants to achieve in a particular offering, whether it wants to issue fixed or floating rate notes and what "call protection" it is prepared to offer investors.

This section is merely intended to provide an overview of some of the most important considerations and key redemption provisions typically found in high yield bond terms. While fairly clear market standards exist for some of the provisions described below, the specific tenor(s) and redemption features for a particular high yield bond offering will ultimately

always reflect, at least to some extent, the outcome of commercial discussions and be affected by a variety of factors, including prevailing market conditions around the time of the offering, recent precedent transactions, the nature of the Issuer's business (e.g. cyclical or non-cyclical), the credit quality of the Issuer, whether or not the transaction is a "sponsor deal", the overall maturity profile of the Issuer's debt, the Issuer's business plan and strategic priorities and other factors.

Tenor and Call Protection; Optional / "Make-Whole" Redemption

As described under "Introduction–Why High Yield?" above, the mutual benefits of high yield bonds (compared to traditional credit facilities) for issuers and investors include (i) the ability of issuers to secure longer-term financing at (typically) fixed interest rates and (ii) the opportunity for investors to benefit from higher interest rates and from potential capital appreciation, i.e. a potential increase in the secondary market prices of their bonds, for example, as a result of an improvement in the credit quality of the issuer and/or a general decline in market interest rates. Fixed rate notes typically account for the vast majority of European high yield bond issuances in any given year, with floating rate notes and/or PIK ("payment-in-kind") notes typically accounting for only small percentages of overall issuances.

The downside, from the Issuer's perspective, of the ability to secure long-term financing at fixed interest rates is that the terms of the high yield bonds will restrict the ability of the Issuer to prepay / refinance the high yield bonds prior to the scheduled maturity date(s) of the bonds. Rather than an outright prohibition of any prepayments, however, typical high yield bond terms will contain "**call schedules**" pursuant to which the Issuer may redeem the bonds, on any one or more occasions, at different redemption prices during different periods (so-called "**Optional Redemption**").

This includes so-called "**non-call periods**" following the initial issuance of the bonds during which the bonds may only be redeemed at a redemption price equal to 100% of the principal amount of the bonds that are being redeem plus an "Applicable Premium" and accrued and unpaid interest and any "Additional Amounts" (see "–Early Redemption for Tax Reasons" below) to but excluding the redemption date (so-called "**Make-Whole Redemption**"). The "**Applicable Premium**" is intended to fully compensate (i.e. "make whole") investors for the loss of their fixed rate investment in the bonds prior to the end of the non-call period and is calculated as the greater of (i) 1.0% of the principal amount of the bonds and (ii) the present value of (x) the specified redemption price at the end of the non-call period and (y) all scheduled interest payments under the bonds until such date. Exercising this option can therefore be very expensive / unattractive for the Issuer, especially early-on during the non-call period, as it will immediately have to repay the principal of the bonds upon redemption and also have to immediately pay the present value of all future interest payments until the end of the non-call period. Make-Whole Redemption, however, is not a feature that is unique to high yield bonds. On the contrary, while (fixed rate) investment grade bonds typically have no call schedules at all and are therefore (expressly or by default) "make-whole for life", the typical call schedules in high yield bond terms are designed to strike a balance. On

the one hand, they give reasonable "**call protection**" to investors for at least a number of years post-issuance. On the other hand, they give the Issuer an incentive (i.e. the ability to do so without any/significant penalties) to make use of available market windows / opportunities to refinance the high yield bonds ahead of the scheduled maturity date, rather than take the risk of leaving a refinancing to the last minute to save costs. Increasing the likelihood of full repayment of the principal of the bonds, of course, is also in the interest of investors, especially given the "sub-investment / speculative grade" nature of investments in high yield bonds.

The duration of the non-call period will differ depending on the tenor of the bonds, i.e. the longer the tenor of the bonds, the longer typically the non-call period. In the European market, the standard non-call periods for fixed rate notes were traditionally 2 years for 5 and 6-year bonds, 3 years for 7-year bonds, 4 years for 8-year bonds and 5 years for 10-year bonds, i.e. "5nc2", "6nc2", "7nc3", "8nc4" or "10nc5". Following the expiration of the non-call period, the Issuer will then have the option to redeem the bonds at a specified premium (expressed as a fixed percentage that is calculated as a percentage of the coupon, rather than a "make-whole" amount), which will decrease / "step-down" each year until the Issuer is able to redeem the bonds at par. The traditional call schedule for 7-year bonds, for example, would normally specify a redemption price with a "first call premium" (i.e. for the year immediately following the expiration of the 3-year non-call period) of 75% of the coupon, which would step down to 50%, 25% and 0%, respectively, during years 5, 6 and thereafter. This standard, however, has gradually been eroded in recent years in two ways. First, a number of Issuers have been able to issue bonds with shorter non-call periods, for example, 5-year bonds with just an 18-month or even just a 1-year non-call period, or 8-year bonds with 3-year non-call periods. In addition, many bonds now (also) feature shortened call schedules. For example, many 7 and 8-year bonds now feature call schedules with a first call premium of 50% of the coupon, i.e. skipping the "75% step" and effectively removing all call protection for investors for several years prior to the scheduled maturity date.

Other than for fixed rate notes, the standard non-call period in the European market for floating rate notes is just one year, irrespective of the tenor of the floating rate notes. Until a few years ago, the standard call schedules for floating rate notes would then typically provide for optional redemption at 102%, 101% and 100%, respectively, of the principal amount of the notes to be redeemed in years 2, 3 and thereafter. The current European market standard is for the redemption price to step down immediately to 101% and 100%, respectively, of the principal amount of the notes to be redeemed in year 2 and thereafter.

To exercise its option to early redeem all or a part of its bonds, the Issuer must typically give holders of the bonds not less than 30 nor more than 60 days' prior notice, although certain bond terms provide for shorter minimum notice periods (e.g. not less than 10 days).

The strength (or weakness) of the call protection afforded to investors by these provisions and the other redemption provisions described below can significantly impact the overall economics for investors, as any additional flexibility afforded to the Issuer to redeem the bonds prior to the scheduled maturity date (i.e. in terms of lower redemption prices) directly impacts the potential upside for bond investors in terms of potential capital appreciation. Stated differently, without any call protection, the Issuer could just refinance the bonds at lower interest rates whenever it

has an opportunity to do so, for example, as a result of an improvement in the credit quality of the issuer and/or a general decline in market interest rates. Bond investors, on the other hand, would be locked into the "fixed" interest rate agreed at issuance of the bonds until the bonds mature (i.e. absent early termination of the bonds following occurrence of an event of default or the occurrence of a change of control), even if the credit quality of the Issuer subsequently deteriorates and/or market interest rates increase.

Equity Clawback Option

As a potentially important exemption from the general rule that the Issuer may only redeem fixed rates notes during the relevant non-call period by way of Make-Whole Redemption as described above, most fixed rate notes terms will provide that the Issuer may, during the non-call period, on any one of more occasions redeem up to a certain percentage (i.e. traditionally up to 35%) of the principal amount of the notes with the net cash proceeds of one or more qualifying "Equity Offerings" at par plus 100% of the coupon (rather than at par plus a full "make-whole premium"), provided (i) at least a minimum percentage of the principal amount of the relevant bonds (i.e. traditionally the balance / 65%) remains outstanding after each such redemption and (ii) the redemption occurs within a specified number of days (i.e. traditionally 90 days and sometimes 120 days) upon not less than 30 nor more than 60 days' notice (so-called "**Equity Clawback Option**"). The original rationale for this exemption, presumably, was to give the Issuer the ability and an incentive to conduct an equity offering (potentially an IPO) after the high yield bond issuance and to deleverage by replacing some of its debt with equity, which should improve the Issuer's credit quality/rating and thereby also benefit bond investors (i.e. by way of capital appreciation of their remaining bonds).

This former European market standard, however, has also gradually been eroded (from an investor's perspective) in recent years in a number of ways. First, a (significant) majority of European high yield bonds now cap the Equity Clawback Option at 40% of the original principal amount (rather than at 35%), with some bonds providing for an even higher cap (e.g. 45%). In addition, rather than requiring that at least the balance (i.e. 60%) of the original principal amount of the bonds remains outstanding after any redemption pursuant to the Equity Clawback Option, a number of bonds only require that 50% of the original principal amount remain outstanding. Furthermore, some European high yield bond terms contain expanded definitions of what constitutes an "**Equity Offering**" for purposes of the Equity Clawback Option. Rather than just a bona fide underwritten public offering of capital stock of the Issuer or of a parent company of the Issuer (the proceeds of which are contributed to the common equity of the Issuer), for example, such expanded definitions may include equity offerings of any other entity and/or may not even be limited to actual equity offerings (i.e. may even include certain debt offerings). Finally, a significant minority of European high yield bonds have now extended the time period following completion of the Equity Offering during which the Equity Clawback Option is available, i.e. to up to 180 days (rather than 90 days or 120 days).

Given the short, one year non-call period customary for European floating rate notes, the terms of floating rate notes do not normally contain an Equity Clawback Option.

10% at 103% Call Option

The "10% at 103%" call option is another potentially very significant exemption from the general rule that the Issuer may only redeem fixed rates notes during the relevant non-call period by way of Make-Whole Redemption. If included in the bond terms, this provision gives the Issuer the option to redeem, during each 12-month period during the non-call period, up to 10% of the original aggregate principal amount of the bonds at a redemption price equal to 103% of the principal amount of the Notes redeemed, plus accrued and unpaid interest and any Additional Amounts to but excluding the redemption date. The provision does not normally allow the Issuer to carry forward any unused amounts to any subsequent 12-month periods and it also should not normally extend beyond the end of the non-call period, but it still significantly weakens the traditional call protection for fixed rate notes.

The prevalence of the 10% at 103% call option in the European market appears to fluctuate significantly from year to year, depending on the overall strength of the high yield market. However, even in a strong market environment, its inclusion is considered by many as "aggressive" and as characteristic of "sponsor deals". Its inclusion is therefore typically confined to a relatively small (but sometimes significant) minority of senior secured notes issuances.

Early Redemption for Tax Reasons

This standard provision, which is also a common feature of many investment grade bonds, works in tandem with another standard provision which requires the Issuer, subject to certain customary exemptions, to make certain "gross-up" payments to bondholders (i.e. pay so-called "Additional Amounts"), if it is ever required to withhold or otherwise deduct, under the tax laws of certain "Relevant Tax Jurisdictions", any amounts from amounts otherwise due to bondholders. The "**Additional Amounts**" payable are intended to ensure that the net amounts actually received by bondholders after any such required withholding or deduction are equal to the respective amounts of principal and interest that the bondholders would have been entitled to receive in the absence of the relevant requirement to make a withholding or deduction. The "**Relevant Tax Jurisdictions**" typically include the jurisdiction(s) in which the Issuer and/or any relevant Guarantor(s), as applicable, are organized and any jurisdictions through which payments are made by or on behalf of the Issuer and/or any relevant Guarantor(s).

Since subsequent (i.e. after the issue date) changes in tax laws or regulations are outside the Issuer's control and the payment of "Additional Amounts" could become prohibitively expensive, high yield bond terms will invariably give the Issuer the option to early redeem all (but not just a portion) of its bonds if it ever does become obligated to pay Additional Amounts.

CHANGE OF CONTROL AND PORTABILITY

The Change of Control covenant protects bondholders from fundamental changes in the ownership structure of the Issuer and any resultant changes in how the Issuer may conduct its business. Investors have traditionally insisted on a "change of control put option", because the presence (or absence) of any controlling shareholders and their identity (and track record / reputation) may be a significant factor in the investors' overall investment decision. This can

be particularly true for portfolio companies of well-known private equity sponsors that may be repeat players in the high yield or wider leveraged finance markets. A “committed” / “stable” shareholder (group) and/or the continuing, active involvement of one or more “founders”, however, are often also presented prominently as a key “strength for many other closely-held (e.g. family-owned) companies.

Upon the occurrence of any of a series of specified Change of Control events, the Issuer is therefore typically required to make an offer to bondholders (a “**Change of Control Offer**”) to repurchase the bonds at a specific percentage (typically 101%) of their principal amount.

The definition of “**Change of Control**” (i.e. the specific list of events that will constitute a Change of Control) can be heavily negotiated between the Issuer and the Initial Purchasers (especially where an IPO or partial sale of the Issuer prior to the scheduled maturity event are viewed as a realistic scenario), but will ordinarily include:

- the acquisition by a person or group of persons (other than “**Permitted Holders**”) of more than a specified percentage of the Issuer’s voting capital (which percentage may be significantly below 50% once the Issuer has become a public company);
- a change in the majority of the board of directors of the Issuer, unless approved by the outgoing directors; and
- certain dispositions of all or substantially all of the assets of the Issuer and its Restricted Subsidiaries.

While the identity of the Issuer’s (controlling) shareholders may be an important factor for certain investors in their investment decision, the Change of Control covenant can, under certain circumstances, severely limit the ability of the Issuer and its owners, as applicable, to sell all or part of the Issuer, to raise additional equity from new investors (either to fund potential expansion projects or to support the Issuer during a period of economic hardship) or to engage in a strategic merger, to name just a few examples of transactions that could potentially result in a Change of Control. Of course, bondholders are far more likely to exercise their right to sell their bonds back to an Issuer in connection with a Change of Control Offer if the secondary market price of the bonds is below the mandatory (101%) redemption price payable by the Issuer in the Change of Control Offer, for example, because of a deterioration in the business and credit quality of the Issuer or because of a general increase in market interest rates. To be able to complete a potential Change of Control transaction under such circumstances, the Issuer would have to be prepared to potentially refinance all its outstanding bonds, either with the proceeds of a new bond offering or other debt or equity. This will not only potentially involve significant time, effort and expense for completing the necessary fundraising, but also refinancing the bonds at then prevailing (higher) market rates, i.e. if debt financing is available at such time at all.

The desire for “**portability**” of a bond (i.e. the ability to transfer control of the Issuer to new owners without the requirement to make a Change of Control Offer) can therefore be a key commercial point for many issuers and their owners. This may be particularly the case for private equity sponsors,who are in the business of buying and selling companies. As a result, there has been a growing trend in European high yield terms in recent years to include

additional conditions (so-called "**Double-Triggers**") for when a Change of Control event triggers the requirement to make a Change of Control Offer, thereby providing Issuers and their owners greater flexibility to engage in certain Change of Control transactions / exit their investments.

These Double Triggers typically take the form of either (i) a condition that a Change of Control also results in a ratings decline or ratings withdrawal within a specified period following the Change of Control (so-called "**Ratings Decline Double Trigger**") or (ii) a condition that the Issuer also fails to meet a specified leverage test (so-called "**Leverage-Based Portability**"), both immediately prior to the relevant Change of Control event and immediately thereafter and giving *pro forma* effect thereto. As a practical matter, in the case of Leverage-Based Portability, the relevant Double Trigger is typically built into the definition of "**Specified Change of Control Event**" which is deemed not to constitute a "Change of Control". In the case of bonds with a Ratings Decline Double Trigger, the requirement for the Issuer to make a Change of Control Offer is typically tied to the occurrence of a "**Change of Control Triggering Event**", "**Put Event**" or similarly defined event, which will also require the occurrence of a "Ratings Event" or "Ratings Decline" as a result of and/or within a specified period after the occurrence of a Change of Control.

Originally fairly rare and almost exclusively limited to "sponsor deals", Double Triggers have been consistently included in a significant minority (i.e. up to around one third) of European high yield bond issuances in recent years, including in non-sponsor / corporate transactions. In almost all such transactions, the relevant bonds will be "**portable for life**", and the relevant bond terms typically also do not impose any further specific conditions, for example, with regard to the identity of the new owners / transferees or with regard to the capital structure of the Issuer following the Specified Change of Control Event or Change of Control Triggering Event, as applicable. Subject to the relevant leverage test or the non-occurrence of a relevant ratings decline, as applicable, this means that the Issuer and/or its owners may typically engage in a Change of Control transaction at any time during the tenor of the bond without being required to make a Change of Control Offer.

On the other hand, the vast majority of bond terms that include Leverage-Based Portability typically permit only a single Specified Change of Control Event, so that any subsequent/ further Change of Control transactions would again require a Change of Control Offer. Historically, for many bonds that provide for Leverage-Based Portability, the relevant leverage level in the definition of "Specified Change of Control Event" also tightened/stepped down (e.g. by half a turn) over time (e.g. after 18 or 24 months), which made it harder for the Issuer to achieve portability / gave the Issuer and its owners an additional incentive to reduce leverage. Recently, however, flat leverage tests (i.e. without a step down) appear to have become more common, and there have also been a significant number of transactions where the bonds appear to have been either immediately portable or where portability appears to have been within easy reach, based on the relevant leverage tests and the disclosed opening leverage.

The prevalence of Ratings Decline Double Triggers vs. Leverage-Based Portability appears to fluctuate significantly with prevailing market conditions, with Leverage-Based Portability traditionally viewed by many investors as more aggressive and potentially more problematic as it may allow Issuers and their owners to take various actions to artificially reduce their leverage to or below the relevant level specified in their bond terms to avoid triggering the requirement for a

Change of Control Offer. In particular, without appropriate protections in the relevant bond terms, sponsors may be able to (temporarily) reduce leverage on the relevant determination date to the required level by injecting equity or subordinated shareholder debt into the Issuer, solely for the purpose of meeting the relevant leverage threshold in the definition of "Specified Change of Control Event". Rather than permanently reducing leverage, the sponsors or new owners may then be able to extract the injected cash again shortly after the relevant Change of Control event / determination date (so-called "**round-tripping**"), by making "Restricted Payments" (e.g. in the form of a dividend payment or repayment of subordinated shareholder debt) using available capacity under the "Net Income Basket" / "Build Up Basket" or other (standard) baskets in the Restricted Payment covenant, such as the basket permitting certain Restricted Payments made out of the proceeds of a "substantially concurrent" equity contribution or subordinated shareholder debt, a leverage-based Permitted Restricted Payment basket or even a "general" Restricted Payment basket or basket for "Permitted Investments". See also "–Limitation on Restricted Payments" below.

Concerns about potential round-tripping are particularly valid where the definition of Specified Change of Control Event relies on a net leverage test. In such cases, there will not even be a need for the Issuer to use any newly injected cash to actually repay any indebtedness. However, even if the definition of Specified Change of Control Event relies on a gross leverage test, so that the injected cash will actually have to be used to repay outstanding debt to reduce the relevant leverage ratio, the Issuer may be able to simply use the newly injected cash to temporarily repay and subsequently re-borrow amounts outstanding under an existing (revolving) credit facility.

One common (at least historically) form of protection against round-tripping is to simply reset the Build Up Basket (as defined under "–Limitation on Restricted Payments–the "Net Income Basket" / "Build UP Basket" Exemption" below) to zero upon the occurrence of a Change of Control or at least upon the occurrence of a Specified Change of Control Event. However, this form of round-tripping protection appears to have become less common and would also not prevent round-tripping through the use of any of the other Permitted Restricted Payment baskets described below, in particular the basket permitting Restricted Payments made out of the proceeds of a "substantially concurrent" equity contribution or subordinated shareholder debt. More recently, some bonds have therefore relied on an alternative approach to prevent round-tripping via the Build Up Basket and the "substantially concurrent" Permitted Restricted Payment basket. Pursuant to this approach, "**Excluded Amounts**" are carved out / excluded from both baskets to the extent (i) such amounts were received in contemplation of, or in connection with, an event that would otherwise constitute a Change of Control, (ii) the purpose of, or the effect of, the receipt of such amounts was to reduce the relevant leverage ratio so that the Change of Control would qualify as a Specified Change of Control Event, and (iii) no Change of Control Offer is made in connection with the Change of Control. Many recent transactions, however, did not only provide for Leverage-Basked Portability based on a net leverage test, but also did not feature any such protections against round-tripping.

To the extent the Issuer and the Initial Purchasers agree that the terms of a particular bond should include Leverage-Based Portability, one potentially very important question (that may nevertheless be overlooked) is the determination date on which the relevant leverage ratio

must be calculated for the purpose of whether or not a proposed Change of Control transaction qualifies as a "Specified Change of Control Event". This is because there may be a significant time-lag between the date an Issuer or its owners may be contractually committed to a proposed Change of Control transaction and the date on which all closing conditions (e.g. competition and other regulatory approvals or any required third-party consents) are satisfied and the Change of Control transaction is actually completed. The Issuer and its current and future owners, of course, need certainty about the status of the bonds (i.e. whether they are required to conduct a Change of Control Offer and to potentially refinance the bonds) on the date on which definitive agreements with regard to the proposed Change of Control event are entered into. In some bond terms, the definition of "Specified Change of Control Event" therefore specifies that the Issuer shall make the relevant calculations on such date.

LIMITATION ON INDEBTEDNESS

The purpose of the Limitation on Indebtedness covenant is to (i) limit the amount of additional indebtedness that may be incurred by the Restricted Group unless cash flow is sufficient to service all indebtedness and (ii) control structural subordination by specifying which entities within the Restricted Group may incur any such additional indebtedness. See also "Introduction–Subordination–Structural Subordination" above. The covenant includes a general prohibition on the incurrence of indebtedness unless a ratio test is satisfied (so-called "**Ratio Debt**") as well as a fairly extensive list of exemptions from such general prohibition (so-called "**Permitted Debt**").

"**Indebtedness**" is generally broadly defined to include not only indebtedness for borrowed money, bonds, debentures, notes or other similar instruments, but also guarantees, letters of credit, capital lease obligations, hedging obligations, disqualified stock of the Issuer, preferred stock of Restricted Subsidiaries, certain obligations to pay the deferred (for more than a specified maximum period) and unpaid purchase price of property (other than ordinary course trade payables) and even indebtedness of third parties that is secured by liens on any assets of the Issuer or any Restricted Subsidiary.

The "Ratio Debt" Exemption

By far the most common ratio used in the Limitation on Indebtedness covenants of European high yield bonds to test the ability of the Issuer to incur additional Ratio Debt is the "Fixed Charge Coverage Ratio". Ratio tests based primarily on a leverage ratio (i.e. a ratio of debt to EBITDA) are far less common in European high yield bonds, but may be particularly appropriate for Issuers in capital intensive industries such as telecommunications, cable and media. Under the ratio test, the Issuer and its Restricted Subsidiaries (or most often, only those Restricted Subsidiaries that also are Guarantors, to avoid structural subordination of the bonds) will only be permitted to incur additional indebtedness, subject to certain exemptions, so long as the Fixed Charge Coverage Ratio is at least equal to a specified ratio on a *pro forma* basis after giving effect to the incurrence of the additional indebtedness and the application of the proceeds thereof. The exact level of the required Fixed Charge Coverage Ratio is negotiated for each bond between the Issuer and the

Initial Purchasers and will therefore vary. In Europe, however, the required ratio commonly ranges between 2.0 and 2.5 to 1.0.

The "**Fixed Charge Coverage Ratio**" serves as an indication of the capacity of the Restricted Group to generate sufficient amounts of cash on an ongoing basis to service its fixed obligations, such as regular interest payment obligations under its outstanding indebtedness, and it is typically calculated as of any relevant determination date by dividing (i) Consolidated EBITDA of the Restricted Group for the immediately preceding four quarters for which financial statements are available by (ii) the sum of the Fixed Charges of the Restricted Group for the same period and, in each case, by giving *pro forma* effect to the incurrence of indebtedness proposed to be incurred, incurrence and retirement of other debt from the beginning of the four-quarter period until the determination date and acquisitions and dispositions during the same period. The definition of "**Consolidated EBITDA**" and related definitions are typically complex and often uniquely tailored to the Issuer's industry accounting approach, but the starting point for the definition of Consolidated EBITDA is generally Consolidated Net Income with Fixed Charges, income taxes as well as depreciation and amortization expense added back to it. The definition of "**Consolidated Net Income**", in turn, typically contains a series of detailed, negotiated adjustments or add-backs to the related standard accounting measure under the generally accepted accounting principles (GAAP) applied by the Issuer in preparing its financial statements (e.g. IFRS, US GAAP, HGB, ...). These adjustments / add-backs may include, for example, adjustments for certain extraordinary items and non-cash items, pro forma adjustments related to permitted investments, acquisitions or divestments and adjustments for related expenses as well as add-backs for certain financing expenses. "**Fixed Charges**" primarily include (i) interest expense (cash and non-cash), (ii) amortization of debt issuance costs and original interest discount, (iii) the interest component of capital leases, (iv) dividends on preferred stock and (iv) net payments under hedging obligations. It may also include, for certain types of businesses, other charges or expenses (e.g. for retail- and real estate-based Issuers, Fixed Charges could also include rental expenses). In any case, it is critical for the Issuer, its senior management and accounting staff as well as its legal advisers to carefully review all relevant definitions.

Senior Secured Notes, Secured Leverage Ratio Test and Collateral Dilution

In addition to using the Fixed Charge Coverage Ratio test as the primary test to determine whether the Issuer is permitted to incur additional (unsecured) indebtedness, the Limitation on Indebtedness covenants of a (significant) majority of senior secured high yield bonds in Europe also contain some form of secured leverage ratio test (i.e. using some form of ratio of secured debt to EBITDA) to determine whether the Issuer may incur additional secured Ratio Debt. Because any unsecured indebtedness would effectively be subordinated to the senior secured bonds (and any other senior secured indebtedness of the Issuer), at least with regard to the relevant collateral, raising any such additional unsecured indebtedness may be prohibitively expensive (if not impossible) in practice, even if technically permitted under the Ratio Debt Exemption. For many of the relevant Issuers, the relevant secured leverage ratio test (rather than the Fixed Charge Coverage

Ratio test) will therefore determine the true, factual limit of their ability to incur additional Ratio Debt. This is particularly true if the Issuer proposes to incur additional senior secured indebtedness as Ratio Debt that is intended to rank *pari passu* with its existing senior secured indebtedness, would benefit from "Permitted Collateral Liens" over the same collateral and would therefore be "collateral dilutive" to the existing senior secured indebtedness (including the senior secured bonds) of the Issuer. In fact, the ability of the Issuer to incur additional secured Ratio Debt and the ability to generally incur incremental collateral dilutive secured debt are inextricably linked as the definition of "Permitted Collateral Liens" typically includes any Liens securing Ratio Debt. See also "–Limitation on Liens–Permitted Collateral Liens" below.

While the majority of senior secured high yield bonds in Europe do feature a secured leverage ratio test to determine the ability to incur incremental, secured / collateral dilutive Ratio Debt, the level at which the relevant ratio is set can vary widely from as low as 1.75x to 5.5x or even higher, with the average ratio level typically set somewhere between 3.25x and 3.75x, depending on market conditions. The actual level at which the relevant ratio will be set is subject of negotiations between the Issuer and the Initial Purchasers and will depend on a number of factors, such as on the opening leverage of the relevant Issuer, prevailing market conditions / input from investors as well as any relevant requirements of the rating agencies. A secured leverage ratio test set at 4.0x or higher may be considered more "aggressive" by some and may be indicative of a sponsor deal.

How exactly the relevant secured leverage ratio is to be calculated, however, is potentially much more important than the more superficial question of the level at which it is ostensibly set. In its most conservative / traditional form, the secured leverage ratio would be calculated as the ratio of (i) the consolidated (gross) indebtedness of the Issuer and its Restricted Subsidiaries that is secured by Liens (including "effectively senior" indebtedness secured with Liens over assets that are not part of the collateral for the senior secured bonds) as of the end of the most recent quarter for which financial statements are available to (ii) the Issuer's Consolidated EBITDA for the immediately preceding four quarters for which financial statements are available. In some definitions, the numerator of the ratio may even contain any indebtedness (including unsecured indebtedness) of non-guarantor Restricted Subsidiaries, as such indebtedness would be "structurally senior" to the senior secured bonds. In such a "comprehensive" definition, the numerator of the secured leverage ratio would capture all indebtedness of the Restricted Group that would potentially compete with (i.e. would be collateral dilutive or effectively or structurally senior to) the senior secured bonds in a potential insolvency of the Issuer. In recent year, however, there have been an increasing number of departures from this conservative benchmark. In particular, the terms of most senior secured bonds do not include the (structurally senior) debt of non-Guarantor Restricted Subsidiaries in the numerator of the secured leverage ratio definition, although the terms of the relevant bonds may generally prohibit the incurrence of additional indebtedness by non-guarantor Restricted Subsidiaries and there may not be any existing indebtedness of non-guarantor Subsidiaries. More importantly, the terms of up to around a third of senior secured bonds only include indebtedness in the numerator of the ratio which is secured on a (*pari passu* / senior) first lien basis on the collateral that also

secures the senior secured bonds, but not any other indebtedness that may be effectively or structurally senior. Finally, the terms of a very significant minority (i.e. typically more than one third) of senior secured bonds use a net leverage ratio test where the numerator of the ratio is calculated net of (uncapped) cash and cash equivalents.

Historically, Issuers were typically not immediately eligible to incur (secured) Ratio Debt at the time of issuance of the bonds, i.e. the relevant (leverage) ratio levels would typically be set at issuance so that the Issuer would either have to deleverage first (e.g. by growing Consolidated EBITDA) or rely on other exemptions (i.e. one or more "Permitted Debt" exemptions) to incur additional (secured) indebtedness. In recent years, however, an increasing number of bonds appear to have given Issuers immediate (or at least very near term) capacity to incur additional (secured) Ratio Debt from the outset, based on the relevant ratios disclosed in the relevant offering memoranda.

Because the Limitation on Indebtedness covenant, like most high yield covenants, is an "incurrence" covenant, it only tests the ratio if the Issuer or a Restricted Subsidiary proposes to incur additional indebtedness. Once properly incurred, an Issuer is permitted to maintain any Ratio Debt even if the Issuer's subsequent financial performance would have prevented it from incurring any such Ratio Debt at a later point in time.

The "Permitted Debt" Exemptions

The Limitation on Indebtedness covenant will also permit numerous categories / baskets of "Permitted Debt" to be incurred by the Issuer, the Guarantors and, typically only to a more limited extent, other Restricted Subsidiaries, in each case regardless of the Restricted Group's financial performance or condition and without the Issuer having to meet the relevant Ratio Debt test(s). The specific categories of Indebtedness covered by these exemptions will be negotiated between the Issuer and the Initial Purchasers. However, common Permitted Debt baskets include, but are not limited to:

- Indebtedness of the Issuer or any Guarantor incurred pursuant to and incompliance with a Credit Facility (so-called "**Credit Facilities Basket**");

Practice Note: Historically, the Credit Facilities Basket was typically hard-capped at a fixed amount. More recently, however, soft caps / grower baskets that are expressed as the greater of a fixed amount and a percentage of either Total Assets or Consolidated EBITDA appear to have become more common. In addition, capacity under the Credit Facilities Basket was typically reduced to the extent any net proceeds of asset sales are used to permanently repaid debt under a Credit Facility pursuant to the Limitation on Asset Sales covenant (so-called "**Asset Sale Ratchet**"), but Credit Facilities Baskets without an Asset Sales Ratchet have also become more common. As in the case of the Ratio Debt exemption, it is a negotiated point whether the Issuer and all Restricted Subsidiaries, or only the Issuer and its Guarantors, may incur indebtedness under the Credit Facilities Basket. "**Credit Facility**" is typically defined very broadly to include any type of Indebtedness, including debt securities such as high yield bonds.

- Intra-Group Indebtedness between and among the Issuer and its Restricted Subsidiaries, subject to certain conditions to mitigate potential structural subordination if the Issuer or any Guarantor is the obligor of any such indebtedness and the payee is not the Issuer or a Guarantor;
- Permitted Refinancing Indebtedness (i.e., certain indebtedness incurred to refinance Ratio Debt or indebtedness incurred under certain specified Permitted Debt baskets, such as the baskets that cover the various items of existing indebtedness outstanding as of the issue date of the bonds or any Acquired Indebtedness);

Practice Note: To protect the position of the high yield bonds within the overall capital structure of the Issuer, the "**Permitted Refinancing Indebtedness**" definition will typically impose a number of conditions with regard to the amount, maturity, amortization schedule, obligors, any collateral and the ranking of the refinancing indebtedness. The Issuer will therefore not be able to rely on the Permitted Refinancing Indebtedness basket, for example, to replace subordinated and unsecured debt of the Issuer or a Guarantor with a maturity date after the maturity date of the bonds with a larger amount of senior secured indebtedness of a non-guarantor Restricted Subsidiary that matures before the maturity date of the bonds.

- Indebtedness existing on the issue date of the bonds which is not otherwise included within any other Permitted Debt exemption;

Practice Note: This exemption typically excludes debt outstanding on the issue date that is permitted by the Credit Facility Basket or other identified Permitted Debt exemptions so as to prevent the Issuer from "emptying-out" such other baskets by re-designating such debt as "debt existing on the issue date".

- Indebtedness represented by the bonds issued on the issue date and any related guarantees;
- Indebtedness under hedging obligations incurred in the ordinary course of business and not for speculative purposes (the "**Hedging Obligations Basket**");
- Indebtedness represented by Capitalized Lease Obligations and Purchase Money Obligations, subject to either a hard cap or a soft cap (the "**Capitalized Lease Obligations/Purchase Money Obligations Basket**");
- Indebtedness of a Restricted Subsidiary incurred and outstanding on the date on which such Restricted Subsidiary was acquired by, or merged into, the Issuer or any Restricted Subsidiary, other than indebtedness incurred in connection with, or in contemplation of the relevant acquisition (so-called "**Acquired Indebtedness**"), provided that at the time such Restricted Subsidiary is acquired by the Issuer or another Restricted Subsidiary, the Issuer would have been able to incur at least €1.00 of additional (unsecured) Ratio Debt after giving *pro forma* effect to the incurrence of the Acquired Indebtedness (the **"€1.00 of Additional Ratio Debt Test**");

> *Practice Note:* As a more Issuer-friendly alternative to the €1.00 of Additional Ratio Debt Test, Issuers are frequently able to negotiate that Acquired Indebtedness will also be permitted to be incurred as long as the Fixed Charge Coverage Ratio of the Issuer would not be less than it was immediately prior to the relevant acquisition or transactions, again after giving *pro forma* effect to the incurrence of the Acquired Indebtedness.

- Certain categories of ordinary course indebtedness, such as letters of credit, self insurance obligations, workers' compensation claims, performance, surety, appeal or similar bonds, customs, VAT or tax guarantees or the financing of insurance premiums;
- Indebtedness incurred in any Qualified Securitization Financing, which will be defined to include, for example, customary (non-recourse) factoring or ABS programs under standard market terms and documentation;
- Indebtedness in respect of guarantees of indebtedness of joint ventures in which the Issuer or any Restricted Subsidiary has an interest, subject to a cap; and
- a "**General Debt Basket**" permitting the Issuer and its Restricted Subsidiaries to incur any kind of indebtedness for any purpose, subject to a either a hard cap or soft cap.

> *Practice Note:* As with most baskets, the specific size of the General Debt Basket will need to be negotiated between the Issuer and the Initial Purchasers. Historically, the General Debt Basket was typically hard-capped, but it has become more common for Issuers to be able to successfully negotiate for a soft cap / grower element. While the General Debt Basket is typically available to the Issuer and all its Restricted Subsidiaries (i.e. not just Guarantors), it is common for the General Debt Basket to separately cap the amount of indebtedness that may be incurred by non-guarantor Restricted Subsidiaries under this basket at an amount below the total basket size.

While many of these Permitted Debt baskets are "standard" in the European market, the exact scope and size of each basket can vary significantly. As with any other covenant, it is therefore critical for the Issuer and its senior management to be fully engaged in the negotiations of the various baskets to ensure the various baskets are sufficiently tailored to accommodate the Issuer's specific business, strategic plans and any particular industry practices. If relevant to the particular Issuer and its industry and consistent with the Issuer's business and strategy as described elsewhere in the offering memorandum, this may not only include unusually large caps for particular "standard" baskets (e.g., if the Issuer's business model involves regularly entering into a large number of joint ventures), but may also involve the inclusion of additional "bespoke" baskets, for example, for (subsidized / below-market) funding provided by export credit or development agencies or other public or quasi-public entities, project financings or local currency financings.

Contribution Debt

A significant majority of senior secured notes issued in sponsor transactions in Europe (i.e. high yield bonds issued to finance leveraged buy-outs) also feature a Permitted Debt basket that permits the incurrence of indebtedness of the Issuer or any Guarantor in an aggregate outstanding principal amount up to 100% of the net cash proceeds received by the Issuer from the issuance or sale of certain types of qualifying equity and/or subordinated shareholder debt (so-called "**Contribution Debt**"). The Contribution Debt basket is typically not subject to any cap or any other conditions or restrictions, except that any relevant net cash proceeds from the issuance of equity or subordinated shareholder debt should normally be excluded, where relevant, in determining available capacity to make Restricted Payments under the Limitation on Restricted Payments Covenant. See also "Change of Control and Portability" above with regard to potential "round-tripping" and "Limitation on Restricted Payments–The "Net Income Basket" / "Build Up Basket" Exemption" below.

A vast majority of the senior secured notes that feature a Contribution Debt basket, also feature a Permitted Collateral Lien that allows the Issuer to secure any Contribution Debt on a *pari passu* basis with liens over the collateral that secures the bonds, without any further conditions or restrictions, such as compliance with a secured leverage test. From an investors' perspective, this flexibility for the Issuer means significant (i.e. theoretically unlimited) potential for collateral dilution. See also "Limitation on Indebtedness–The "Ratio Debt" Exemption–Senior Secured Notes, Secured Leverage Ratio Test and Collateral Dilution" above and "Limitation on Liens–Permitted Collateral Liens" below.

Classification and Reclassification – Which exemption / basket applies?

To the extent the incurrence of a specific item of indebtedness satisfies more than one exemption or basket, the Issuer has the right under the Limitation on Indebtedness covenant to classify the relevant item of indebtedness, i.e. designate the specific exemption or basket under which the relevant item of indebtedness is being incurred.

Practice Note: It will almost always be advantageous for the Issuer to designate, to the maximum extent possible, any indebtedness as having been incurred pursuant to the Ratio Debt Exemption, as opposed to a specific Permitted Debt basket. This is because any indebtedness incurred in reliance on a Permitted Debt basket also reduces capacity under the Ratio Debt Exemption anyway (because of the related increase in Fixed Charges and the amount of indebtedness outstanding used in the numerator of any secured leverage ratio) as well as using up capacity under the relevant Permitted Debt basket.

In addition, the Issuer generally may, at any time, reclassify any item of indebtedness (other than indebtedness incurred under the Credit Facilities Basket, as discussed in the Practice Note below) that at such time meets the requirements of one or more exemptions or baskets. In particular, if the financial performance / Consolidated EBITDA of the Issuer improves (resulting in increased capacity under the Ratio Debt exemption), the Issuer will typically be permitted to reclassify indebtedness initially incurred under one or more Permitted Debt

baskets as Ratio Debt, thereby freeing up capacity under the relevant Permitted Debt baskets, which would then be fully available again in the future, even if the financial performance of the Issuer subsequently deteriorates again. A reclassification is also advantageous in the event of a refinancing of Permitted Debt. For example, refinancing debt with Ratio Debt need not comply with the limitations required by the definition of Permitted Refinancing Debt.

Practice Note: The Limitation on Indebtedness covenant will typically provide that any indebtedness outstanding on the issue date under the Credit Facilities Basket cannot be reclassified as Ratio Debt or other Permitted Debt. The terms of some bonds further prohibit even the reclassification of any future indebtedness incurred under the Credit Facilities Basket. Without such a limitation, the Credit Facilities Basket may be "emptied out" (i.e. "refilled") by reclassifying any indebtedness incurred under the Issuer's Credit Facility, for example, as Ratio Debt and thus create significant additional debt incurrence capacity. As both Ratio Debt and indebtedness incurred under the Credit Facilities Basket is typically permitted to rank *pari passu* with and be secured with Permitted Collateral Liens over the same collateral that secures the Issuer's existing senior secured indebtedness (including the senior secured bonds), the ability to reclassify indebtedness incurred under the Credit Facilities Basket as Ratio Debt potentially significantly increases the amount of "collateral dilutive" indebtedness the Issuer may be permitted to incur. Although a very subtle point that can often get lost in the drafting of the Limitation on Indebtedness covenant, it can therefore be a very important commercial point.

Other Covenants that Might be Relevant

In evaluating whether the Limitation on Indebtedness covenant provides sufficient flexibility for the Issuer, the Issuer and its advisers must also consider the following covenants:

- *Limitation on Liens.* The mere (abstract) ability to incur any particular item of indebtedness under the Limitation on Indebtedness covenant may be useless in practice if the Limitation on Liens covenant does not also include either (i) a corresponding "Permitted Lien" that would allow the Issuer to secure such indebtedness (e.g. a Purchase Money Obligation) with liens over particular (non-collateral) assets on an exclusive basis, without having to secure the bonds equally and ratably under such lien or (ii) a "Permitted Collateral Lien" that would allow the Issuer to secure such indebtedness with first-ranking liens over the same collateral as the bonds, so that it ranks *pari passu* with the bonds. In capital intensive industries, in particular, companies may rely heavily on certain secured financing arrangements with customers or suppliers in the ordinary course of business.
- *Limitation on Restrictions on Distributions from Restricted Subsidiaries.* The Limitation on Restrictions on Distributions from Restricted Subsidiaries covenant may also be relevant, since the incurrence of additional indebtedness may involve the imposition of contractual restrictions on dividends, asset transfers and other payments by the borrowing subsidiaries.

LIMITATION ON RESTRICTED PAYMENTS

The Limitation on Restricted Payments covenant prevents cash and assets from being transferred outside the Restricted Group (also referred to as "leakage"), subject to certain exemptions, unless the Restricted Group's positive financial performance or improved financial condition justify its ability to make such transfers. This protection is important to bondholders because it is intended to protect the Issuer's ability to repay its indebtedness as well as to preserve the assets of the Restricted Group with a view to any potential future insolvency or bankruptcy.

The covenant can typically be divided into three main parts: (i) the definitions of "Restricted Payment", "Investment" and "Permitted Investment", (ii) the so-called "Net Income Basket" or "Build Up Basket" exemption, and (iii) a typically fairly extensive list of specific "Permitted Restricted Payments" exemptions / baskets describing instances when certain Restricted Payments may be made even if the conditions under the Net Income Basket / Build Up Basket are not met.

Definitions of "Restricted Payments" and "Permitted Investments"

"**Restricted Payments**" are typically defined as including any of the following actions by the Restricted Group:

- the payment of cash dividends or making of other distributions of assets to shareholders, provided that dividends paid in capital stock of the Issuer (other than disqualifying stock) and dividends paid by a Restricted Subsidiary to the Issuer or another Restricted Subsidiary are excluded (i.e. are either not Restricted Payments or are otherwise permitted exemptions);
- the purchase, redemption or other acquisition for value of any capital stock of the Issuer or any parent of the Issuer held by Persons other than the Issuer or a Restricted Subsidiary;
- subject to certain exemptions, the purchase, repurchase, redemption, defeasance or other acquisition for value, prior to the scheduled maturity or scheduled repayment of any indebtedness of the Issuer or any Guarantor that is contractually subordinated to the bonds;
- any payment on or with respect to, or to purchase, redeem, defease or otherwise acquire or retire for value any "Subordinated Shareholder Debt"; and
- the making of any "Investments" outside the Restricted Group (including, for example, 50/50 joint ventures), other than "Permitted Investments".

The term "**Investment** " is defined very broadly and consists generally of:

- purchases of equity or debt securities of another entity;
- capital contributions to any entity; and
- loans to or guarantees or other credit support for the benefit of any person or entity.

"**Permitted Investments**" generally include:

- investments in the Issuer, any Restricted Subsidiary (sometimes limited to Investments in Guarantors), or any entity that becomes a Restricted Subsidiary (or Guarantor) as a result of the Investment;
- investments in Unrestricted Subsidiaries or entities engaged in a "Related Business", such as joint ventures, subject to either a hard cap or a soft cap with a grower element, typically linked to Total Assets ("**Joint Venture Basket**");
- certain investments received from a debtor in connection with certain settlement, legal, enforcements or insolvency proceedings;
- investments existing on the issue date of the bonds or made pursuant to legally binding commitments in existence on the issue date;
- cash and certain cash equivalents;
- investments that constitute non-cash proceeds from an asset sale permitted by the Limitation on Asset Sales covenant;
- hedging transactions entered into and guarantees provided in compliance with the Limitation on Indebtedness Covenant;
- investments acquired in connection with the acquisition of entities not prohibited by the Limitation on Merger, Consolidation and Sale of Substantially All Assets covenant, provided the relevant investments were not made in contemplation of any such acquisition;
- the acquisition of assets solely in exchange for capital stock of the Issuer (other than disqualified stock) or subordinated shareholder debt;
- certain loans or advances to directors, officers, employees or consultants of the Issuer, a Restricted Subsidiary or a parent company of the issuer, for example, in respect of travel, entertainment or moving related expenses or to fund any such person's purchase of capital stock or subordinated shareholder debt of the Issuer or, subject to a (typically modest) hard cap, general loans and advances to such persons ("**Management Advances**");
- investments in connection with customary cash management, cash pooling or netting or setting-off arrangements entered into the in ordinary course of business; and
- other Investments, subject to either a hard cap or a soft cap with a grower element, typically linked to Total Assets (the "**Permitted Investments General Basket**").

Investments are generally treated as Restricted Payments because they typically involve assets of the Issuer or its Restricted Subsidiaries being transferred to a third party outside the Restricted Group and therefore not subject to the covenants / restrictions imposed by the terms of the bonds. Because Investments may be both Permitted Investments and Restricted Payments, it is important to remember the Issuer is permitted to aggregate multiple baskets to make an Investment.

Practice Note: Permitted Investments are specifically excluded from the definition of Restricted Payments. As such, because they are not Restricted Payments, they do not count against the Net Income Basket as described below. Consequently, an Issuer will prefer that an Investment be permitted as a Permitted Investment rather than merely as a Permitted Restricted Payment.

While many of the types of investments included in the definition of "Permitted Investment" are "standard" in the European market, the exact scope and particularly the sizes of each basket do vary. As with any other covenant, it is therefore critical for the Issuer and its senior management to be fully familiar with the definition and its potential implications for the future conduct of the Issuer's business and the Issuer's strategic plans. If relevant to the particular Issuer and its industry and consistent with the Issuer's business practices and strategy as described elsewhere in the offering memorandum, the Issuer may not only want to negotiate for increased flexibility under one or more "standard" baskets (e.g. the Joint Venture Basket), but also for the inclusion of one or more "bespoke" baskets. For example, the author of this guide has represented an emerging markets issuer active in the agricultural sector. To enable / encourage the (fairly poor) local farmers in the areas around its plants to grow the desired crops and to sell their harvest to the Issuer, the Issuer was required to provide a large number of small loans to local farmers at the beginning of the planting season, as a kind of advance in respect of the next harvest. Preserving the ability of the Issuer to make such loans and advances in the ordinary course of business, either by increasing the size of the Joint Venture Basket or introducing a separate category of "Permitted Investment" (then no impact on the Build Up Basket) or by introducing an appropriate "Permitted Restricted Payments" basket (utilization of which may reduce capacity under the Build Up Basket), was therefore critical and should also not be objectionable to investors.

The Limitation on Restricted Payments covenant does not restrict acquisitions of companies that become Restricted Subsidiaries, capital expenditures and most intra-group loans and guarantees as all of these transactions represent investments "in the system" / within the Restricted Group.

The "Net Income Basket" / "Build Up Basket" Exemption

Under the Limitation on Restricted Payments covenant, members of the Restricted Group are typically prevented from making any Restricted Payment unless:

- no default or event of default shall have occurred and be continuing or would result from such Restricted Payment;
- the Issuer is able to incur at least €1.00 of additional (unsecured) Ratio Debt under the Limitation on Indebtedness covenant on a *pro forma* basis after giving effect to the Restricted Payment (the "**€1.00 of Additional Ratio Debt Test**"); and
- the aggregate amount of such Restricted Payment and all other Restricted Payments (subject to certain exemptions discussed at the end of the section with the heading "– Permitted Restricted Payments" below) made subsequent to the issue date of the bonds does not exceed the sum of the following (collectively, the "**Net Income Basket**" or "**Build Up Basket**"):

– 50% of cumulative Consolidated Net Income (or in the case of a loss, minus 100% of the loss) for the period from the beginning of the quarter either immediately prior to or after the original issue date of the bonds until the end of the most recent quarter for which consolidated financial statements for the Issuer are available; plus

> *Practice Note:* It is important to note that the definition of "Consolidated Net Income" for purposes of the Build Up Basket typically contains a series of detailed, negotiated adjustments or add-backs to the related GAAP measure. See also "Limitation on Indebtedness-The "Ratio Debt" Exemption" above.
>
> Profitable Issuers will typically want to negotiate for an early start date for the Net Income Basket, so that any Consolidated Net Income for the current quarter (i.e. the quarter beginning immediately prior to the original issue date) already counts towards building Restricted Payment capacity under the Build Up Basket.

– 100% of the aggregate net cash proceeds (and often also the fair market value of assets, property or marketable securities) from sales of the Issuer's capital stock (other than disqualified stock) and capital contributions received subsequent to the issue date of the bonds (other than net cash proceeds from a sale of the Issuer's capital stock to a subsidiary or an employee share plan) or the issuance or sale of subordinated shareholder debt (other than to a subsidiary of the Issuer), but excluding any net proceeds used to redeem bonds; plus

> *Practice Note:* To avoid double-counting, investors will want to make sure that if capital contributions or equity proceeds are a separate basis for making a Permitted Investment or Permitted Restricted Payment, any capital contribution or equity proceeds used for those specific exemptions do not also increase capacity under the Build Up Basket.

– 100% of the aggregate net cash proceeds (and often also the fair market value of assets, property or marketable securities) received by Issuer or any Restricted Subsidiary upon the sale or other disposition of any Investment made pursuant to the Build Up Basket; plus

– 100% of the fair market value of any Restricted Investments in entities that subsequently become Restricted Subsidiaries; plus

– in the case of a guarantee by the Issuer or a Restricted Subsidiary, upon the release of such guarantee an amount equal to the amount of such guarantee to the extent the guarantee reduced the capacity to make Restricted Payments under the Build Up Basket; plus

– to the extent that the capacity to make Restricted Payments under the Build Up Basket was reduced as the result of the designation of an Unrestricted Subsidiary, the portion (proportionate to Issuer's equity interest in such Subsidiary) of the fair market value of the (net) assets of such Unrestricted Subsidiary received by the Issuer or a Restricted Subsidiary or the Issuer's Restricted Investment in such subsidiary at the time such Unrestricted Subsidiary is re-designated as a Restricted Subsidiary or is merged or consolidated into the Issuer or a Restricted Subsidiary, or the assets of such Unrestricted Subsidiary are transferred to the Issuer or a Restricted Subsidiary; plus

- 100% of any cash dividends or distributions received by the Issuer or a Restricted Subsidiary after the issue date of the bonds from Unrestricted Subsidiaries, to the extent not otherwise included in the Consolidated Net Income of the Issuer; plus
- 100% of the net cash proceeds (and often also the fair market value of assets, property or marketable securities) from any issuances of *pari passu* or senior debt of the Issuer and its Restricted Subsidiaries subsequent to the issue date of the bonds which is converted or exchanged (other than by a subsidiary of the Issuer) into capital stock of the Issuer (other than disqualified stock) or subordinated shareholder debt; plus
- sometimes, a negotiated euro amount to "prime" the Build Up Basket, i.e. provide immediate capacity to make Restricted Payments under the Build Up Basket as of the issue date of the bonds.

As any other covenant, the exact calculation and scope of the Build Up Basket can vary and is subject to negotiations.

Practice Note: As discussed in more detail under "Change of Control and Portability" above, it was historically common to reset the Build Up Basket to zero upon the occurrence of a Change of Control, or at least upon the occurrence of a Specified Change of Control Event to protect investors against potential "round-tripping" in the event the relevant bonds provide for Leverage Based Portability. More recently, some bonds have relied on an alternative approach to prevent round-tripping via the Build Up Basket or the "substantially concurrent" Permitted Restricted Payment basket (as described below) by carving out / excluding from both baskets certain "**Excluded Amounts**".

Permitted Restricted Payments

Certain Restricted Payments can be made even in the absence of capacity under the Build Up Basket or the conditions for its use described above. Common "**Permitted Restricted Payments**" baskets include, but are not limited to:

- the payment of any dividend within 60 days after the date of declaration thereof, if at such date of declaration such payment was permitted under the Build Up Basket Exemption;
- the purchase, repurchase, redemption, defeasance or other acquisition or retirement of capital stock or subordinated shareholder debt made by exchange for, or out of the proceeds of the "substantially concurrent" sale of, capital stock of the Issuer (other than disqualified stock, capital stock issued or sold to a subsidiary or to certain employee stock ownership plans and, sometimes, other than Excluded Amounts), subordinated shareholder debt or a substantially concurrent contribution to the equity of the Issuer (other than by a Subsidiary of the Issuer);
- the purchase, redemption or other acquisition for value of capital stock in connection with the obligations under employee or management stock option agreements or other agreements to compensate management or employees, subject to a hard annual cap;

> *Practice Note:* Often the Issuer can negotiate that any unused amounts in any calendar year may be carried over to the immediately following calendar year but not any subsequent calendar years.

- if not already excluded from the definition of "Restricted Payment", *pro rata* dividends or distributions of Restricted Subsidiaries that are not wholly-owned subsidiaries to their other holders of capital stock;
- so long as no default has occurred and is continuing (or would result therefrom), following an IPO of the Issuer, the declaration and payment by the Issuer of dividends on its common stock on a pro rata basis, in an amount not to exceed in any fiscal year the greater of (a) a specified percentage of the net cash proceeds received by the Issuer from the IPO and any subsequent public equity offering and (b) an amount equal to the greater of (i) a specified percentage of the Issuer's market capitalization and (ii) a specified percentage of its IPO market capitalization, subject to the Issuer meeting a leverage test after giving pro forma effect to any such dividends or distributions (so-called "**IPO Basket**");

> *Practice Note:* The rationale of the IPO basket is to give the Issuer the necessary flexibility to adopt an appropriate / attractive dividend policy in connection with a proposed initial public offering (IPO). Enabling a successful IPO is typically also in the interest of bondholders as it may provide the Issuer with an opportunity to broaden its investor base and to use all or a portion of the proceeds from the IPO to deleverage.

- so long as no default has occurred and is continuing (or would result therefrom), any Restricted Payment, subject to the Issuer meeting a leverage test after giving *pro forma* effect to any such dividends (so-called "**Leverage-Based Permitted Payments Basket**");

> *Practice Note:* Considered by many as "aggressive" or a "sponsor term" only a few years ago, Leverage-Based Permitted Payments Baskets that permit (theoretically) unlimited cash leakage from the Restricted Group in the form of Restricted Payments, subject only to a leverage ratio test, have become a standard market feature of European high yield bonds. Although their prevalence fluctuates with changing market conditions, Leverage-Based Permitted Payments Baskets now regularly feature in a significant majority of European high yield bonds, including in corporate / non-sponsor transactions. The level at which the relevant leverage ratio is set in those transactions can vary widely. However, in a majority of cases, the relevant leverage ratio is now calculated on a net basis (i.e. the numerator of the ratio is calculated net of (uncapped) cash and cash equivalents), even where other leverage-based exemptions in the relevant bond terms use a gross leverage test.

- so long as no default has occurred and is continuing (or would result therefrom), any Restricted Payment, subject to a hard cap or soft cap (so-called "**General Basket**"); and
- dividends, loans, advances or distributions to any holding company in amounts equal to the amounts required for any such holding company to pay certain defined holding company expenses and related taxes.

Again, while many Permitted Restricted Payment baskets are "standard" in the European market, the exact scope and size of the various baskets can vary considerably and must always be tailored to fit the Issuer's business, strategic plans and other circumstances.

As a general matter, all Permitted Restricted Payments count against the Build Up Basket other than certain Restricted Payments which either:

- expressly provide that the cash or assets used for making such Permitted Restricted Payments do not also increase capacity under the Build Up Basket;
- are credit-neutral; or
- are of a *de minimis* or "ordinary course" nature, making it impractical or disproportionately burdensome for the Issuer to track them.

Other Covenants that Might be Relevant

Guarantees of indebtedness of third parties constitute both indebtedness and Investments. Therefore, prior providing any guarantees of third party indebtedness, the Issuer must make sure that sufficient capacity exists under both the Limitation on Restricted Payments covenant and the Limitation on Indebtedness covenant.

LIMITATION ON LIENS

The Limitation on Liens covenant limits (i) the Issuer's ability to effectively subordinate the bonds through liens on property or assets that do not constitute collateral for the bonds and (ii) in the case of secured bonds, the Issuer's ability to incur incremental senior secured indebtedness that ranks *pari passu* with the Issuer's existing senior secured indebtedness (including the senior secured bonds), benefits from liens over the same collateral and is therefore "collateral dilutive" to the Issuer's existing senior secured indebtedness (including the senior secured bonds). See also "Introduction–Subordination-Effective/Lien Subordination" and "Limitation on Indebtedness–The "Permitted Debt" Exemption–Senior Secured Notes, Secured Leverage Ratio Test and Collateral Dilution" above.

Liens on Non-Collateral Assets / "Permitted Liens"

With regard to any assets of the Restricted Group that do not constitute collateral for the bonds, the Limitation on Liens covenant prohibits any liens or other security interests on such assets to secure any indebtedness unless either (i) the bonds are equally and ratably secured for as long as the relevant indebtedness is so secured or (ii) the relevant lien is permitted by one or more available exemptions / baskets (so-called "**Permitted Liens**"). In this respect, the Limitation on Liens covenant is similar to (but in certain respects more robust than) "negative pledges" that are also a common feature of investment-grade bonds.

The definition of "**Permitted Liens**" typically includes a fairly extensive list of liens that generally fall into the following broad categories:

- *Ordinary Course Liens.* Liens of a *de minimis* and/or technical nature that are typically incurred in the ordinary course of the Issuer's business, may be outside the control of the Issuer and may there for be impossible or impractical for the Issuer to track, for example, liens imposed by law, such as workmen's compensation laws, unemployment insurance laws or social security laws; tax liens, judgment liens, liens created under bank's standard business terms and conditions; retention of title arrangements or similar arrangements entered into in the ordinary course of business or minor survey exceptions, minor encumbrances, easements or reservations of, or rights of others for, licenses, rights-of ways, sewers, electric lines, telephone lines and other similar purposes and which do not materially adversely affect the value of the affected properties; or liens granted in connection with customary cash management, cash pooling or netting or setting-off arrangements.
- *Existing Liens.* Liens existing on the issue date of the bonds (including liens created for the benefit of the bonds and any related guarantees); subject to certain limitations, liens existing on property at the time the Issuer or a Restricted Subsidiary acquired the property (other than liens incurred in contemplation of such acquisition); and liens securing indebtedness incurred to refinance indebtedness that was previously secured (but limited to the collateral that secured the indebtedness that is being refinanced).
- *Liens securing indebtedness incurred under specific Permitted Debt baskets.* The definition of "Permitted Liens" typically includes specific baskets intended to ensure that indebtedness under certain Permitted Debt baskets under the Limitation on Indebtedness covenant can, at least partly, be incurred on a secured basis.

Practice Note: For example, the definition of Permitted Liens typically includes specific baskets that permit liens securing indebtedness represented by Capitalized Lease Obligations and Purchase Money Obligations or incurred in connection with Qualified Securitization Financings. Typically, the relevant Permitted Liens basket expressly cross-refers to the corresponding Permitted Debt basket, such as the Capitalized Lease Obligations/Purchase Money Obligations basket. Invariably, the definition of "Permitted Liens" will also contain a "**General Permitted Liens Basket**" that will be subject to either a hard cap or to a soft cap which would typically be expressed as the greater of a fixed amount and a percentage of Total Assets.

However, it is important to note that the size of a particular Permitted Liens basket may not necessarily exactly match the size of the corresponding Permitted Debt basket and that it may also be used to secure indebtedness incurred pursuant to other exemptions. For example, the size of Permitted Liens basket permitting liens securing indebtedness represented by Capitalized Lease Obligations and Purchase Money Obligations may be higher than the size of the corresponding Permitted Debt Basket. In practice, this means that it may also be possible for the Issuer to rely on this basket for liens that secure indebtedness represented by Capitalized Lease Obligations or Purchase Money Obligations that was incurred, for example, as Ratio Debt or in reliance on the General Debt Basket, rather than under the Capitalized Lease Obligations/Purchase Money Obligations basket.

Since the Limitation on Liens covenant will be similar to the relevant covenants contained in a typical senior credit facility, it is also important to cross-check / match the definition of "Permitted Liens" with the corresponding definitions in the Issuer's senior credit facility or facilities, i.e. any liens permitted by the Issuer's senior credit facilities should also be "Permitted Liens" under terms of bonds, although the terms of the bonds may contain additional "Permitted Liens".

"Permitted Collateral Liens"

With regard to property or assets that already constitute collateral for any senior secured bonds, the Limitation on Liens covenant will only permit so-called "**Permitted Collateral Liens**". Any additional / incremental indebtedness secured by any such Permitted Collateral Liens will typically rank (at least) *pari passu* with the Issuer's existing senior secured indebtedness (including the senior secured bonds) and, because it benefits from liens over the same collateral, will be "collateral dilutive" to the Issuer's existing senior secured indebtedness (including the senior secured bonds).

Super Priority Debt

A growing majority of European senior secured bond transactions also involves at least some element of so-called "**Super Priority Debt**" or "**Super Senior Debt**", which is secured on a *pari passu* basis on the same collateral as the senior secured bonds, but is repayable ahead of the senior secured bonds in an enforcement scenario under the terms of the Intercreditor Agreement.

This Super Priority Debt typically includes (i) all indebtedness incurred under the (often soft-capped) Credit Facilities Basket, (ii) certain priority hedging obligations, frequently without any cap and (iii) sometimes also certain cash management liabilities. One particularly popular capital structure involves the issuance of senior secured bonds and the concurrent entry into a super senior secured revolving credit facility that is afforded super priority status under the terms of the Intercreditor Agreement. However, this super priority status (on terms not materially less favorable to bond holders than that accorded to the super senior revolving credit facility existing on the issue date pursuant to the Intercreditor Agreement as in effect on the issue date) is typically still afforded to all indebtedness incurred under the Credit Facilities Basket (including potential term loan facilities or any debt securities issued in reliance on the Credit Facilities Basket), rather than just indebtedness incurred under the super senior revolving credit facility existing on the issue date.

Because the definition of "Permitted Collateral Liens" typically expressly permits the creation of (first-ranking) liens over the collateral to secure certain additional / incremental items of indebtedness that may have super priority, rather than just certain items of indebtedness that is existing as of the issue date of the bonds, certain Permitted Collateral Liens may not only be merely (significantly) collateral dilutive to the senior secured bonds, but may even result in the senior secured bonds to become effectively and/or contractually subordinated to potentially very significant amounts of incremental Super Priority Debt under the terms of the Intercreditor Agreement.

The definition of "**Permitted Collateral Liens**" for a senior secured bond can vary significantly, depending on how much flexibility for the Issuer to incur further collateral dilutive *pari passu* and/or super senior indebtedness is envisaged, but it will generally include the following:

- liens on the collateral to secure the bonds issued on the issue date or the related guarantees and any refinancing indebtedness in respect thereof on a *pari passu* basis, provided that all property and assets securing such indebtedness also secures the bonds and related guarantees on a senior or *pari passu* basis and that the relevant parties have entered into the Intercreditor Agreement or an additional intercreditor agreement;
- liens on the collateral to secure indebtedness incurred pursuant to the Credit Facilities Basket, which may have super priority not materially less favorable to bond holders than that accorded to the super senior revolving credit facility existing on the issue date pursuant to the Intercreditor Agreement as in effect on the issue date, provided that all property and assets securing such indebtedness also secures the bonds and related guarantees on a senior or *pari passu* basis and that the relevant parties have entered into the Intercreditor Agreement or an additional intercreditor agreement;
- liens on the collateral to secure indebtedness incurred pursuant to the Hedging Obligations Basket, provided that liens in favor of (a capped amount of) "priority hedging obligations" may have super priority not materially less favorable to bond holders than that accorded to the super senior revolving credit facility existing on the issue date pursuant to the Intercreditor Agreement as in effect on the issue date, and provided further that all property and assets securing such indebtedness also secures the bonds and related guarantees and that the relevant parties have entered into the Intercreditor Agreement or an additional intercreditor agreement;
- liens on the collateral to secure any Ratio Debt, provided that all property and assets securing such indebtedness also secures the bonds and related guarantees on a senior or *pari passu* basis and that the relevant parties have entered into the Intercreditor Agreement or an additional intercreditor agreement; and

Practice Note: As described in more detail under "Limitation on Indebtedness–The "Ratio Debt" Exemption–Senior Secured Notes, Secured Leverage Ratio Test and Collateral Dilution", the majority of senior secured high yield bonds in Europe feature a secured leverage ratio test to determine the ability to incur incremental, collateral dilutive, secured Ratio Debt. However, collateral dilution pursuant to any of the other prongs under the definition of Permitted Collateral Liens is typically not similarly limited by reference to any such secured leverage test. While the incurrence of incremental (collateral dilutive) indebtedness under the Credit Facilities Basket is capped by the size of the Credit Facilities Basket and there will certainly be practical limits with regard to indebtedness that could be properly incurred under the Hedging Obligations Basket, the potential for very significant and potentially unchecked collateral dilution becomes much more of a concern (from an investor's perspective) in transactions with more expansive / aggressive definitions of Permitted Collateral Liens. Examples include transactions that also allow the creation of Permitted

> Collateral Liens to secure, on a *pari passu* basis with the bonds, uncapped amounts of Contribution Debt or even transactions that allow the creation of Permitted Collateral Liens to secure any indebtedness in the form of "Additional Notes" (i.e. additional bonds that are fungible with and form a single series with the senior secured bonds), including any Additional Notes issued pursuant to a Permitted Debt basket (rather than as Ratio Debt) and therefore without any requirement to comply with either the Fixed Charge Coverage Ratio Test or any secured leverage ratio test.

- most of the different categories of "Ordinary Course Liens" that are also included in the definition of "Permitted Liens" as described above.

While there may be "standard" elements in the definitions of Permitted Liens and Permitted Collateral Liens, it is again important to stress that there is almost invariably a need to make adjustments to these definitions so they fit the Issuer's business, strategic plans and other circumstances. For example, the author of this guide has advised on a transaction where the Issuer's business model / key strategy involved either encouraging key customers to establish production sites in immediate proximity to the Issuer's own production site (frequently on land owned by the Issuer that constituted part of the collateral for the bonds) or the Issuer's itself establishing production sites in immediate proximity to production sites of its key customers. Either type of project typically involved bespoke financing arrangements, including indebtedness represented by Capitalized Lease Obligations and Purchase Money Obligations and secured with bespoke Permitted Collateral Liens such as hereditary building rights, rights to purchase and certain easements and rights of way.

Other Covenants that Might be Relevant

It is important to review the Limitation on Liens covenant in the context of the Limitation on Indebtedness covenant because it limits the ability to incur indebtedness on a secured basis. See also "Limitation on Indebtedness–The "Permitted Debt" Exemption-Senior Secured Notes, Secured Leverage Ratio Test and Collateral Dilution" and "Limitation on Indebtedness–Other Covenants that Might be Relevant" above.

LIMITATION ON RESTRICTIONS ON DISTRIBUTIONS FROM RESTRICTED SUBSIDIARIES

The purpose of this covenant (often also referred to as "Limitation on Dividend Stoppers" covenant) is to prevent funds needed to service indebtedness of the Issuer from being trapped at a subsidiary level and to ensure that all cash generated by Restricted Subsidiaries can be up-streamed to the Issuer so that it may be used to satisfy its obligations under the bonds. To this end, the covenant contains a general prohibition on the existence of any restriction on Restricted Subsidiaries (or sometimes only on Guarantors):

- to pay dividends, repay indebtedness or other obligations owed to the Issuer or any Restricted Subsidiary;
- to make loans or advances to the Issuer or any Restricted Subsidiary; or

- to otherwise sell, lease or transfer any of its property or assets to the Issuer or any Restricted Subsidiary.

The covenant is important to investors because they look to the credit quality and financial condition of the Issuer and its Restricted Subsidiaries as a whole for the repayment of (and the payment of interest under) the bonds, not just the Issuer.

Common exemptions to the covenant include, but are not limited to:

- any encumbrance or restriction in any agreements governing indebtedness in effect or entered into on the issue date of the bonds;
- any encumbrance or restriction with respect to a Restricted Subsidiary pursuant to an agreement relating to any capital stock or indebtedness incurred by such subsidiary prior to the date such subsidiary was acquired, other than any capital stock issued or indebtedness incurred in connection with or contemplation of the relevant acquisition;
- any encumbrances or restrictions pursuant to an agreement or instrument effecting a refinancing of indebtedness incurred pursuant to, or that otherwise refinances, an agreement or instrument referred to in the preceding two bullets or contained in any amendment, supplement or other modification to an agreement in the preceding two bullets, provided that any such encumbrances and restrictions are no less favorable in any material respect to the bond holders taken as a whole than the existing encumbrances and restrictions;
- customary provisions in leases, licenses, joint venture agreements and other similar agreements and instruments entered into in the ordinary course of business;
- any encumbrances or restrictions arising or existing by reason of applicable law or any applicable rule, regulation or order, or required by any regulatory authority;
- any encumbrance or restriction pursuant to certain hedging agreements;
- any encumbrance or restriction existing by reason of any lien permitted under the Limitation on Liens covenant; and
- any encumbrance or restriction arising pursuant to an agreement or instrument relating to any indebtedness permitted to be incurred under the Limitation on Indebtedness covenant if the encumbrances and restrictions contained in any such agreement or instrument taken as a whole are not materially less favorable to the holders of the bonds than those contained in any existing credit facility, the related security documents and the Intercreditor Agreement, in each case, as in effect on the Issue Date.

Joint ventures entered into (and are majority-owned / controlled) by the Issuer or its Restricted Subsidiaries may create issues under the Limitation on Restrictions on Distributions from Restricted Subsidiaries covenant, because the partner in such joint venture will typically insist, for example, on certain veto rights over dividend payments and certain related party transactions (e.g. up-stream loans). To the extent it is not possible to negotiate for relevant exemptions, an alternative solution may be the formation of joint ventures that are not controlled by the Issuer, as such a joint venture would not be a "Subsidiary" or to designate any joint venture subsidiary as an "Unrestricted Subsidiary", so the joint venture would not be subject to the bond covenants. However, any investment in such a joint venture would then constitute a Restricted Payment (unless it qualifies as a Permitted Investment) and be subject to the limitations imposed by the Limitation on Restricted Payments covenant.

Other Covenants that Might be Relevant

The covenant should be reviewed in conjunction with the Limitation on Indebtedness covenant and the Limitation on Liens covenant since indebtedness and/or liens that otherwise may be incurred may be limited by this covenant if the terms of the additional indebtedness or liens contain any provisions that restrict the movement of cash or assets around the Restricted Group.

LIMITATION ON ASSET SALES

Sales of assets (including subsidiary stock) are potentially of concern to investors, because they may result in income-producing assets being transferred outside the Restricted Group. The purposes of the Limitation on Asset Sales covenant is to ensure that certain procedural requirements are met in connection with sales of assets and subsidiary stock. The covenant is not intended to prevent sales of assets by the Issuer or its Restricted Subsidiary, but it restricts (i) the types of proceeds the Issuer and its Restricted Subsidiaries may receive as consideration in any Asset Dispositions as well as (ii) how and within which time frame the Issuer and its Restricted Subsidiaries must use such proceeds.

"**Asset Disposition**" is typically defined broadly and will generally include traditional asset disposals as well as any direct and indirect sales of interests in the Restricted Subsidiaries, including any issue of new shares of a Restricted Subsidiary or any disposition by means of a merger, consolidation or similar transaction. At the same time, the definition will list numerous categories of asset disposals that do not need to satisfy the Asset Sale Test described below, including various ordinary course transactions and a carve-out / basket for transactions below a specified minimum fair market value.

The Limitation on Asset Sales covenants typically imposes the following conditions (together, the "**Asset Sale Test**") in connection with Asset Dispositions:

- the Issuer or its Restricted Subsidiaries receive consideration at least equal to the fair market value of the assets sold (as determined in good faith by the Issuer's board of directors);
- a minimum percentage (typically 75%) of the consideration the Issuer or Restricted Subsidiary receives in respect of the Asset Disposition is in the form of cash or cash equivalents or a combination thereof; and

Practice Note: In addition to cash and "Cash Equivalents" (which is a separate defined term), the Limitation on Assets Sale Covenant will also contain a negotiated list of "**Deemed Cash**" items.

These "**Deemed Cash**" items typically include:

- the assumption by the purchaser of (i) any liabilities recorded on the Issuer's or Restricted Subsidiary's balance sheet or, if incurred since the date of the latest balance sheet, that would be recorded on the next balance sheet (other than contingent liabilities, disqualified stock or subordinated debt), as a result of which

neither the Issuer nor any of the Restricted Subsidiaries remains obligated in respect of such liabilities or (ii) indebtedness of a Restricted Subsidiary that is no longer a Restricted Subsidiary as a result of such Asset Disposition, if the Issuer and each other Restricted Subsidiary is released from any guarantee of such Indebtedness as a result of such Asset Disposition;

- consideration consisting of (at least *pari passu*) indebtedness of the Issuer or any Restricted Subsidiary received from persons who are not the Issuer or any Restricted Subsidiary; and
- any securities, notes or other obligations received by the Issuer or a Restricted Subsidiary from the transferee that are converted by the Issuer or the relevant Restricted Subsidiary into cash or Cash Equivalents within a set number of days (typically 180 days) following the closing of the Asset Disposition, to the extent of the cash or Cash Equivalents received in that conversion.

In many cases, the Limitation on Asset Sales Covenant also permits consideration directly in the form of "**Additional Assets**" as defined below (i.e. certain asset swaps) and/or includes a separate basket for "**Designated Non-Cash Consideration**" (i.e. non-cash consideration with a maximum fair market value that is designated as such pursuant to an officer's certificate). In addition, Issuers can sometimes negotiate a general carve-out from the general requirement that 75% of the consideration be in the form of cash or Cash Equivalents with regard to certain specifically negotiated "**Permitted Asset Swaps**".

- the net available cash proceeds from the Asset Disposition are applied by the Issuer or relevant Restricted Subsidiary within a specified period of time (historically within 365 days, but often longer):
  - to (permanently) repay, prepay, purchase or redeem certain types of qualifying (*pari passu*) indebtedness;
  - to invest in any "Additional Assets" (or "Replacement Assets");

    Practice Note: "**Additional Assets**" is typically defined to include (i) any property or assets (other than indebtedness and capital stock) used or to be used by the Issuer, a Restricted Subsidiary or otherwise useful in a "Related Business" (it being understood that capital expenditures on property or assets already used in a Related Business or to replace any property or assets that are the subject of such Asset Disposition shall be deemed an investment in Additional Assets), (ii) the capital stock of a Person that is engaged in a Related Business and becomes a Restricted Subsidiary as a result of the acquisition of such capital stock by the Issuer or a Restricted Subsidiary, and (iii) capital stock constituting a minority interest in any person that at such time is a Restricted Subsidiary.

  - to make capital expenditures; or
  - to enter into a binding arrangement to apply the net available cash proceeds pursuant to one or more of the preceding bullets that will be consummated within 180 days of the end of the relevant (i.e. typically 365-day) period.

To the extent the net available cash proceeds from an Asset Disposition are not applied in accordance with the Asset Sale Test and exceed a specified minimum threshold amount (i.e. a basket negotiated by the Issuer), the Issuer must use such "**Excess Proceeds**" to make an offer to repurchase (a portion of) the bonds at their face value plus accrued interest and other *pari passu* Indebtedness with similar provisions (so-called "**Asset Disposition Offer**").

Practice Note: To avoid any uncertainty regarding a potential need to segregate asset sale proceeds, the Issuers will want to ensure that the covenant directs the use of "an amount equal to" (or similar wording) the net available cash proceeds from any Asset Disposition, rather than the actual cash proceeds.

Because cash is fungible, as long as the Issuer or the relevant Restricted Subsidiary makes qualifying capital expenditures within the relevant time frame following an Asset Disposition, compliance with the covenant should normally not be difficult without the Issuer actually having to conduct an Asset Disposition Offer.

Other Covenants that Might be Relevant

In the event that a proposed Asset Disposition involves the transfer of all or substantially all of the assets of the Issuer and its Restricted Subsidiaries, the permissibility of the relevant transaction or transactions will likely be determined by the Change of Control covenant and the Limitation on Merger, Consolidation Sale of Substantially All Assets covenant, rather than the Limitation on Asset Sales covenant. This is because transactions permitted under the Limitation on Merger, Consolidation Sale of Substantially All Assets covenant and transactions that constitute a Change of Control are typically excluded from the definition of Asset Disposition.

LIMITATION ON AFFILIATE TRANSACTIONS

The purpose of the Limitation on Affiliate Transactions covenant is to avoid leakage from the Restricted Group to controlling shareholders and other affiliates. An "**Affiliate**" is typically defined to include any person which controls, or is under common control with, the Issuer.

The covenant prohibits the Issuer and its Restricted Subsidiaries from entering into transactions with any Affiliate, subject to a *de minimis* threshold, unless:

- the transaction is on an arm's-length basis, i.e. on terms no less favor able to the Issuer or the relevant Restricted Subsidiary than those that could have been obtained from a third party;
- if the transaction value exceeds a negotiated threshold amount, the transaction is approved by a majority of the Issuer's board of directors, including a majority of disinterested directors (although sometimes this approval is required only from an officer); and
- if the transaction value exceeds a higher threshold amount, the Issuer obtains a fairness opinion from an independent investment bank, accounting or appraisal firm (although often this approval is required only from the Issuer's board of directors).

Typical exemptions to the covenant include: (i) transactions between and among the Issuer and its Restricted Subsidiaries, (ii) payment of reasonable and customary fees to directors, (iii) Restricted Payments and Permitted Investments made in accordance with the Limitation on Restricted Payments covenant; (iv) transactions with the Issuer's parent company and its subsidiaries in the ordinary course of business, consistent with past practice and as otherwise permitted by the covenants; (v) arm's length transactions with customers, clients, suppliers, or purchasers or sellers of goods or services or providers of employees or other labor, in each case in the ordinary course of trading; (vi) arm's length transactions in the ordinary course of business between the Issuer or any of its Restricted Subsidiaries and any person that is an Affiliate of the Issuer solely because a director of such person is also a director of the Issuer or any direct or indirect parent of the Issuer; and (vi) if applicable, payment of management fees to leveraged buyout sponsors.

LIMITATION ON DESIGNATION OF RESTRICTED SUBSIDIARIES AND UNRESTRICTED SUBSIDIARIES

The Limitation on Designation of Restricted Subsidiaries and Unrestricted Subsidiaries covenant ensures that the various other covenants are not thwarted through the designation and re-designation of Restricted Subsidiaries and Unrestricted Subsidiaries. As a general rule, all subsidiaries of the Issuer are Restricted Subsidiaries unless a subsidiary is designated as an Unrestricted Subsidiary upon issuance of the bonds or the Issuer subsequently expressly designates a Restricted Subsidiary as an Unrestricted Subsidiary in accordance with the requirements of the Indenture.

The Issuer may designate and re-designate its subsidiaries as either Restricted Subsidiaries or Unrestricted Subsidiaries at any time; provided, that in order to designate a Restricted Subsidiary as an Unrestricted Subsidiary, the following conditions must typically be met:

- the Issuer must comply with the Limitation on Restricted Payments covenant, i.e. the fair market value of the Issuer's deemed Investment in the relevant subsidiary at the time of designation must be permitted under the Restricted Payments covenant or as a Permitted Investment;

> *Practice Note:* Such deemed Investment will be valued at the fair market value of the sum of the net assets of such subsidiary at the time of designation and the amount of any indebtedness of such subsidiary owed to the Issuer and any Restricted Subsidiary.

- the Issuer must comply with the Limitation on Indebtedness covenant, i.e. any guarantee by the Issuer or the remaining Restricted Subsidiaries of any indebtedness of the Unrestricted Subsidiary will be deemed to be an incurrence of additional indebtedness;

> *Practice Note:* Typically, the Unrestricted Subsidiary may only incur "non-recourse" indebtedness, which prohibits the Unrestricted Subsidiary from incurring any indebtedness that is guaranteed or secured by the Issuer or any Restricted Subsidiary. In addition, the Issuer and its Restricted Subsidiaries are often prohibited from being the lenders of any indebtedness to an Unrestricted Subsidiary.

- the newly Unrestricted Subsidiary must not hold capital stock or indebtedness of, or hold any liens on the assets of, or have any investment in, the Issuer and its remaining Restricted Subsidiaries;
- the Issuer must comply with the Limitation on Affiliate Transactions covenant, i.e. any agreement, transaction or arrangement between the Issuer, the newly Unrestricted Subsidiary and the Issuer's remaining Restricted Subsidiaries must comply with the Limitation on Affiliate Transactions Covenant;
- the Issuer and its remaining Restricted Subsidiaries must not have any obligation to (i) subscribe for additional equity in the newly Unrestricted Subsidiary or (ii) maintain or preserve the financial condition of the newly Unrestricted Subsidiary (whether by guarantee or extension of credit); and
- the designation will not result in a default or an event of default.

In order to designate an Unrestricted Subsidiary as a Restricted Subsidiary, the following conditions must be met:

- the designation must be made in compliance with the Restricted Payments covenant, i.e. any Investment held by the newly Restricted Subsidiary must be able to be made in accordance with the Limitation on Restricted Payments covenant or as a Permitted Investment);
- any indebtedness of the newly Restricted Subsidiary must be able to be incurred in accordance with the Limitation on Indebtedness covenant;
- any liens on the newly Restricted Subsidiary's assets must be in compliance with the Limitation on Liens covenant; and
- the designation will not result in a default or an event of default.

LIMITATION ON MERGER, CONSOLIDATION AND SALE OF SUBSTANTIALLY ALL ASSETS

The goal of this covenant is to prevent a business combination in which the surviving entity is not financially healthy, as measured by the "€1.00 of Additional Ratio Debt Test" (and sometimes a consolidated net worth test), or otherwise does not have the same basic characteristics of the Issuer. The covenant prohibits the Issuer from merging with or consolidating into another entity, or transferring all or substantially all its assets and the assets of its Restricted Subsidiaries, as a whole, to another entity, unless the following general conditions are satisfied:

- either the Issuer is the surviving entity or the surviving entity is an entity organized under the laws of a specified jurisdiction (e.g. the laws of the Issuer's jurisdiction of organization or the laws of a European Union member state or the United States);
- the surviving entity, if other than the Issuer, assumes all of the Issuer's obligations under the bonds;
- the Issuer or the surviving entity would be able to satisfy the €1.00 of Additional Indebtedness Test; and

- no default or event of default under the bonds exists either before or as a result of the transaction.

Sometimes, this covenant contains an additional condition that the consolidated net worth of Issuer or the surviving entity must be at least equal to the consolidated net worth of the Issuer prior to the relevant transaction.

As the covenant restricts certain transactions that may also constitute a Change of Control that would potentially give bondholders the option to put their bonds back to the Issuer, this covenant must be reviewed and negotiated together with the Change of Control covenant. See also "Change of Control and Portability" above.

REPORTING

The purpose of the Reporting covenant is to ensure the continuous availability of current information on the Issuer's financial performance. While it may appear to be a "boiler-plate" covenant, potential investors can be very sensitive about the content of this covenant and generally require the Issuer to provide full public disclosure for as long as the bonds are outstanding, whether or not the Issuer is subject to any other reporting requirements under applicable securities laws or stock exchange rules.

Public availability of current information on the Issuer's financial performance is not only critical for the development of a liquid market in the bonds, but it also protects bondholders that may wish to sell their bonds from potential liability under any applicable market abuse rules. In addition, the availability of current information about the Issuer is also necessary to permit U.S. investors to on-sell their bonds within the United States in reliance on Rule 144A . See "Introduction–Certain Securities Law Considerations–U.S. Securities Law Considerations" above.

Practice Note: Some (privately-held) Issuers that are not otherwise subject to any significant public reporting obligations, do not regularly access the debt capital markets and also do not plan any equity offering (e.g. an IPO) in the near future, may struggle to get comfortable with the (common) requirement that the MD&A in future annual reports prepared under the Reporting covenant must be prepared "with a level of detail that is substantially comparable to the offering memorandum".

Indicative Transaction Timetable

PRE-LAUNCH

Under ideal circumstances and with the full commitment of all parties involved in the offering, the preparations necessary for a "**Launch**" (i.e. the formal external announcement) of a proposed high yield bond offering for a first-time issuer can be completed in approximately eight to ten weeks from the initial kick-off meeting, although the actual preparation time will always depend on a variety of factors that are specific to the individual Issuer and each offering.

Key factors that can (very significantly) extend the preparation time required for a particular offering include (i) the lack of existing, high-quality disclosure language (in English) regarding the Issuer and its business that can be tailored for purposes of the offering memorandum, (ii) the time needed by the Issuer's internal accounting team and external auditors to prepare the required financial information, (iii) potential general resource constraints / availability of dedicated staff at the Issuer for the offering, (iv) complications and delays in any necessary negotiations with existing creditors of the Issuer, (v) complexities involved in releasing existing security interests (in favor of creditors that are to be repaid with the proceeds of the offering) and in creating new security interests (in favor of the bondholders), potentially in multiple jurisdictions, (vi) potential delays and complications in the rating process and (vii) general market conditions.

Time	Tasks
Week 1	• Issuer's counsel prepares initial outline of offering memorandum and discusses it with Issuer • Issuer, Initial Purchasers and their counsels agree offering structure • Issuer and Issuer's counsel discuss covenant package and flag key issues to Initial Purchasers and their counsel • Issuer prepares data room based on due diligence request list provided by Issuer's counsel and Initial Purchasers' counsel • Initial Purchasers circulate management due diligence questionnaire • Issuer's counsel circulates publicity guidelines • Research guidelines (if any) circulated by Initial Purchaser's counsel
Week 2	• Issuer circulates / gives management presentation to working group • Issuer, Initial Purchasers and their counsel to agree approach with regard to existing lenders and security trustee • Working group provides initial feedback on draft offering memorandum • Issuer and Issuer's counsel revise draft offering memorandum • Issuer's counsel and Initial Purchasers' counsel commence documentary due diligence • Initial Purchasers and counsel draft description of notes and bond documentation

Time	Tasks
Week 3	• Select listing venue • Select Trustee and Trustee's counsel • Issuer's counsel circulates draft of offering memorandum • Initial Purchasers' counsel to circulate draft description of notes • Draft documentation for Trustee accession arrangements to existing security (if applicable) • Initial Purchasers and their counsel review draft offering memorandum and prepare by consolidated mark up • Issuer and Issuer's counsel discuss description of notes • Drafting session on offering memorandum • Auditors circulate draft engagement and comfort letters • Initial Purchasers and counsel circulate draft purchase agreement • Issuer and Initial Purchasers prepare rating agency presentation • Further discussions with regard to security trustee and lender consents and approach to existing lenders if required
Week 4	• Issuer's counsel re-circulates draft of offering memorandum to working group • Issuer's counsel circulates mark up of description of notes • Initial Purchasers and their counsel review draft offering memorandum and prepare by consolidated mark up • Initial Purchasers, Issuer and their respective counsels discuss description of notes • Drafting session on offering memorandum • Issuer and Issuer's counsel to discuss and comment on purchase agreement, distribute mark up to Initial Purchasers and Initial Purchasers' counsel • Issuer and Initial Purchasers continue to work on rating agency presentation
Week 5	• Drafting sessions on offering memorandum, description of notes and security package, as necessary • Potential discussions with Trustee, fiscal agent and/or security agent, as necessary • Parties to discuss purchase agreement, as necessary • Issuer and Initial Purchasers continue to work on rating agency presentation and commence work on road show presentation

Time	Tasks
Week 6	• Issuer's counsel sends draft offering memorandum to stock exchange and send draft offering memorandum to printers (if sufficiently advanced) • Drafting sessions on offering memorandum as necessary to finalize preliminary offering memorandum • Discussions to finalize purchase agreement as necessary • Issuer and Initial Purchasers meet with rating agencies and receive feedback • Issuer and Initial Purchasers continue to work on work on road show presentation
Week 7	• Receive stock exchange comments and incorporate into offering memorandum, continue to fine-tune offering memorandum and resubmit offering memorandum to exchange • Finalize description of notes
Week 8	• Board meeting to approve issue of preliminary offering memorandum, appoint committee to approve pricing, approve contractual documentation when finalized • Finalize preliminary offering memorandum • Finalize purchase agreement • Finalize road show presentation • Security agent / trustee and any lender consents obtained • Print preliminary offering memorandum • Announce and launch offering, subject to favorable market conditions

POST-LAUNCH

To market and build momentum for the offering, the Issuer and the Initial Purchasers will go on a roadshow (the length of which varies from a few days to up to two weeks) after "**Launch**". During this time, the other members of the working group finalize the listing, bond rating and contractual documentation, including Indenture, guarantees and security documents. Repeat Issuers may only conduct an electronic roadshow or conduct the offering on a much accelerated basis, sometime "overnight" without conducting a roadshow at all.

Since many key European high yield investors are based in London, Paris or Frankfurt, European high yield roadshows frequently include visits to those three cities. Other common roadshow stops include Amsterdam and Edinburgh, and further stops may be included based on the home country or particular industry of the Issuer, the market environment and other factors.

Following completion of the roadshow, all parties participate in a final "bring-down due diligence call" with the Issuer's management, the Issuer's auditors deliver a comfort letter and the Issuer and the Initial Purchasers hold the "**Pricing**" meeting during which the exact offering terms are set (e.g. offering size, coupon and tenors). After the Pricing meeting, the Issuer, any Guarantors and the Initial Purchasers will execute the purchase agreement, at which point both the Issuer and the Initial Purchasers are bound to complete the offering, subject to certain closing conditions. Issuer's counsel and Initial Purchaser's counsel then prepare the final offering memorandum and finalize and collect signatures for the various closing documents (including bring-down comfort letters, legal opinions and disclosure letters) in preparation for the "**Closing**" of the transaction. Upon Closing, the bonds are formally issued and delivered by the Issuer against payment therefore by the Initial Purchasers. Closing typically takes place three to five business days after Pricing (i.e., "T+3", "T+4", "T+5"), although a longer period (i.e. up to ten business days / "T+10") may be agreed, especially where transaction security must be put in place in multiple jurisdictions and/or existing security for the benefit of other creditors may need to be released.

For more information about the marketing of high yield bond offerings, see also "Introduction – Key Documents – Offering Memorandum" above.

Glossary

Term	Page
€1.00 of Additional Ratio Debt Test	40, 54
10b-5 Letter	11
Add-Backs	20, 31
Additional Amounts	26
Additional Assets	51
Affiliate Transactions	52-53
Agency Agreement	7
Asset Disposition	50-52
Asset Sale	50-52
Asset Sale Test	50-51
Asset Sale Ratchet	33
Acquired Indebtedness	34
Baskets	20-21
Build Up Basket	40-42
Call Protection	23-25
Call Schedule	23-25
Category 1/2/3	15
Closing	59
Change of Control	26-30
Change of Control Event	27
Change of Control Offer	27
Collateral	9-10
Collateral Dilution	31-33, 46-48
Comfort letter	11
Competent Authority	16
Conditions of Issue	7
Consolidated EBITDA	31
Consolidated Net Income	31
Contribution Debt	36
Covenants	18-19
Coverage Ratio	30-31
Credit Facilities Basket	33
Deemed Cash	50-51

Term	Page
Designated Non-Cash Consideration	51
Disclosure Letter	11, 59
Directed Selling Efforts	15
Dividends	38, 42, 48
Dividend Blockers	3-4, 48
Dividend Stoppers	3-4, 48
Description of Notes (DoN)	5
Documentation	5-11
Double Trigger	27-28
Down-stream Guarantees	12
Due Diligence	11
EBITDA	31
EEA	16
Engagement Letter	8-9
Exchange Act	16
Exchange-Regulated Market	17
Fall Away Covenants	21
Final Offering Memorandum	6
Fiscal Agency Agreement	7
Fixed Charge Coverage Ratio	30-31
Fixed Charges	31
Global Notes	6-7
Grower Basket	20
Governing Law	21-22
Guarantees	12
Guarantor Coverage	12
Guarantors	12
Hard Cap	20
Hedging Obligations	34, 46-47
Hell-or-High Water	20
Incurrence Covenants	19
Indebtedness	30
Indenture	6-7

Glossary

Term	Page
Initial Purchasers	7
Intercreditor Agreement	9
Investments	38-39
Issuer	12
Joint Ventures	35, 39, 49
Launch	56, 58
Legal Opinions	11
Leverage-Based Portability	28-30
Leverage-Based Restricted Payments	43
Leverage Ratio	31-33,43,47-48
Liens	44-48
Limitation Language	12
Maintenance Covenants	19
Mandate Letter	8-9
Merger	54-55
MD&A	5
Negative Assurance Letter	11
Negative Covenants	19
Net Income Basket	40-42
Non-Call Period	23-24
Offering Circular (OC)	5-6
Offering Memorandum (OM)	5-6
Offshore Transactions	15
Parties	12-14
Payment Blockage Provisions	3
Permitted Asset Swaps	51
Permitted Debt	33-36
Permitted Holders	27
Permitted Collateral Liens	46-48
Permitted Liens	44-46
Permitted Investments	39
Permitted Refinancing Indebtedness	34
Permitted Restricted Payments	42-44

Term	Page
Pink	6
Portability	27-30
Prelim	6
Preliminary Offering Memorandum	6
Pre-Marketing	6
Pricing	6, 59
Pricing Supplement	6
Priority Hedging	46-47
Prospectus	5-6
Prospectus Directive	16
Publicity	14
Publicity Guidelines	14
Purchase Agreement	7-9
Qualified Institutional Buyers (QIBs)	15-16
Ratings Decline Double Trigger	28
Ratio Debt	30-33
Red	6
Redemption	22-26
Optional Redemption / Make-Whole Redemption	23-25
10% at 103% Option	26
Equity Clawback Option	25
Early Redemption for Tax Reasons	26
Refinancing Indebtedness	34
Regulated Market	17
Regulation S (Reg. S)	15
Replacement Assets (see “Additional Assets”)	51
Reporting	55
Restricted Group	13-14
Restricted Payments	38-44
Restricted Subsidiaries	13-14, 53-54
Roadshow	58
Round-Tripping	29-30, 42
Rule 10b-5 Letter	11

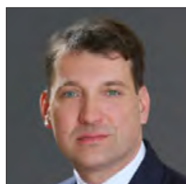
Glossary

Term	Page
Rule 144A	15-16
SEC	15
Securities Act	15
Securities Laws	14-17
Secured Leverage Ratio	31-33, 43, 47-48
Security Package	9-10, 44-48
Senior Notes	2
Single Point of Enforcement	19
Soft Cap	20
Specified Change of Control Event	28
Standstill Provisions	3
Subordinated Notes	2
Subordination	2-5
Contractual Subordination	3
Structural Subordination	3-4
Effective/Lien Subordination	4-5
Subscription Agreement	7-9
Substantial U.S. Market Interest/SUSMI	15
Super Priority Debt	2-4, 46-48
Super Senior Debt	2-4, 46-48
Tenor	1, 23-34
Timetable	56-59
Trustee	6
Up-stream Guarantees	12
Unregulated Market	17
Unrestricted Subsidiaries	13-14, 53-54
Underwriters	7
Underwriting Agreement	7-9
Underwriting Discount	8
Underwriting Spread	8
Whole-Sale Debt Exemption	17

Key Members of our Global High Yield Practice Include:

EUROPE

BERND BOHR
Partner, London/New York
London +44 20 3130 3640
NewYork +1 212 506 2299
bbohr@mayerbrown.com



ROBERT FLANIGAN
Partner, London/Paris
London +44 20 3130 3488
Paris + 33 1 53 53 43 43
rflanigan@mayerbrown.com

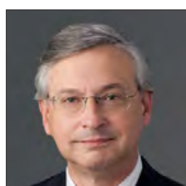
AMERICAS

GEORGE BAPTISTA
Partner, NewYork
+1 212 506 2375
george.baptista@mayerbrown.com

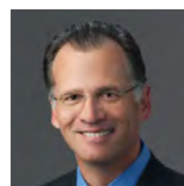
HARRY BEAUDRY
Partner, Houston
+1 713 238 2635h
beaudry@mayerbrown.com

JOHN BERKERY
Partner, NewYork
+1 212 506 2552
jberkery@mayerbrown.com

EDWARD BEST
Partner, Chicago
+1 312 701 7100
ebest@mayerbrown.com

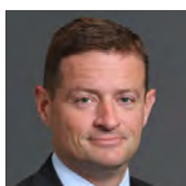


BILL HART JR.
Partner, Houston
+1 713 238 2603
bhart@mayerbrown.com



BILL HELLER
Partner, Houston
+1 713 238 2684
wheller@mayerbrown.com

ASIA



JASON T. ELDER
Registered Foreign Consultant (New York)
Partner, Mayer Brown LLP, Hong Kong
+852 2843 2394
jason.elder@mayerbrownjsm.com

THOMAS KOLLAR
Partner, Hong Kong
+852 2843 4260
thomas.kollar@mayerbrownjsm.com

About Mayer Brown

Mayer Brown is a global legal services organization advising clients across the Americas, Asia, Europe and the Middle East. Our presence in the world's leading markets enables us to offer clients access to local market knowledge combined with global reach.

We are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, CAC 40, DAX, Hang Seng and Nikkei index companies and more than half of the world's largest banks. We provide legal services in areas such as banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory and enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

Please visit www.mayerbrown.com for comprehensive contact information for all Mayer Brown offices.

Mayer Brown comprises legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP and Mayer Brown Europe-Brussels LLP, both limited liability partnerships established in Illinois USA; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales (authorized and regulated by the Solicitors Regulation Authority and registered in England and Wales number OC 303359); Mayer Brown, a SELAS established in France; Mayer Brown Mexico, S.C., a sociedad civil formed under the laws of the State of Durango, Mexico; Mayer Brown JSM, a Hong Kong partnership and its associated legal practices in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. Mayer Brown Consulting (Singapore) Pte. Ltd and its subsidiary, which are affiliated with Mayer Brown, provide customs and trade advisory and consultancy services, not legal services.

"Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.

© 2016 The Mayer Brown Practices. All rights reserved.

Americas | Asia | Europe | Middle East | www.mayerbrown.com

MAYER • BROWN

0835cor