

LATHAM & WATKINS LLP

*The*  
BOOK  
*of*  
JARGON®  
US Corporate &  
Bank Finance

The Latham & Watkins Glossary of  
US Corporate and Bank Finance  
Slang and Terminology

Second Edition



With this publication, we aim to assist the new and not-so-new members of the finance community in talking the talk of corporate and bank finance. This community is constantly adapting to the shifting economic climate, and this Second Edition is intended to keep you in the know on both new slang and timeless corporate and bank finance terminology. In this book, you will find the key to the code of Wall Street's A-Z jargon. While this publication is prepared on the basis of US law and practice, we believe it may be of interest to professionals in other financial centers of the world.

*Latham & Watkins publishes a series of practice area-specific glossaries which are available at [www.lw.com](http://www.lw.com) or can be downloaded on iTunes or Google Play.*

*The definitions contained herein are designed to provide an introduction to the applicable terms. The terms included herein raise complex legal issues on which specific legal advice will be required. The terms are also subject to change as applicable laws and customary practice evolve. As a general matter, *The Book of Jargon* is drafted from a US practice perspective.*

*The information contained herein should not be construed as legal advice.*

**'33 Act:** another name for the Securities Act.

**'34 Act:** another name for the Exchange Act.

**'40 Act:** another name for the Investment Company Act.

**"A" Loan:** another name for a Tranche A Term Loan.

**"B" Loan:** another name for a Tranche B Term Loan.

**10b-5 Letter:** another name for a Negative Assurance Letter.

**10b-5 Rep:** another name for a Rule 10b-5 Representation.

**135 Day Rule:** under SAS 72, auditors generally will only provide comfort on Financial Statements that are less than 135 days old. A Comfort Letter may be issued after this time, but the cut-off date for the auditors' procedures (which include Negative Assurance) is generally within 134 days from the date of the latest reviewed Financial Statements. Note that comfort periods generally, but not always, coincide with Staleness dates. See Latham & Watkins Desktop Staleness Calendar, available at [www.lw.com](http://www.lw.com).

**135(c) Release:** press release announcing the commencement of a private offering by a public company in reliance on the safe harbor provided by Rule 135(c). Rule 135(c) provides that a company subject to the reporting requirements of the Exchange Act (and certain non-reporting Foreign Private Issuers) will not be deemed to make an offer of Securities under Section 5(c) if it issues a notice of a proposed or completed unregistered offering.

**144A for Life Offering:** a Rule 144A Financing that does not provide Registration Rights for the buyers of the Securities. Accordingly, the Issuer in a 144A for Life Offering is not required to become a Reporting Company under the Exchange Act.

**144A Offering:** another name for a Rule 144A Financing.

**3(a)(9):** an offer to exchange new debt or Equity Securities for an Issuer's outstanding debt or Equity Securities, which offer is exempt from registration requirements pursuant to Section 3(a)(9) of the Securities Act. 3(a)(9) provides an exemption for "any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange" and requires that: (1) the issuer of both the exchanged securities and the surrendered securities be identical; (2) the transaction be a bona fide exchange where the security holder does not part with anything of value other than the outstanding securities; (3) the securities acquired in the exchange be offered exclusively to the issuer's existing security holders and (4) the issuer does not pay any remuneration for the solicitation of the exchange. See Latham & Watkins Client Alert No. 696, Restructuring High Yield Bonds: Getting Ready for the Next Phase of the Cycle (April 21, 2008), available at [www.lw.com](http://www.lw.com).

*4(2)*: shorthand for Section 4(a)(2).

*404 Compliant*: an Issuer that is compliant with SOX Section 404.

*A/B Exchange Offer*: another name for an Exchange Offer.

*AAIP*: acronym for Agreement Among Initial Purchasers.

*AAU*: acronym for Agreement Among Underwriters.

*ABL*: acronym for Asset-Based Loan.

*ABR Loans*: another name for Base Rate Loans.

*ABS*: acronym for Asset-Backed Security.

*Absolute Priority Rule*: under Bankruptcy law, this rule states that when a company is liquidated or reorganized, senior classes of claims and Equity interests must receive full distributions on account of their claims or Equity interests before junior classes may receive any distributions, unless the senior classes consent otherwise.

*Accelerated Filer*: a category of Issuer created by SEC rules. An Issuer's status as an Accelerated Filer, as opposed to a Large Accelerated Filer, a Non-Accelerated Filer or a Smaller Reporting Company, determines when its Financial Statements go Stale and when it has to comply with SOX Section 404. An Issuer qualifies as an Accelerated Filer if (i) its Public Float is between \$75.0 and \$700.0 million as of the last business day of the second fiscal quarter of the Issuer's preceding fiscal year and (ii) it has been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for at least 12 months, including the requirement to file an annual report. Once an Issuer is in Accelerated Filer land, its Public Float has to fall below \$50.0 million to get out. See Latham & Watkins Desktop Staleness Calendar, available at [www.lw.com](http://www.lw.com).

*Acceleration*: the end of the line under an Indenture or Credit Agreement. The definitions of Default and Event of Default describe how we get there. Following an Event of Default, the Bondholders (under an Indenture) or Lenders (under a Credit Agreement) have the right to "accelerate" the due date of their debts; in other words, they have the right to declare their Notes or loans immediately due and payable. Bankruptcy and insolvency Events of Default automatically lead to Acceleration (without any action by the Bondholders or the Lenders) because otherwise Acceleration would be prohibited under the Automatic Stay.

*Accordion Feature*: so called because it resembles the expanding musical instrument that shares its name, this is a feature in a Credit Agreement that allows the Borrower to increase the maximum commitment amount under a Revolver or to incur additional Term Loan debt under circumstances specified in the Credit Agreement. The Accordion, however, is not pre-committed financing. It is really just an advance agreement to share Collateral with additional Lenders in the

future if the Borrower can find them on the agreed terms. Also known as an Incremental Facility.

**Account:** when used in secured bank land, this is not a bank account. Under the UCC, an Account is a right to payment for, among other things: (i) property that has been or will be sold, leased, licensed or assigned; (ii) services that have been performed or will be performed; (iii) insurance policies that have been issued or will be issued or (iv) secondary obligations that have been incurred or will be incurred. An Account does not include a right to payment that is evidenced by Chattel Paper or an instrument, or which results from commercial tort claims, deposit accounts, investment property, Letter of Credit rights or Letters of Credit. When used in Bond land this term is a shorthand reference to the potential buyers of Securities in an offering.

**Account Control Agreement:** this is how Lenders in a secured financing Perfect their Security Interest in a Borrower's deposit and securities accounts. It is an agreement among the Borrower, the Collateral Agent and the bank or securities intermediary where the Borrower has its deposit or securities account. Absent an Event of Default, the Borrower usually retains full access to the account. Upon an Event of Default, however, the Collateral Agent may notify the deposit bank or securities intermediary to transfer control over the account to the Collateral Agent. A Security Interest in a securities account is typically Perfected either by means of an Account Control Agreement or by filing a Financing Statement, although a Security Interest Perfected by means of Control has Priority over a Security Interest Perfected by filing a Financing Statement. A Security Interest in a deposit account, by contrast, can be Perfected only by means of an Account Control Agreement or another method of Control, not by filing a Financing Statement.

**Account Party:** the party that asks that a Letter of Credit be issued, and who is responsible for repaying the Issuing Bank when the Letter of Credit is drawn by the beneficiary.

**Accounting Circle Up:** another name for a Circle Up.

**Accredited Investor:** defined under SEC Rule 501 of Regulation D, this refers to people and entities that are permitted to buy Securities in a Private Placement. The term covers virtually all the types of institutions that are participants in the Private Placement market, and also includes people who are either rich or sophisticated. It is, of course, better to be both rich and sophisticated, but one will do for Regulation D purposes.

**Accreted Value:** this is the original purchase price of a Zero Coupon Bond or Discount Note plus all non-cash Interest that has accrued on the Bond or Note since the date of issuance. The calculation of Accreted Value is set forth in the Indenture under which the Bonds or Notes were issued.

**Accrued and Unpaid Interest:** Indentures and Credit Agreements all designate Interest Payment Dates. If a redemption or prepayment is made, Accrued and Unpaid Interest refers to the interest that has accrued since the last payment date, but has not yet been paid to Bondholders or Lenders.

**Acquisition Line:** a Delayed Draw Term Facility intended to be used to fund acquisitions.

**Additional Amounts:** like a Tax Gross-Up in a Credit Agreement, a provision in an Indenture that increases the amount of any payment with respect to the Notes by the Issuer to a holder of the Notes so that, after payment of applicable withholding taxes, the holder receives what it would have received if no withholding taxes had been imposed.

**Additional Interest or Special Interest:** In the context of Bonds, Additional Interest begins to accrue in instances where the Issuer fails to comply with its obligations under its Registration Rights agreement—for instance, because the Issuer does not get the Exchange Offer effective in the time specified by the Registration Rights agreement.

**Adjusted EBITDA:** EBITDA on steroids. Refers to EBITDA, adjusted to eliminate the impact of certain unusual or non-cash items that the Issuer/Borrower (or its Sponsor) believes are not indicative of the future performance of its business. In Credit Agreements, this term can also refer to EBITDA adjusted on a Pro Forma basis for acquisitions and dispositions, so that, when measuring EBITDA for a particular period, any acquisition or disposition in that period is deemed to have happened on the first day of such period so the EBITDA of the acquired/dispensed of asset is gained/lost for the whole period. For Reporting Companies, disclosure of EBITDA, Adjusted EBITDA and other “non-GAAP financial measures” must be done within the confines of Item 10 of Regulation S-K (in the case of certain public filings) and Regulation G of the SEC (in all cases). A form of Adjusted EBITDA is also a component of the Leverage Ratio and Fixed Charge Coverage Ratio definitions.

**Admin Agent:** shorthand for Administrative Agent.

**Administrative Agent:** the bank that serves as the principal Agent administering the Credit Facilities documented in the Credit Agreement. The Administrative Agent is responsible for processing Interest payments to Lenders, posting notices delivered by the Borrower and acting as the primary representative of the Lenders under a Credit Agreement in dealings with the Borrower. The Trustee performs an analogous role in Bond land.

**Administrative Agent Fee:** the annual fee paid to the Administrative Agent for administering a Credit Facility; sometimes referred to as the Agency Fee.

***Affiliate:*** defined slightly differently in different types of agreements, but generally refers to a subsidiary, corporation, partnership, or other person controlling, controlled by or under common control with another entity. The official Securities law definition is found in SEC Rule 144 and Rule 405.

***Affiliate Transactions Covenant:*** a Negative Covenant that protects against disguised dividends by preventing the Issuer/Borrower from entering into non-arm's-length transactions with its Affiliates, such as paying excessive management fees to Sponsors, selling assets to stockholders for less than fair market value or overpaying stockholders/employers through excessive salaries. The Affiliate Transactions Covenant typically does not flatly prohibit Affiliate transactions, but rather requires that they be on arm's-length terms and, at certain dollar thresholds, be approved by disinterested directors. Fairness Opinions are also sometimes required.

***Affirmative Covenant:*** requires an Issuer/Borrower to affirmatively do something. These are contractual provisions in an Indenture or a Credit Agreement that itemize certain actions the Issuer/Borrower must take to be in compliance with the applicable document. Think of these as the "Thou Shalt" Covenants. Affirmative Covenants are usually more boilerplate in nature, covering such things as a promise by the Borrower to pay Interest and fees, maintain insurance, pay taxes, provide quarterly operating reports, and so forth. In a secured deal, the Affirmative Covenants regarding delivery and maintenance of Collateral will be more highly negotiated. Compare Negative Covenant.

***Agency Fee:*** another name for Administrative Agent Fee.

***Agent:*** generic term used to describe any of the Administrative Agent, Collateral Agent, Documentation Agent and Syndication Agent.

***Agreement Among Initial Purchasers:*** the agreement that governs the relationship among the Initial Purchasers in connection with an unregistered securities offering. Comparable to an Agreement Among Underwriters. See Master Agreement Among Underwriters.

***Agreement Among Underwriters:*** the agreement that governs the relationship among the Underwriters in a registered Securities offering. See Master Agreement Among Underwriters. There is no directly comparable document among the members of a bank loan Syndicate, mostly as a matter of custom. See, however, Syndication Agreement.

***AHYDO Catch-Up Payment:*** it is possible to avoid "significant OID" (and thereby avoid the AHYDO Rules altogether) by providing for a "catch-up" payment to holders of certain High Yield instruments issued with OID on or before the first payment date after the fifth anniversary of the original issuance of the debt instrument. The purpose of the AHYDO Catch-Up Payment is to pay enough of the OID in cash so that

the Issuer is not more than one year's worth of Interest behind on that date. For a more comprehensive summary of the requirements for an AHYDO Catch-Up Payment that will permit a debt instrument to avoid the AHYDO Rules, see Latham & Watkins Client Alert No. 598, The AHYDO Rules and the PIK Toggle Feature (May 16, 2007), available at [www.lw.com](http://www.lw.com).

**AHYDO Rules:** rules under the Internal Revenue Code that limit a company's ability to deduct Interest on certain High Yield instruments issued with OID. AHYDO (Applicable High Yield Discount Obligations) Rules are particularly important in hot markets when Bonds with a PIK feature are being sold. Normally, a company can deduct Interest from its calculation of taxable income, whether paid in cash or in kind. However, if the AHYDO Rules apply, a company cannot deduct Interest from its calculation of taxable income until it pays the Interest in cash (and the company may be prohibited from deducting a portion of the Interest permanently). If a debt instrument is issued by a partnership (or a limited liability company or other entity that is taxed as a partnership), the AHYDO Rules would apply to any corporate partner of the Issuer.

The AHYDO Rules apply if a debt instrument meets each of the following criteria: (i) it is issued by a corporation; (ii) it has a maturity greater than five years; (iii) it is issued with "significant OID;" and (iv) it is issued at a Yield to maturity that equals or exceeds the applicable federal rate for the month of issuance (the "AFR") plus 500 Basis Points. "Significant OID" generally means that the debt instrument permits the Borrower to pay more than one year's worth of Interest in the aggregate over the first five years of the life of the instrument on a non-cash basis. If the AHYDO Rules do apply, then the Issuer (or, in the case of a partnership Issuer, its corporate partners) cannot take tax deductions for non-cash Interest payments until the Interest is actually paid in cash. In addition, if the Yield to maturity on the debt instrument exceeds the AFR plus 600 Basis Points, and if the AHYDO Rules otherwise apply, then the Issuer (or its corporate partners) can never take the deduction for any Interest over that level. For a more comprehensive summary of the AHYDO Rules, see Latham & Watkins Client Alert No. 598, The AHYDO Rules and the PIK Toggle Feature (May 16, 2007), available at [www.lw.com](http://www.lw.com). See AHYDO Catch-Up Payment.

**AICPA:** acronym for the American Institute of Certified Public Accountants, Inc.

**All or Substantially All:** no one knows exactly what this phrase means. This phrase is used in various Covenants and other contractual provisions, but the precise meaning is the subject of much debate (and litigation). It does not necessarily mean what it sounds like in general layman's terms. See, for example, *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039 (2d Cir. 1982) and *B.S.F. Co. v.*

*Philadelphia National Bank*, 204 A.2d 746 (Del. 1964). If you think you have an “all or substantially all” question, call a Latham lawyer.

**Alleco:** refers to a transaction (and the subsequent court decision) where an Issuer of High Yield Bonds was determined by the court to have made an “indirect” Restricted Payment. As interpreted by High Yield market participants, Alleco now stands for the proposition that an Issuer of High Yield Bonds cannot get “around” a Restricted Payments Covenant by (a) having another entity borrow the necessary funds and make the (prohibited) payment and (b) having the Issuer subsequently assume (and/or repay) that debt. Always look out for an “Alleco issue” when Target Bonds are being left in place.

**In Alleco:** (1) the buyer borrowed \$65 million and used it to purchase Alleco’s common stock; (2) the buyer then merged into Alleco, and, as a result, Alleco became the borrower under that new \$65 million bridge loan and (3) the following day Alleco repaid the \$65 million bridge loan. The court found that the substance of those transactions constituted a self-tender and therefore violated the Restricted Payments Covenant in Alleco’s Indenture, notwithstanding Alleco’s argument that each step was permitted thereunder. See *Alleco, Inc. v. IBJ Schroder Bank & Trust Co.*, 745 F.Supp. 1467 (D. Minn. 1989).

**Allocation:** see Allotment.

**Allotment:** also described as Allocation. When used in Bond land, this is the amount of a new issue of Securities allotted to each Syndicate member by the Lead Manager after the final terms of the issue have been fixed. Following Allotment, the Syndicate members will sell the Securities allotted to them to their investor clients.

**Alternative Transactions Language:** a provision in the Fee Letter that says that the investment bank that has committed to a Senior Secured Credit Facility or Bridge Facility will still get paid all or some of its agreed fees if the Borrower ends up funding the applicable facilities through a different bank. Sometimes this is negotiated down to either giving the original bank a right to play in any new deal (but not a guarantee of payment), or giving the original bank an amount of fees equal to what the alternative bank gets.

**Amend and Extend:** a phrase used to describe an amendment to a Credit Agreement that extends the maturity of one or more debt tranches, sometimes in conjunction with covenant and/or pricing amendments.

**Amendment:** a change to the provisions of an existing agreement. For instance, a Borrower might amend its Credit Agreement to allow for more indebtedness to be incurred. See also Technical Amendment.

**American Depository Receipt or ADR:** a negotiable certificate issued by a bank or trust company and traded in the US markets that represents ownership of Securities of a non-US company. ADRs are

denominated in US dollars, and the underlying Security is held by a US financial institution overseas. ADRs are US Securities and are accordingly subject to US Securities regulations.

**AML:** acronym for Anti-Money Laundering.

**Amortization:** the required periodic repayment in installments of portions of the principal of a Term Loan prior to its final maturity. Bonds, Revolving Facilities, and Second Lien Facilities generally do not Amortize. In accounting speak, Amortization is the same concept as Depreciation, except that intangible assets are Amortized and tangible assets are Depreciated. See Depreciation.

**Amortization Schedule:** the schedule of regularly timed repayments of principal prior to the maturity of a Term Loan. The Amortization Schedule is usually set forth in the Senior Secured Facilities Term Sheet and then in the Credit Agreement itself.

**Amortizing Loan:** usually a reference to a Tranche A Term Loan.

**Angel Investor:** an investor that provides capital for a business start-up, usually in exchange for convertible Preferred Stock or Equity ownership.

**Anti-Layering Covenant:** a Covenant that prohibits an Issuer from layering in another series of debt between the Senior Debt and the Subordinated Debt. This is essentially a no-cheating rule and is only used in senior subordinated deals. Senior Notes include an analogous provision that requires that all debt that Subordinates itself to any Senior Secured Credit Facilities also subordinate itself to the Senior Notes. The Anti-Layering Covenant ensures that the Subordinated Debt occupies the second class slot and not the third or fourth. Since Second Lien Facilities are effectively "sandwiched" in-between the First Lien Facilities and unsecured Bonds, Second Lien Facilities are sometimes prohibited by the Anti-Layering Covenant.

**Anti-Money Laundering:** see KYC.

**Applicable Margin:** the additional percentage that is added to a particular Interest Rate index to determine the Interest Rate payable on variable rate debt. Generally, the Credit Agreement (or the Interest Rate section of the Senior Secured Facilities Term Sheet) will set the Interest Rate at either (at the Borrower's option) the Base Rate plus a specified percentage, or LIBOR plus a specified percentage. The specified percentage is usually referred to as the Applicable Margin. The Applicable Margin for Base Rate Loans is almost always 100 Basis Points lower than the Applicable Margin for LIBOR Loans.

**Arbitrage:** to take advantage of a price differential between two or more markets, such as by buying an investment in one market and then immediately selling it at a higher price in another market.

**Arranger:** the investment bank that “arranges” a Credit Facility by negotiating original terms with the Borrower and Syndicating the facility to a larger group of Lenders. In a Commitment Letter, the name of the Arranger for the Senior Secured Credit Facilities is set forth in the Senior Secured Facilities Term Sheet; the name of the Arranger for the Bridge Loan facilities is set forth in the Bridge Facility Term Sheet. Generally, the same entity serves as Arranger for both. The Arranger generally has no ongoing obligations under a Credit Agreement or Bridge Loan Agreement after the Closing Date.

**Arranger Fee:** another name for an Underwriting Fee.

**Article 9:** the law that governs the validity and Perfection of Security Interests in most personal property. This is the article of the UCC that governs secured transactions. See Perfection. In California, Article 9 is called “Division 9”—they just have to be special.

**As-Extracted Collateral:** a type of personal property defined in Article 9. It consists of (i) oil, gas or minerals that are subject to a Security Interest before they have been extracted or (ii) accounts from the sale of oil, gas or minerals that the debtor has an interest in before their extraction. For troubled credits, may also include teeth.

**Asset Sale Covenant:** the Covenant in an Indenture or Credit Agreement that governs the sale or other disposition of assets. In an Indenture, the Covenant assures that the Issuer's Balance Sheet stays in balance by making sure that if assets shrink, the Issuer either replaces the assets with new assets or reduces its debt. The company is allowed to sell assets under the Covenant, but it must get fair market value and mostly cash (typically 75 percent). The proceeds must be used to repay Senior Debt, reinvested in long-term assets useful in the business or used to make an offer to repurchase Bonds at Par. In a Credit Agreement, by contrast, this Covenant also limits the Borrower's ability to sell assets, except as may be specifically negotiated on a deal-by-deal basis (which may permit the Borrower to sell assets for fair market value if the Borrower receives mostly cash). In the Credit Agreement context, see also Asset Sale Prepayment.

**Asset Sale Prepayment:** a specific type of Mandatory Prepayment. This provision in a Credit Agreement requires the loans to be prepaid with the net cash proceeds of certain non-ordinary course asset sales of the Borrower and its subsidiaries. The idea is that secured loans are made partly based on the knowledge that a certain amount of asset value is held by the Borrower and pledged as Collateral. To the extent the Collateral is disposed of, the loans are prepaid with the proceeds. This provision will often pick up proceeds of casualty or condemnation insurance, thereby incorporating the Insurance Proceeds Prepayment provision. This repayment requirement is often subject to a Reinvestment Right (if the Borrower reinvests the proceeds within a certain period, it generally does not have to repay the loans with these proceeds).

**Asset Sale Sweep:** another name for an Asset Sale Prepayment.

**Asset-Backed Security:** a generic term describing Tranching, exchange-listed Bonds issued by Special Purpose Entities backed by financial assets as mundane as residential mortgages (residential mortgage-backed securities or RMBS), commercial mortgages (commercial mortgage-backed securities or CMBS), automobile loans and leases, and credit card obligations, or as esoteric as casualty insurance claims (catastrophe Bonds or cat Bonds), life insurance claims (viatical settlement Bonds) or changes in survival rates (longevity Bonds). CBOs, CDOs, CFOs, and CLOs are all also types of Asset-Backed Securities.

**Asset-Based Loan:** a Revolving Facility where the total amount that can be borrowed fluctuates based upon the value of certain assets of the Borrower at a given time. Unlike a Cash Flow Revolver, which provides the Borrower with a line of credit in a fixed amount that can be borrowed at any time, an Asset-Based Loan limits the line of credit to the lesser of a fixed amount and a percentage of the value of a certain set of assets (primarily accounts receivable and inventory). This is often referred to as a Borrowing Base. Asset-based lending is a way for companies to meet their short-term cash needs by borrowing against their short-term assets at favorable rates. Asset-Based Loans are particularly popular among retailers and other businesses with large amounts of accounts receivable and inventory. See Borrowing Base.

**Assignment:** a Lender's transfer of its rights and obligations under a Credit Agreement or Bridge Loan Agreement to a new Lender. Borrowers frequently like to maintain a degree of control over the Assignment process through consent rights and, in some cases, Blacklists. Lenders prefer to limit such consent rights in order to maximize Syndication options and keep the loans more freely tradable. Note that a Borrower's right to consent to transfers is an important fact that helps distinguish loans from Securities.

**At Par:** see Par Value.

**Auction Rate Securities:** a long-term Security, often a municipal Bond, that has interest that re-sets on very short terms, usually seven, 28 or 35 days. At the end of that period, the Interest Rate is re-set through a Dutch Auction. The holder can, at the end of any Interest Period, put the Bond back to the Issuer (*i.e.*, cause the Issuer to buy the Bond). The Bond is then quickly remarketed. Variable Rate Debt Obligations are similar but have a bank facility to ensure purchase of the Bonds if they are not successfully remarketed.

**Audit Committee:** A committee of the board of directors that oversees a company's audit, control and financial reporting functions. SEC rules require that the Audit Committee of a public company be comprised entirely of Independent Directors and be responsible for engaging and overseeing the company's independent accountants and establishing procedures for the treatment of complaints regarding auditing, internal

control, and accounting matters.

**Authentication:** the signing of a Security (in global or definitive form) by the Trustee in order to give it legal effect.

**Automatic Shelf Registration:** a Registration Statement on Form S-3 or Form F-3 filed by a WKSI. The advantage of an Automatic Shelf Registration (as opposed to a plain-vanilla Shelf Registration filed by a company that is not a WKSI) is that it becomes automatically effective, so that sales of the Securities can take place immediately after filing, without the possibility of SEC review.

**Automatic Stay:** the rule under Bankruptcy law that once a Bankruptcy case is commenced, creditors and other parties generally are not permitted to collect on claims against the debtor or otherwise obtain or exercise Control or possession over property of the debtor's bankruptcy estate outside of the Bankruptcy proceedings. Creditors may seek relief from the Automatic Stay by filing a motion with the Bankruptcy court. There are also a number of exceptions to the Automatic Stay, such as governmental entities exercising their police power and the termination or liquidation of certain financial contracts.

**Availability:** this is a term used most frequently in the world of Revolving Facilities. It is a measure of the amount of additional borrowings or other extensions of credit (such as the issuance of Letters of Credit) that would be permitted under the Revolver at any particular point in time. Term Loan Facilities are generally drawn once on the Closing Date, although some allow for delayed draws during a specified period (see Delayed Draw Term Facility). Revolving Facilities are lines of credit that generally may be drawn, repaid and redrawn throughout the life of the facility, but only if there is Availability (in the case of an Asset-Based Loan, under the Borrowing Base formula). The Availability terms are found in the Senior Secured Facilities Term Sheet and then documented in full in the Credit Agreement.

**Available Amounts Basket:** an extra Basket (included in many Credit Agreements) that may be used for dividends, Capital Expenditures, investments or the prepayment of other debt (usually Subordinated Debt). This is a bank land replica of the way Restricted Payment capacity works in most High Yield Indentures. The Available Amounts Basket generally starts with 50 percent of consolidated net income or that portion of Excess Cash Flow that is not captured by the Excess Cash Flow Sweep, and builds cumulatively over time (perhaps with the receipt of Equity proceeds, in deals where no Equity Sweep is present). Though available for Capital Expenditures, prepayments of other debt, dividends and investments, the Available Amounts Basket is a single Basket, so usage for one purpose reduces the amount available for other purposes.

**Average Life:** another name for Weighted Average Life.

**Bad Actor:** Pursuant to Rule 506(d), eligibility to conduct a Rule 506 private placement is dependent upon, among other things, the absence of any "bad actors," including the Issuer, the Issuer's directors and officers, certain significant shareholders of the Issuer and any person who has received or will receive direct or indirect compensation for solicitation of purchasers in connection with such offering, among others. The parade of horrors that renders one a Bad Actor includes certain criminal convictions, restraining orders and regulatory proceedings in connection with the purchase or sale of a security involving false statements, certain types of mail fraud and being Keanu Reeves. See Latham & Watkins Client Alert No. 1569, "You Talkin' to Me?" (July 25, 2013), available at [www.lw.com](http://www.lw.com).

**Balance Sheet:** a Financial Statement on which a company reports its assets, liabilities and Equity as of a given point in time. In contrast to an Income Statement, which depicts a company's situation over a period of time, a Balance Sheet provides a "snapshot" as of a moment in time. The term Balance Sheet derives from the accounting principle that a company's assets must equal (or "balance" with) its liabilities plus stockholders' equity. See Income Statement.

**Balloon Payment:** the payment of principal on a Bond or Term Loan on the Maturity Date. See Bullet Maturity.

**Bank Book:** shorthand for the Confidential Information Memorandum (or CIM) used to Syndicate bank loans.

**Bank Meeting:** the initial meeting of potential Lenders to whom an Arranger hopes to Syndicate a Credit Facility, at which meeting the Bank Book will be discussed.

**Bank-Bridge Structure:** a set of Commitment Papers that contains terms for both a Senior Secured Credit Facility and a Bridge Facility.

**Bank-Only Deal:** financing consisting only of bank debt (*i.e.*, no Bridge Facility or Securities).

**Bankruptcy:** a federal court process under the Bankruptcy Code whereby a company restructures its debt under the auspices of the Bankruptcy court. There are advantages (such as the ability to Cramdown a plan on dissenting creditors) and disadvantages (such as high costs and public disclosure requirements) to restructuring debts in Bankruptcy, as opposed to out of court.

**Bankruptcy Code:** Title 11 of the United States Code.

**Bankruptcy Remote Vehicle:** a company that is set up within a corporate group in a way so as to prevent the insolvency of that company from affecting any other company within the group. A Bankruptcy Remote Vehicle is often created for a limited corporate purpose. A typical example would be when a Bankruptcy Remote Vehicle is set up for the purpose of acquiring or operating a particularly risky asset or

making investments. Conducting a transaction by means of forming and utilizing a Bankruptcy Remote Vehicle is a type of Off Balance Sheet Arrangement. Also known as a Special Purpose Vehicle (SPV) or Special Purpose Entity (SPE).

**Base Prospectus:** a Shelf Registration Statement contains two parts: (i) the Base Prospectus (which is in the initial filing) and (ii) the Prospectus Supplement (which is filed along with the Base Prospectus when the Issuer executes a “takedown” off the shelf). See Shelf Takedown.

**Base Rate:** a Floating Rate of Interest that varies daily, usually equal to the highest of (i) the prime rate, (ii) the Federal Funds effective rate plus ½ percent and (iii) one-month LIBOR plus 1 percent. Lending rates are set at a margin over the Base Rate, depending on the risk involved. See Applicable Margin and LIBOR.

**Base Rate Loans:** loans bearing Interest based upon the Base Rate.

**Basel I:** the first of the international regulatory capital accords to provide for risk-based capital standards for international banks. Basel I standards were published in 1988 by the Basel Committee on Banking Supervision (affiliated with the Bank for International Settlements located in Basel, Switzerland and consisting of regulators from leading industrialized countries). Basel I was largely superseded by Basel II, but in the US, smaller, less complex banks are still permitted to follow Basel I standards. See also Capital Adequacy.

**Basel II:** the imaginatively titled second installment of the Basel accords, Basel II was published by the Basel Committee on Banking Supervision in 2004. One of the principal purposes of Basel II was to establish a more risk-sensitive framework for defining risk capital and weightings. Many countries, including the US, had not fully implemented Basel II before the financial crisis of 2008-2009. Basel II was significantly amended by Basel III. See also Capital Adequacy.

**Basel III:** the much anticipated and also imaginatively titled third installment of the Basel accords. Basel III attempts to address deficiencies in global financial regulation revealed by the financial crisis of 2008-2009. Among other key components, Basel III substantially increases the amount and quality of capital for banks and introduces a new leverage ratio requirement and complex liquidity requirements. See also Capital Adequacy. See Latham & Watkins Client Alert No. 1094, Making Increased Costs Claims Under Basel III—Working with the LMA provisions (October 25, 2010), available at [www.lw.com](http://www.lw.com). See Also Latham & Watkins Client Alert No. 1138, Basel III: A New Environment for International Banks (February 3, 2011), available at [www.lw.com](http://www.lw.com).

**Basis Point:** one one-hundredth of a percentage point (e.g., 50 Basis Points equals 0.50 percent).

**Basket:** an exception contained in a Negative Covenant (often expressed as a dollar amount). For example, a Negative Covenant

may be: "Borrower shall not issue additional debt;" a Basket would be: "except for unsecured debt in an amount not to exceed \$10.0 million." See also Carveout.

**Bear Hug Letter:** an offer letter by an acquiror to buy a Target at a price considerably in excess of the Target's current share price. Called a Bear Hug because the high price is hard to resist.

**Bear Market:** bad times. Hang in there for a Bull Market.

**Bed Bug Letter:** no, this is not a letter from your landlord saying you will be spending the next six months in a hotel. This is a letter issued by the SEC in response to a Registration Statement that it deems too deficient to warrant a detailed comment letter, often recommending a substantive amendment or withdrawal of the filing. Frequently results from insufficient Financial Statements.

**Beige Book:** an informal name for a report published by the Federal Reserve Board eight times a year. The report is a collection of current economic conditions and is gathered by the Federal Reserve Bank in each of the 12 districts and is based on sources such as bank and branch director reports and expert interviews. An overall summary is prepared by a designated Federal Reserve Bank on a rotating basis.

**Beneficial Owner:** Section 13(d) of the Exchange Act and the rules adopted thereunder (most notably Rule 13d-3) cover the gory details of this concept. The big picture is this: if you have the power to vote or dispose of a particular Security, either individually or as part of a group acting in concert, then you are probably the Beneficial Owner of that Security.

**Best Efforts Syndication:** a Syndication where the Arranger commits to provide less than the entire amount of the loans (or even none of them), but agrees to use its "commercially reasonable" efforts (not "best" efforts, notwithstanding the name) to find Lenders to provide the loans. Traditionally used for risky Borrowers, complex transactions, Syndications in bad markets or in other circumstances (such as Refinancings) where the Borrower doesn't absolutely need the money by a certain time and would prefer not to pay the higher fees associated with committed financings.

**Bid Letter:** in a seller-controlled auction for a company, a letter to potential bidders communicating the requirements for submitting bids and the auction process.

**Bidco:** name given to the SPV established by a Sponsor as the acquiring entity in a Leveraged Buyout or by a corporate in a takeover. Usually Bidco will be the main Borrower in acquisition-related Credit Facilities.

**Big Boy Letter:** a letter sometimes entered into in connection with a secondary trade of Securities where one party to the trade has more information about the Issuer than the other. A Big Boy Letter says something to the effect that one party may have more information than

the other about the Issuer, but because they are both “big boys,” they are still knowingly and willingly entering into the transaction. Big Boy Letters raise a number of interesting legal issues, including whether the letter itself is actually enforceable and whether or not the letters actually work as a defense against insider trading liability.

**Bill of Exchange:** a written, unconditional order by one party (the “drawer”) to another (the “drawee”) to pay a certain sum to a third party (the “payee”), either immediately or on a fixed date, for payment of goods or services received. A Bill of Exchange is not a Negotiable Instrument unless it states that payment is to be made “to order” of the payee.

**Bill of Lading:** a document issued by a carrier of goods to a shipper, acknowledging that specified goods have been received on board from the shipper as cargo for conveyance to a named place for delivery. If a Bill of Lading is issued “to order” of the recipient of the goods (the “consignee”) or another party (usually the shipper), then it is a Negotiable Instrument.

**Blacklist:** a list put together by the Borrower or the Sponsor of Lenders to whom a certain loan may not be Assigned because the Borrower or Sponsor believes the Lenders on the Blacklist will not be easy to deal with (in terms of Amendments, consents, etc.) over the life of its loans. See also Disqualified Lenders.

**Blackout Period:** a provision in a Commitment Letter that certain holiday time periods (generally late August, late December and around Thanksgiving) do not count as part of the Minimum Marketing Period and Minimum Syndication Period. In the Securities context, Blackout Period also refers to a period during which certain designated individuals are prohibited from trading in a company’s Equity Securities. Blackout Periods in the Securities context are governed by SEC Regulation BTR (Blackout Trading Restriction), which came about as a result of Sarbanes-Oxley. Regulation BTR prohibits directors and executive officers of public companies from trading that company’s Equity Securities during a Blackout Period under the company’s pension or 401(k) plans. The regulation came about after several highly publicized cases in which senior executives of soon-to-fail companies sold shares at the same time their employees’ plans prohibited the employees from doing so.

**Block Sale/Trade:** a sale of a block of Securities. The term is often used interchangeably with the term Bought Deal, particularly where the seller is an existing stockholder rather than the Issuer. See also Bought Deal. See Latham & Watkins Client Alert No. 1305, *The Bought Deal Bible: A User’s Guide to Bought Deals and Block Trades* (March 15, 2012), available at [www.lw.com](http://www.lw.com).

**Blood Letter:** in the context of a Securities offering, a letter by Underwriters or Initial Purchasers acknowledging that that they

have furnished certain disclosure in the “Underwriting” or “Plan of Distribution” section of the offering document. Such disclosure often relates to the terms of the offering, market-making activities, short sales, stabilizing transactions and penalty bids. Frequently the Blood Provisions are in either the Purchase Agreement or Underwriting Agreement rather than a separate Blood Letter.

**Blood Provisions:** see Blood Letter.

**Bloomberg Screen:** in Bond land, shortly after Pricing, the capital markets desks of the relevant investment banks will prepare Pricing Term Sheets. In order to do so, the desks use a Bloomberg data service known as the Bloomberg Screen. These Bloomberg Screens are then forwarded to the relevant sales force at such investment bank, and the sales force will in turn forward these screens via Bloomberg to Accounts that have received Allocations in the offering. Bloomberg Screens are also used for a variety of other purposes—they really are useful things.

**Blue or “EZ-Blue”:** a printer's final proof of an offering document (whether the preliminary or final) prepared as the last step for signoff by the deal teams before the printer begins printing. Printers will typically circulate a link to an electronic blue line, or EZ-Blue, that allows the reviewer to electronically “page-flip” the final proof of the offering document exactly as it will appear when printed.

**Blue Sky Laws:** state, as opposed to US federal, Securities laws. While most state securities regulation has been preempted (with certain exceptions) by the National Securities Market Act of 1996, antifraud litigation and notice filings for certain covered securities still remain under state jurisdiction.

**Board Observer Rights:** rights given to debt providers or minority Equity investors to attend (but not vote) at board meetings of a particular Borrower, Issuer of Notes or other appropriate Affiliate. The board observer attends but is not appointed as a director or board member. Often used in Mezzanine Financings. Board Observer Rights are often limited to permit exclusion of the observer in the event of a conflict of interest or to protect confidentiality or legal privilege.

**Boilerplate:** general term used to describe standard clauses found in most contracts. In an Indenture or a Credit Agreement, Boilerplate clauses would include the notices clause, Counterparts clause, governing law clause and so on. Such clauses should be customary and standardized to an extent that only a very limited amount of negotiation is required.

**Bondholder:** exactly what you think it means—a holder of a Bond.

**Bonds:** debt instruments that represent a fixed principal amount of money and a fixed (or floating) Interest Rate. Also known as Notes or Debentures. These puppies are almost always issued pursuant to an agreement known as an Indenture. See also Fixed Income Security.

**Book:** (i) shorthand for the Offering Memorandum or Prospectus, regardless of whether in draft form or final, for example, "We'll revise the book and distribute it in the morning," or (ii) the master list of orders from Accounts, setting forth the amounts and pricing. Such orders will generally be scaled, for example, "I'll take \$5 million in Bonds at 10 percent and \$20 million at 10.5 percent."

**Book Building:** the process of building the Book in a Securities offering amongst the various potential buyers who have been approached and expressed interest in the Securities. See also Accounts.

**Book Entry:** a reference to the computerized ledger systems used by the Clearing Systems.

**Book Value:** the dollar amount stated for particular assets on a company's Balance Sheet.

**Bookrunner:** the Arranger who determines what portion of a Credit Facility will be allocated to each potential Lender. See Arranger. The Bookrunner should not be confused with the Syndication Agent for a particular Credit Facility. The Syndication Agent role (like the Documentation Agent role) is often driven entirely by a desire to hand out League Table Credit—these Agents don't actually do much of anything. The Bookrunner actually runs the books during Syndication. Similarly, the Bookrunner in a Securities offering manages the Syndication efforts. See Lead Managing Underwriter.

**Booster Shot Provision:** a provision commonly seen in older Lockup Agreements, which is no longer used today. The provision provided for the automatic extension of the Lockup (generally by 18 days) in instances where (i) the Issuer has announced material news during the last 17 days of the Lockup period or (ii) prior to the expiration of the Lockup period, the Issuer announces that it will release earnings during the 15-day period following the expiration of the Lockup. The provision was included in these older Lockup Agreements to ensure compliance with a 15-day "quiet period" required by FINRA rules, however this 15-day "quiet period" was repealed by FINRA in September 2015 (thereby rendering Booster Shot Provisions a thing of the past).

**Borrower:** a company that borrows under a Credit Agreement.

**Borrowing Base:** a concept in an Asset-Based Loan where the maximum amount available for borrowing under a Revolver is a moving target. A Cash Flow Revolver does not have a Borrowing Base. A Cash Flow Revolver provides the Borrower with a line of credit up to a fixed dollar amount. When there is a Borrowing Base, the maximum amount available for borrowing moves based on the dollar value of the pledged Collateral (e.g., receivables, inventory, equipment) multiplied by a discount factor, and subject to an overall Cap. For example, Lenders might agree to advance funds against 80 percent of accounts receivable and 60 percent of inventory up to a maximum amount of \$100.0 million.

So the amount available on any date is the lesser of the amount of the Borrowing Base and the maximum revolving commitment amount (minus amounts already borrowed and outstanding). See Asset-Based Loan and Availability.

***Bought Deal:*** an offering of Securities in which one or a few Underwriters buy the entire issue at a fixed price before a formal marketing process has commenced.

***Box:*** another name for the Summary. The Summary is surrounded by a rectangular border on all margins (hence the term "box").

***bps:*** shorthand for Basis Points and generally pronounced "bips."

***Breakage Costs:*** the losses, costs and expenses incurred by a Lender as a result of a Borrower's (i) failure to borrow, convert or continue a LIBOR Loan after giving notice requesting the same; (ii) failure to make a prepayment of LIBOR Loans after giving notice thereof; or (iii) making of a prepayment of LIBOR Loans on a day that is not the last day of the applicable Interest Period (*i.e.*, the costs of "breaking" a LIBOR Tranche).

***Breakup Fee:*** in an M&A transaction, a fee the seller must pay to the original buyer if the seller ends up selling to a different buyer. Compare Reverse Breakup Fee.

***Bridge Facility:*** a Credit Facility pursuant to which Lenders make Bridge Loans.

***Bridge Facility Term Sheet:*** an annex to the Commitment Letter that contains a summary of the terms of the Bridge Facility. In a committed financing, each series of Notes contemplated to be part of the permanent financing structure is backed up by a bridge, so in instances where there is more than one series of Notes (for instance, senior and senior secured), there will be multiple bridges. These multiple bridges may be described in one or multiple Term Sheets.

***Bridge Loan Agreement:*** a Credit Agreement governing Bridge Loans.

***Bridge Loans:*** short-term loans (generally maturing in one year) that typically (although not always) are not intended to be funded. The purpose of a Bridge Loan is to provide a bidder with committed financing in the context of an auction for a business in case the Notes offering contemplated as part of the acquisition financing cannot be consummated prior to the consummation of the acquisition (*i.e.*, to "bridge" the gap in financing). Traditionally, Bridge Loans are used by Financial Buyers (Sponsors) in auction situations, but corporate buyers also sometimes use Bridge Loans to finance acquisitions. In the Commitment Papers context, Bridge Loans are sometimes referred to as the Bridge Facility.

***Bringdown Certificate of Good Standing:*** see Certificate of Good Standing.

**Bringdown Comfort Letter:** a second Comfort Letter, delivered at Closing, that Ticks and Ties to the Final and updates the change period comfort to a date not more than three to five business days prior to the Closing Date.

**Bringdowns:** shorthand for Bringdown Certificates of Good Standing.

**Broker-Dealers:** entities that have to register with the SEC because they trade Securities for themselves or on behalf of others.

**Builder Basket:** used in the context of the Restricted Payments Covenant in a High Yield Indenture, this is the principal Basket from which the Issuer may make Restricted Payments. A typical formulation provides that the total sum of Restricted Payments since the date of the Indenture (except for certain enumerated exceptions) may not exceed the sum of 50 percent of the Issuer's consolidated net income since the date of the Indenture and 100 percent of proceeds from Equity offerings and capital contributions since the date of the Indenture. Use of the Builder Basket is typically subject to certain conditions, including that no Default has occurred and is continuing and that the Issuer can incur at least \$1 of additional Ratio Debt under the Ratio Test at the time of making the payment. See also Available Amounts Basket.

**Bulge Bracket Bank:** a term to describe the largest investment banks.

**Bull Market:** good times, until a Bear Market comes along.

**Bullet Maturity:** when the entire principal of a Bond or Term Loan is due and payable on the Maturity Date (*i.e.*, there is no Amortization prior to maturity).

**Business MAC:** definitions vary, but this is a reference to the Condition Precedent in a Commitment Letter, merger agreement or Credit Agreement that there has been no Material Adverse Change in the operations, business or (sometimes) prospects of the Borrower or the Target company. This should not be confused with a Market MAC, which deals with Material Adverse Changes in market conditions. See also Material Adverse Change, Company MAC and Target MAC.

**Buy Back:** name given to the act of a Borrower (or its Affiliate) acquiring debt under a Credit Facility, often at a discount. Credit Agreements now typically include either an absolute prohibition on this (on the theory that all Lenders should receive the benefit of voluntary prepayments on a pro rata basis and to prevent Affiliates of the Borrower from holding debt and disrupting the workings of the syndicate of Lenders) or set out the regime that must be followed for any Buy Back (which may involve a Dutch Auction). Sponsors that Buy Back debt of their portfolio companies must usually agree to various limits on their rights as Lenders, such as not being able to vote on most matters, not attending Lender meetings, etc. If the Borrower itself completes a Buy Back, the Borrower would typically be required to automatically cancel the debt that it purchased. Also used to describe the purchase by an Issuer of its

Securities in the open market or pursuant to a more formalized Tender Offer or private agreement.

**Call:** another term for Call Option.

**Call Option:** a financial contract between a buyer and a seller, where the buyer has the right or Option to buy a specific quantity of a Commodity or a Security or other financial instrument from the seller at a certain time and at a certain price. Also describes the option of an Issuer to redeem its outstanding Bonds on a date earlier than the Maturity Date as described in the Indenture. Compare Put Option.

**Call Premium:** the Bond equivalent to a Prepayment Premium in a Credit Agreement. This term refers to the amount of premium payable, calculated as a percentage of the principal amount of the Bonds being redeemed, upon the redemption of such Bonds prior to their maturity. See Optional Redemption.

**Call Protection:** a feature that requires an Issuer/Borrower to pay a Call Premium or Prepayment Premium, as applicable, under an Indenture or Credit Agreement, as applicable. Bondholders/Lenders like this feature because it gives them potential upside if the Issuer/Borrower repays the debt and because it compensates the Bondholders/Lenders for the risk associated with having to reinvest the money that they have been paid back. A Non-Call Period is the strongest form of Call Protection, followed by a Hard Call and then a Soft Call.

**Call Spread Overlay:** a Hedging transaction in which the Issuer simultaneously purchases a Call Option that mimics the Call Option embedded in a series of Convertible Bonds and then sells a Warrant on the same number of underlying shares at a higher strike price. The net effect is an increase in the Conversion Premium of the Convertible Bonds to the strike price of the Warrant. There may also be favorable tax benefits to the Issuer. Call Spread Overlays are a common companion to new Convertible Bond issuances.

**Callable:** applied to Bonds and other Convertible Securities, this term means that Securities are redeemable by the Issuer prior to the Maturity Date under specific conditions and at a price which is usually the par value together with Accrued and Unpaid Interest. The Issuer might call a Bond in connection with an acquisition or when Interest Rates fall to the point that it makes financial sense to issue new Bonds at lower rates.

**CAM:** acronym for Collateral Allocation Mechanism. It is also known as a Debt Allocation Mechanism or DAM, which is really a better name, since it doesn't actually allocate any Collateral, it only allocates debt holdings.

**Canadian Wrapper:** a Canadian disclosure document that is wrapped around (or stapled to the front of) the US Offering Memorandum or Prospectus. The Canadian Wrapper is required in certain instances

where Canadian (or provincial) law requires certain statutory disclosure on the cover of the offering document for sales in Canada.

**Cap:** generally refers to a dollar limitation, as in, “a cap on the amount of permitted Secured Debt.” Caps are often used in Negative Covenants, financial definitions and prepayment provisions. In the Commitment Letter context, Cap refers to the maximum Interest Rate for Bridge Loans. Bridge Loans generally bear Interest at an increasing rate (meaning the Applicable Margin steps up every several months), but the rate stops increasing once the Cap is achieved. This Cap is found in the Interest Rate section of a Bridge Facility Term Sheet.

**Cap Table:** a simplified Balance Sheet generally included in a Prospectus or an Offering Memorandum that sets forth the Capital Structure (and sometimes other information such as cash holdings) of the Issuer as of a certain date, often on a historical basis and an as-adjusted for the offering basis. A Cap Table is not required by Regulation S-K, but is generally included to make the disclosure more investor-friendly.

**Capex:** shorthand for Capital Expenditures.

**Capital Adequacy:** a requirement of applicable national legislation that specifies what type and amount of capital a bank should have when compared to its business and the risks that it undertakes. See Basel I, Basel II and Basel III. For more information, see Latham & Watkins Client Alert No. 896, A Guide to Regulatory Capital Requirements for European Banks (July 9, 2009), available at [www.lw.com](http://www.lw.com), and Latham & Watkins and Goldman Sachs publication, Regulatory Capital Requirements for European Banks (July 9, 2009), available at [www.lw.com](http://www.lw.com).

**Capital Expenditures:** an expenditure by a business that is Capitalized to the Balance Sheet under the rules of GAAP and then Amortized as an Income Statement expense over a period of more than one year rather than being immediately “expensed” to the Income Statement in full in the current period. A Capital Expenditure is distinguished from a plain old current expense because it has a long-term impact that will benefit the business in future years as well as the current year. Buying vegetables for dinner is probably a current expense. Buying a vegetable farm is probably a Capital Expenditure. See Amortization and Capitalize.

**Capital Lease:** another term for Capitalized Lease.

**Capital Markets:** a broad term that refers to the market for raising money through Securities offerings.

**Capital Structure:** a term referring to the overall structure of the company’s debt and Equity. A company’s Capital Structure is generally divided into several distinct constituencies, such as Senior Debt, Subordinated Debt and common Equity.

**Capitalize:** in accounting terminology, when a company Capitalizes a cost, it is recognizing that cost as a long-term investment rather than immediately recognizing it as an expense. The company then Amortizes or Depreciates the expense over time on its Income Statement, until eventually all the expense is recognized. Spreading the expense over time like this increases earnings in the short term, because the entire cost is not deducted in the first period. The term Capitalize is also used in the context of PIK Notes, where it refers to adding any accrued and unpaid Interest to the principal amount of the Notes on any Interest Payment Date in lieu of paying that Interest in cash. What does this mean? Technically, PIK Notes should pay Interest by issuing additional Notes on each Interest Payment Date (a payment in kind, rather than cash Interest). However, it is administratively easier (and therefore often preferable) to simply increase the amount each Note is worth on each Interest Payment Date by Capitalizing the accrued Interest to principal (*i.e.*, increasing the principal amount of the Note by the amount of the accrued Interest).

**Capitalized Lease:** this is a lease that accountants have decided looks more like a loan secured by the property being leased than like a true lease. Leases that are not Capitalized are called "operating leases." Capitalized Leases are treated as debt under GAAP and are shown on the face of the lessee's Balance Sheet as debt in an amount determined by the accountants to be the equivalent of what a loan would be if secured by the leased assets. One typical feature of a Capitalized Lease that is not typical in an operating lease is an Option on the part of the lessee to purchase the leased property upon the expiration of the lease.

**Capped Call:** a Hedging transaction in which the Issuer purchases a Call Option that mimics the Call Option embedded in a series of Convertible Bonds, subject to a Cap on the maximum share price of the shares covered by the call.

**Carried Interest:** see Carry.

**Carry:** the share of profits belonging to Sponsors from their investments. Usually the Carry (or Carried Interest) is set at around 20 percent with the remaining 80 percent being distributed to investors in the Sponsor.

**Carry Back:** some Credit Agreements contain an annual Cap on the amount of Capital Expenditure that a Borrower can make. A Carry Back provision enables the Borrower to "over-spend" on Capex in one year in excess of the agreed limit by grabbing a portion of its limit for the following year, which is then reduced. The amount which the Borrower can grab is the subject of negotiation. Similarly, a Carry Forward allows some or all of unused capital expenditures in year one to be carried forward to year two.

**Carry Forward:** the ability of an Issuer/Borrower to carry unused amounts from a Covenant Basket to a future fiscal period.

**Carveout:** an exception to a Covenant or other term. See also Basket.

**Cash Cap:** a provision in a Bridge Loan Agreement stating that to the extent the Interest payable on the Bridge Loans on any quarterly Interest Payment Date is at a rate that exceeds the Cash Cap, the Borrower will have the option to pay such excess Interest by Capitalizing it to principal on the Bridge Loans. Remember, Bridge Loans progressively increase in rate. See Total Cap.

**Cash Equivalent:** highly-rated, short-term, liquid investments that are readily convertible to cash and have short maturities. Indentures and Credit Agreements treat Cash Equivalents like cash insofar as they allow the Issuer/Borrower to make unlimited investments in them.

**Cash Flow Revolver:** a Revolving Facility that provides the Borrower with a line of credit up to a fixed amount, in contrast to an Asset-Based Loan, which is based on the value of certain categories of the Borrower's assets as of a given time. A Cash Flow Revolver typically contains more Financial Covenants than an Asset-Based Loan, but also has fewer ongoing reporting requirements. In a Cash Flow Revolver, the Lenders will focus on a Borrower's ability to cover debt service by generating cash flow, whereas in an Asset-Based Loan, the Lenders will focus on the value of certain categories of the Borrower's assets (in particular, the categories that are used in the Borrowing Base), especially the liquidation value of those assets, relative to the Lenders' exposure under the loans (this is known as Collateral coverage).

**Cash Flow Statement:** a Financial Statement in which a company reports its incoming and outgoing cash flows during a specified time period (typically monthly, quarterly or annually).

**Cash Sweep:** another name for Excess Cash Flow Sweep.

**Category 1/2/3:** there are three categories of transactions that are eligible for exemptions under Regulation S. Category 1 is the least restrictive because it applies to Securities least likely to "come to rest" in the US, while Category 3 is the most restrictive (and consequently the least attractive). Category 1 transactions include offerings of Securities by foreign Issuers that do not have a "substantial US market interest" or are "overseas directed offerings"; Category 2 transactions include offerings of Equity Securities of a reporting foreign Issuer, debt Securities of a reporting US Issuer and any other debt Securities of a foreign Issuer not covered by Category 1; Category 3 is the safe harbor available to all other offerings. An Issuer that is a US company raising Equity will fall in Category 3. Category 3 is the safe harbor available to all other offerings and requires a Temporary Global Security.

**CDS:** acronym for Credit Default Swap.

**CEO:** acronym for "chief executive officer," the CEO is the highest-ranking executive officer of a company, in charge of managing the day-to-day affairs of the company.

**Certain Funds:** is a requirement of the UK Takeover Panel (which regulates acquisitions of public companies in the UK) and a number of comparable European regulators that the bank making a takeover offer on behalf of a bidder must verify that the bidder has the money available to close its deal at the time the public offer is first announced. This means the financing commitments for a going private transaction need to be almost completely condition free (so the bidder can be “certain” that it will have the funds when it needs them). Although the Certain Funds requirement only applies as a matter of regulation to acquisitions of European public companies, sellers of private companies in Europe may seek to require that the buyers have Certain Funds commitments to provide the required financing as a condition to winning the private auction of the company being sold. Although there have been some examples of Certain Funds-style financing commitments in the US market, Certain Funds is not a legal requirement in the US. Compare SunGard Language.

**Certificate of Formation or Articles of Organization:** like a Certificate of Incorporation, the charter document filed with the state government for the creation of a limited liability company.

**Certificate of Good Standing:** ordered in connection with a Closing to make sure that the company and its subsidiaries are good corporate citizens, this is a document issued by the Secretary of State of the relevant jurisdiction certifying that an entity is in good standing (*i.e.*, all fees, taxes and penalties owed to the state have been paid, annual reports have been filed, no articles of dissolution have been filed, etc.). A Bringdown Certificate of Good Standing is a short form Certificate of Good Standing that is obtained more quickly and generally ordered for delivery on the morning of the Closing to make sure nothing has happened since the date of the long-form Certificate of Good Standing.

**Certificate or Articles of Incorporation:** the charter document filed with the state government required for the creation of a corporation as a legal entity, often setting forth the name, address and business purpose of the corporation along with the number and type of shares.

**CFC:** acronym for Chelsea Football Club, winners of the FA Cup and UEFA Champions League in the 2011/12 season. Less interesting, the acronym for a Controlled Foreign Corporation.

**CFO:** acronym for “chief financial officer,” the CFO is the senior officer of a company primarily responsible for managing the company’s financing and (usually) accounting activities.

**Change of Control:** a material change in the ownership of a company or the makeup of its board of directors. Definitions vary in Indentures and Credit Agreements. See Change of Control Covenant, Change of Control Default and Change of Control Put.

***Change of Control Covenant:*** in an Indenture, this is a reference to the Change of Control Put provision. In most Credit Agreements, the occurrence of a Change of Control is treated as an Event of Default (the Change of Control Default) rather than the trigger for a Put Right. See Change of Control Default and Change of Control Put.

***Change of Control Default:*** under most Credit Agreements, a Change of Control (which will be specifically defined in the Credit Agreement, and will include any Change of Control that occurs under any Bonds of the Borrower) is an immediate Event of Default. Some Second Lien Facilities instead follow the Bond model of a Change of Control Put.

***Change of Control Put:*** this provision of an Indenture and some Second Lien Facilities gives each Bondholder a separate Put Right, generally at 101 percent of Par Value, if a Change of Control (which will be specifically defined in the Indenture) occurs.

***Chattel Paper:*** a type of personal property defined in Article 9. Chattel Paper is a tangible or electronic record or records that has both a monetary obligation and a Security Interest in specific goods or a lease of specific goods. A loan secured by a specific automobile or a lease of a specific automobile are among the most common types of Chattel Paper.

***Check the Box/Check-the-Box Election:*** US tax rules that allow certain types of domestic and foreign entities (including domestic limited liability companies) to make an election to be treated, for US federal income tax purposes, either as a corporation or as a pass-through entity. A pass-through entity generally means a “disregarded entity” like a branch (if there is one owner) or a partnership (if more than one owner).

***Chinese Wall:*** an information barrier used within a firm or business to separate and isolate persons who receive confidential information from disclosing such information to members of a different part of the firm or business. This is a way of avoiding conflict of interest problems. Also known as an Ethical Wall. Apparently there is actually a large wall in China—what a coincidence.

***CIM:*** acronym for Confidential Information Memorandum. See also Bank Book.

***Circle Up:*** in order to receive Ticking and Tying in a Comfort Letter, Underwriters’ counsel will send a Circle Up of the Offering Memorandum or Prospectus to the Issuer’s auditors, in which such counsel circles each number it would like to see Ticked and Tied.

***Class:*** Lenders holding a particular “class” or Tranche of Term Loans or Revolving Loans.

***Class Voting:*** type of voting where one or more Classes under a Credit Agreement vote separately (and normally the affirmative vote

of a majority of each affected Class is required for an Amendment or other action to pass). Class Voting on all matters is unusual except in very strict Credit Agreements. Limited Class Voting is more common with regard to Amendments that one Class of Lenders will care about more than the other Classes of Lenders. For example, when altering the required application of prepayments of loans as between Lenders under a US dollar denominated Term Loan Facility and Lenders under a Canadian dollar denominated Term Loan Facility in a way that benefits the US Tranche Lenders at the expense of the Canadian Tranche Lenders, Class Voting would require the affirmative vote of a majority of the Canadian Tranche Lenders.

**Clawback:** if a creditor receives assets or payments from a debtor during the 90-day period (or one year period in the case of insiders) prior to the date the debtor files a Bankruptcy petition (see Preference Period) or obtains a Fraudulent Transfer from the debtor prior to the Bankruptcy petition, a Bankruptcy court can require that such creditor return those assets or payments that are determined to be preferential transfers or Fraudulent Transfers. This is known as the Bankruptcy court exercising its "clawback powers." The creditor may be able to assert a defense against a Preference, such as by demonstrating that it gave "new value" to the debtor in exchange for the assets or payments received or that the debtor made the payment in the ordinary course of business. Not to be mistaken for the Equity Claw provisions often found in Indentures. See Equity Claw.

**Clean-Down:** a provision in certain Revolving Facilities that requires the Borrower to reduce its total borrowings under the Revolving Facility to below a certain level, or even to zero, for a period of consecutive days in each of the Borrower's fiscal years (or other specified period). Designed to ensure that Revolving Facilities are not being used as permanent debt like Term Loan Facilities. The "clean-down" threshold is often calculated net of cash such that the Borrower does not actually need to use its available cash to repay the Revolver just to satisfy the Clean-Down.

**Cleanup Period:** a period during which a Borrower is required to cure any Defaults it closed into after utilizing the Specified Representations limitations on Closing Conditions contained in the SunGard Language. The point here is that even though the Specified Representations provisions allow the Borrower to close a financing in the face of a Default, the Borrower is still in Default and must clean up that Default within the Cleanup Period provided in the Credit Agreement or face the wrath of its Lenders.

**Clear:** the formal completion of a transaction, on delivery of the Securities by the Issuer and payment by the Syndicate. If a transaction does not "clear" by the Closing Date, it is said to "fail." Also known as Settle.

**Clear Market Provision:** found in the text of the Commitment Letter, an agreement by the Issuer/Borrower not to issue new debt, Equity, preferred or other Securities during Syndication. The purpose is to protect the banks from having to compete for the same pool of investors as the Borrower's other financings.

**Clearing System:** the large, complex computer systems that enable Securities to be traded without people handing over paper cash for paper certificates. Clearing Systems are the workhorses behind all the computer screens that facilitate all trading, payments, settlement and other back office mechanics. Also known as a Clearing House or Clearing Corporation. The primary Clearing System used for debt Securities offerings in the US is DTC. In Europe, the primary Clearing Systems are Clearstream and Euroclear.

**Clearstream:** shorthand for Clearstream Banking, société anonyme, one of the two primary Clearing Systems used in Europe, located in Luxembourg. See Clearing System.

**Closed Flex:** Market Flex structured so that the Arranger may make only the changes that are specifically enumerated. Compare Open Flex.

**Closing:** the consummation of the deal, when all remaining documents are executed and the money changes hands. Plan on staying up all night working the night before (see Pre-Closing). If the Closing goes smoothly, plan on staying up all night celebrating afterwards, and if you are lucky you might even get a Closing Dinner and a Tombstone.

**Closing Checklist:** the document which lists every last piece of paper that needs to be executed and delivered as a Closing Condition.

**Closing Condition:** another name for a Condition Precedent.

**Closing Date:** the date on which the Closing occurs.

**Closing Dinner:** your reward. A dinner organized by the bankers and lawyers to celebrate the Closing of the transaction. The better the deal, the better the wine.

**Closing Fee:** a fee payable to each Lender on the Closing Date. Bankers sometimes refer to the loans as having been issued with OID. The Closing Fee payable to each Lender is expressed as a percentage of the principal amount of such Lender's loan and is payable from the proceeds of such loan as and when funded on the Closing Date. We prefer not to think of loans as being issued with OID because it has negative consequences in Bankruptcy (e.g., claims for "unmatured interest," such as OID, may be disallowed in Bankruptcy unless the loans are over-collateralized).

**Closing Memorandum:** a formal memorandum used in a Securities offering to set forth actions taken prior to and at Closing. The Closing

Memorandum exhibits include the forms of secretary's and officers' certificates, payment instructions and Cross Receipt.

**Club Deal:** historically, a smaller loan Pre-Marketed to a group of relationship banks. The term Club Deal can also refer to a very large Sponsor LBO transaction where multiple Sponsors pool together in order to buy a multi-billion dollar company.

**COBRA:** highly venomous snakes including the Naja and Ophiophagus. Also the name of a military attack helicopter. What you should care about, however, is that COBRA was FINRA's Corporate Offerings Business Regulatory Analysis system, which was the online system used to make FINRA filings. COBRA has now been replaced by the Public Offering System.

**Collar:** a form of Hedge that limits the upside and protects the downside on the particular item being Hedged. For instance, an Interest Rate Collar on a Floating Rate Security would establish an upper and lower limit on the Floating Rate.

**Collateral:** assets of a Borrower and any Guarantors or other Grantors or Pledgors that secure the Borrower's and Guarantors' obligations under the applicable credit documents in a Secured Debt financing.

**Collateral Agent:** in a Secured Debt financing, the Agent that is responsible for holding any Possessory Collateral in its vault, and to whom, on behalf of all the Secured Parties, all Security Interests in Collateral will be granted.

**Collateral Allocation Mechanism:** used in cross-border secured deals where, for tax reasons (see Deemed Dividend), debt of US companies is secured only by US assets, and debt of foreign co-Borrowers is secured by both US and foreign assets. The CAM is an agreement among the Lenders intended to equalize the recovery rates of the various groups of Lenders in the case of Default and foreclosure on Collateral, by deeming loans held by Lenders in each group to be automatically shared for purposes of recovery upon the occurrence of certain events, such as Hair-Triggers. Despite the name, it is not a way to spread or allocate the Collateral to loans that the Collateral was not originally intended to secure. Also known as a Debt Allocation Mechanism or DAM.

**Collateral Questionnaire:** another name for a Perfection Certificate.

**Collateral Trust Agreement:** a form of Intercreditor Agreement where a collateral trustee holds the First Lien debt and Second Lien debt for the benefit of both the First Lien and Second Lien debt holders. Collateral Trust Agreements can facilitate future Secured Debt offerings by allowing the Lien holders to Plug-And-Play into the Security Package.

**Co-Manager:** a manager who is not a Bookrunner and does not typically have any principal obligations in the documentation of the issue, but who is included in the Syndicate because of its ability to place the Securities.

**Comfort Letter:** the natural enemy of both accounting firms and junior- and mid-level law firm associates. The Comfort Letter is a letter from the Issuer's auditors addressed to the Underwriters (in public offerings) or the Initial Purchasers (in 144A Offerings) that provides "comfort" that the Numbers included in the Prospectus (in public offerings) or in the Offering Memorandum (in 144A Offerings) are accurate. The prescribed form a Comfort Letter should take is spelled out in SAS 72. The Underwriters or Initial Purchasers (and sometimes the board of directors) seek such a letter in order to help establish a Due Diligence Defense. The Comfort Letter allows the Underwriters or Initial Purchasers to demonstrate reliance on experts for the audited financials and an element of a "reasonable investigation" for the unaudited financials and other unaudited financial information. The Comfort Letter is delivered at Pricing. See also Bringdown Comfort Letter, Negative Assurance and SAS 72.

**Commercial Letter of Credit:** a Letter of Credit that provides a means of facilitating payments between parties in the normal course of business. Commercial Letters of Credit are intended to be drawn on. Compare Standby Letter of Credit.

**Commercial Paper:** an unsecured debt instrument issued by a company to finance short-term liabilities. Commercial Paper usually matures in less than 270 days, therefore allowing the Issuer to avoid registering the paper with the SEC.

**Commitment Fee:** a fee paid to the Arranger of a Bridge Facility and/or Senior Secured Credit Facility for the commitment provided in the Commitment Letter. Note that the fee for a Bridge Facility is generally payable when the overall deal closes, whether or not the Bridge Loan is funded (which is usually not the case for the fee for the Senior Secured Credit Facility). The term also refers to a fee that is paid on the undrawn portion of a committed Revolver as compensation to the Revolver Lenders for keeping money available for borrowing. See Undrawn Commitment.

**Commitment Letter:** the letter in which financial institutions commit to provide loans. In the acquisition finance context, these loans generally consist of Senior Secured Credit Facilities and one or more Bridge Loan facilities to "bridge" any Notes offering expected to be part of the permanent financing, meaning that the Bridge Loans are committed financing that will be available if the company is unable to issue the Notes successfully in time to fund the acquisition Closing. The Commitment Letter consists of the actual text of the letter, along with annexes and exhibits that lay out the terms of the facilities and the Conditions Precedent to funding.

**Commitment Papers:** a catch-all term referring to the Commitment Letter, Fee Letter, Fee Credit Letter and Engagement Letter (and the related annexes and exhibits).

**Commitment Period:** in Commitment Letters, the period of time that the Lenders have committed that loans be available to the Borrower. If the contemplated transactions do not occur during the Commitment Period, the Lenders are no longer on the hook to fund. Also a term in a Credit Agreement defining the period following the closing date during which the Borrower may request a borrowing for those loans not fully disbursed at closing, e.g., Revolvers and Delayed Draw Term Facilities.

**Commodity:** a good or resource that investors trade, usually through Futures. A primary characteristic of Commodities is that their prices are determined by the way the market for such Commodities functions as a whole, rather than being differentiated based on qualitative differences between products of the same type produced by different producers. This is because a Commodity produced by one producer is considered equivalent to a Commodity of the same type produced by another producer. See Trading Places (Paramount Pictures 1983).

**Common Stock:** the Equity slice of the capitalization that sits at the bottom of the Capital Structure. Common Stock has no Interest payments, no principal payments and no Covenants. The only protections for common stockholders are the fiduciary duties owed to them by the board of directors. By contrast, no fiduciary duty is owed to the creditors of a solvent company. The creditors' rights are entirely contractual. See, however, Zone of Insolvency.

**Company MAC:** another name for a Business MAC.

**Comparable Treasury:** when the bankers refer to the Comparable Treasury they mean the US Treasury Note having a remaining life to maturity that most nearly approximates the Bond in your deal. An example would be: "There will be a Make-Whole call at 50 bps above the Comparable Treasury." This means that the discount rate to be used in calculating the Make-Whole redemption price will be the rate on the Comparable Treasury plus 50 Basis Points.

**Compliance Certificate:** Lenders want to know that the Financial Covenants are being complied with. So when the Borrower delivers its Financial Statements for a relevant period ending on a Financial Covenant testing date (typically quarterly), it must also deliver a Compliance Certificate (signed by one or two officers, one of whom often must be the CFO) setting out in detail the calculations which show this compliance. Lenders may also ask for the auditors to complete a similar certificate following preparation of the annual audited accounts. Compliance Certificates can also contain (among other things) confirmation of no Default and evidence of compliance with the Guarantor Coverage Test. In Bond land, Indentures also require an annual Compliance Certificate specifying Covenant compliance and no Events of Default.

**Conditions Annex:** an exhibit to the Commitment Letter that contains Conditions Precedent to the Closing of the Credit Facilities. Note that additional Conditions Precedent may be contained in the text of the Commitment Letter and not in the Conditions Annex.

**Conditions Precedent:** the conditions that need to be satisfied on or prior to the Closing of the relevant transaction. In the world of finance, they are sometimes called "conditions to funding."

**Conditions Subsequent:** this term is mainly used by lawyers, unlike its cousin Conditions Precedent. A Condition Subsequent is something that must occur at a point after your contract has been signed, before one of the parties is required to do something.

**Confidentiality Agreement:** shorthand for a Confidentiality Agreement.

**Confidential Information Memorandum:** the marketing book used to Syndicate Credit Facilities. Also refers to a marketing book used in a mergers and acquisitions or auction context. Often referred to as the "CIM" for short, or Bank Book.

**Confidentiality Agreement:** a written agreement stating that the disclosure of certain information is only being provided for specific limited purposes, which is entered into prior to any disclosure of any confidential information and where the recipient of such information agrees to keep it confidential.

**Confidentiality Provisions:** provisions in the text of the Commitment Letter providing that the Commitment Papers and any other advice provided by the Arranger may not be disclosed by the Borrower without the consent of the Arranger, and that confidential information relating to the Borrower/Target may not be disclosed by the Arranger without the consent of the Borrower.

**Conflicting Interest Provisions:** provisions in the text of the Commitment Letter disclosing that the Arranger (and its Affiliates) may have economic interests that conflict with those of the company.

**Consent Solicitation:** the form of relief sought by Issuers who want to amend Bond Covenants. Consent Solicitations are generally less common than bank loan Amendments. Because Bond Covenants are incurrence-based, unlike Financial Covenants (which are found in Credit Agreements), Issuers are less likely to need relief under Bond Covenants. For the same reason, Covenant Lite loan Borrowers (who also usually have liberal Baskets and other Borrower-friendly terms) are less likely to seek Amendments to the applicable Credit Agreement. Bondholders are also likely to charge Issuers more for consents, in part because the longer and more punitive Call Protection that Bondholders typically enjoy gives them greater leverage. See Non-Call Period.

**Consolidated:** used in the context of Financial Statements, refers to Financial Statements that reflect the assets, liabilities and operating

accounts of a company and its subsidiaries, taken as a whole (meaning they are taken together as a single enterprise). Compare Consolidating.

**Consolidating:** used in the context of Financial Statements, refers to financial information that is broken out to show the results of different parts of a corporate structure. The most common example is the condensed, Consolidating financial information required by Rule 3-10 of Regulation S-X, which applies to certain Issuers with debt Securities that are Guaranteed at the parent or subsidiary level. In certain instances, Rule 3-10 requires a footnote providing condensed, Consolidating financial information in tabular format with columns for the parent company, the Subsidiary Guarantors on a combined basis, any non-Guarantors on a combined basis, Consolidating adjustments and total Consolidated amounts. Compare Consolidated. For a complete discussion of when Consolidating financial information is required, see Latham & Watkins publication, *Financial Statement Requirements in US Securities Offerings: What You Need to Know* (September 2013), available at [www.lw.com](http://www.lw.com).

**Contingent Conversion:** Convertible Bonds being convertible only if certain triggers are met.

**Contingent Interest:** Interest on Convertible Bonds that is payable only if certain conditions are satisfied (usually if the market price of the Bonds exceeds a threshold (e.g., 120 percent) of their Par Value).

**Contingent Registration Rights:** Registration Rights that are only applicable if the underlying Securities are not freely tradable after one year. See Latham & Watkins Client Alert No. 669, *The Future of Registration Rights in Private Offerings of Debt Securities* (January 22, 2008), available at [www.lw.com](http://www.lw.com).

**Contractual Subordination:** Subordination provisions that contractually require the Bondholders to “fork over” to a specified class of senior Lenders anything they get in a liquidation of the company until the senior Lenders are paid in full. This is an express agreement by the holders of the Junior Debt to be Subordinated. Note that the holders of Senior Debt cannot effect this type of Subordination without the agreement of the holders of the Junior Debt. In other words, you don’t get to be Senior Debt by saying you are Senior Debt; you get to be Senior Debt by persuading the other guy to say he is Junior Debt. See Subordination.

**Control:** a means of achieving Perfection under Article 9 for certain types of Collateral. For certain Collateral, such as deposit accounts, Control is the only method of Perfection. For other Collateral, such as securities accounts, certificated Securities and uncertificated Securities, Perfection can be achieved by filing a Financing Statement, although Perfection by Control has higher Priority in instances where Perfection can be achieved both ways. See Account Control Agreement. In the

Securities and contractual context, Control has a range of meanings, factoring in shareholdings, management roles, shareholder agreements, directorships and the degree to which others have any of these things. In the marital context, Control is your spouse saying you can't go to the Closing Dinner.

***Control Agreements:*** a type of agreement that allows Lenders in a secured financing to Perfect their Security Interest in certain types of Collateral by exercising Control (most often used for deposit accounts and securities accounts). See Control and Account Control Agreement.

***Controlled Company:*** a public company, the majority of which is owned by an individual or group or another company. Controlled Companies are exempt from some of the stock exchange Independent Director requirements (other than those applicable to the Audit Committee). See Independent Directors.

***Controlled Foreign Corporation:*** for US tax purposes, a "Controlled Foreign Corporation" or CFC generally means a non-US corporation that is owned more than 50 percent by one or more US shareholders (each of which owning at least 10 percent of the non-US corporation). Certain types of income of a CFC, investment in certain US assets by a CFC, or Guarantee or asset pledge by a CFC of a related US person's debt obligation could give rise to Deemed Dividend income to the US shareholders of the CFC to the extent of current or accumulated earnings and profits of the CFC. Some non-US jurisdictions (in Europe and elsewhere) have corresponding concepts, although the definition and the application vary widely.

***Conversion Fee:*** another name for Rollover Fee.

***Conversion Premium:*** the amount by which the Conversion Price of Convertible Bonds exceeds the current market value of the underlying stock as of the Pricing date. When a Convertible Bond is priced at a 20 percent Conversion Premium, it is said to be "up 20."

***Conversion Price:*** the price at which a given convertible Security can be converted to stock. The Conversion Price is set on the Pricing date at a premium above the current market price of the underlying stock on that date. Rule 144A requires that the premium be at least 10 percent as of the Pricing date for Securities sold in a 144A Offering when the underlying stock is an exchange listed Security.

***Conversion Rate:*** the rate at which a Convertible Bond may be converted into stock, typically expressed as a share number per \$1,000 in principal amount of Bonds. This is really just another way of expressing the Conversion Price.

***Conversion Value:*** value of a Convertible Bond if it were immediately converted into stock at the Conversion Rate then applicable. If the Conversion Value of a Convertible Bond is more than its principal amount, then that Convertible Bond is said to be In the Money.

**Convert Deal:** a transaction in which Convertible Bonds are issued.

**Convertible Bond:** a Bond that is convertible into another Security, typically Common Stock.

**Convertible Security:** a Security that is convertible into another type of Security, often Common Stock.

**Coordinated Sell Down Letter:** another name for Syndication Agreement.

**Counterparts:** under many legal systems, including New York and Delaware, not all signatories to a document need to sign the same hardcopy document; each separate hardcopy document that is signed is known as a Counterpart and together they create a binding agreement.

**Countersign Deadline Date:** the date by which the Borrower must countersign for the Commitment Papers to take effect. The Countersign Deadline Date is usually found at the end of the Commitment Letter and it applies to the Fee Letter and Engagement Letter as well. It is typically set just a few days (or at most a few weeks) into the future. If the Commitment Letter is not signed by this date, the commitment offer terminates. This is not the same as the Drop Dead Date, which is usually several months into the future.

**Coupon:** the contractual Interest Rate stated on a Bond when the Bond is issued. Note the Coupon is not the same as the Yield.

**Covenant:** legalese for an agreement to do something (Affirmative Covenants), not to do something (Negative Covenants), or to maintain something (Maintenance Covenants).

**Covenant Defeasance:** one of two types of Defeasance (the other kind is Legal Defeasance). Covenant Defeasance relieves the Issuer from complying with its obligations under the substantive Indenture Covenants and waives the related Events of Default. See also Legal Defeasance.

**Covenant Lite:** a Credit Facility does not contain Maintenance Covenants and that may, in red-hot markets, contain Bond-like Covenants.

**Coverage Covenant:** a Maintenance Covenant that requires the Borrower to maintain a minimum level of cash flow or earnings relative to specified expenses, most often Interest, debt service (Interest and repayments) and Fixed Charges (debt service, Capital Expenditures and/or rent). See Interest Coverage Ratio and Fixed Charge Coverage Ratio.

**Covered Call:** a situation where somebody owns shares in a company and sells a Call Option on those same shares. So, for instance, you take your bonus and buy 100 shares of Google at \$500 a share and also sell a Call Option on those shares at \$550 a share (for which you are paid \$25 a share). In this situation, you then have to sell the shares to the

person you sold the Call Option to if the shares rise above \$550 a share. On these facts, your Covered Call was a good bet if the shares rise to less than \$575, but a bad bet if they rise to more than that. The call is a "covered" call because you own the shares you need to deliver if the Option is exercised.

**CP Memo:** a memo required by some banks in connection with the Closing of a Credit Facility. The CP Memo is prepared by counsel to the Lenders. It confirms the satisfaction of certain mechanical Closing Conditions set forth in the Credit Agreement that require delivery of specified legal documents and points out whether any items have been deferred for delivery after Closing.

**CPS:** acronym for Conditions Precedent.

**Cram:** bankers' slang for the Securities Demand. See also Put Bond.

**Cramdown:** the confirmation of a plan of reorganization by a Bankruptcy court, even though one or more classes of creditors or Equity interest holders has objected to the plan. The confirmed plan will bind all classes of creditors and Equity interest holders, even those who voted against the plan. Hence the descriptive phrase—the plan proponent "crams down" on dissenters. This is a key tool for debtors and a major reason that some companies restructure in Bankruptcy, rather than out of court. Governed by §1129(b) of the Bankruptcy Code.

**Credit Agreement:** the legal document in which one or more Lenders agrees to lend money to a Borrower. The Credit Agreement not only sets forth the mechanics for the making of loans and the issuance of Letters of Credit, but also contains Representations and Warranties of the loan parties, Affirmative Covenants, Financial Covenants, Negative Covenants, the remedies of the Lenders after the occurrence of an Event of Default, and expense reimbursement, indemnity and other Boilerplate provisions.

**Credit Bid:** a bid by a secured creditor in a Bankruptcy sale whereby the secured creditor offsets the allowed amount of its secured claim against the price at which it would purchase the assets.

**Credit Default Swap:** a contract, using ISDA form documentation, whereby one party agrees to pay the other party if certain catastrophic "credit events" (such as payment default, insolvency or restructuring) occur under a debt undertaking of an obligor.

**Credit Enhancement:** the improvement of the credit quality of a company or its Securities by employing resources, financial instruments or the credit of another entity to support such credit quality. Common methods of Credit Enhancement include Guarantees, Letters of Credit, surety bonds, reserve accounts, cash collateral accounts and Monoline Bond Insurance.

**Credit Facility:** a collective reference to the loans and commitments of the Lenders. Examples of Credit Facilities include: Revolving Facilities,

Term Loan Facilities, First Lien Facilities, Second Lien Facilities, Mezzanine Facilities and Bridge Facilities.

**Credit Group:** any party restricted by the Covenants in the Credit Agreement or the Indenture, typically including the Issuer/Borrower and Guarantors.

**Credit Rating:** designations used by Ratings Agencies to give relative indications of credit quality.

**Creeping Tender:** the gradual acquisition of the shares or Bonds of a company on the open market rather than through a registered Tender Offer in order to avoid the reporting requirements of the Williams Act. The acquiror is able to gain a controlling interest in the Target without a formal bid to all shareholders offering to purchase at a premium.

**Cross Acceleration:** an Event of Default which occurs when other indebtedness of the Borrower or of companies in the Borrower's group above an agreed dollar threshold is Accelerated. Contrast to Cross Default.

**Cross Default:** an Event of Default which occurs when other indebtedness of the Borrower or of companies in the Borrower's group above an agreed dollar threshold is not paid when due or otherwise goes into default whether or not the relevant creditors actually Accelerate, so the Lenders under the Credit Agreement benefit from and can rely on the occurrence of an Event of Default with respect to more stringent obligations agreed to in another debt instrument. Contrast to Cross Acceleration.

**Cross Receipt:** a receipt signed at the Closing of an issue of Securities, whereby the Issuer confirms receipt of the net proceeds of the issue and the managers confirm receipt the Securities. Receipt of net proceeds and Securities is deemed to take place simultaneously.

**Cross-Stream:** from a company to another company in the same group which isn't its parent company or its subsidiary (*i.e.*, its sister company). For example, a Guarantee granted by a company to support the debt of a sister company is a Cross-Stream Guarantee. Compare Downstream and Upstream.

**Cure:** the act of coming into compliance with a Covenant or otherwise eliminating a Default or Event of Default. A standard Indenture or Credit Agreement might provide that a certain Default only becomes an Event of Default after it has been in effect for a certain period (the "cure period" or "grace period"). Ideally, the Issuer/Borrower would Cure within that period. If the Cure is effected after an Event of Default has occurred (*i.e.*, after the cure period has expired), is that good enough? How about after Acceleration? Ask your lawyer.

**Cure Period:** the period provided in an Indenture or Credit Agreement for an Issuer/Borrower to cure (*i.e.*, fix) a Default so it does not mature into an Event of Default. Also called a Grace Period. See Default, Event of Default and Acceleration.

**Currency Swap:** an arrangement entered into by a company for the purpose of Hedging foreign currency risk associated with the company's operations. For instance, a US-based company with operations in Europe might use a Currency Swap to protect itself from fluctuations in the Euro-to-Dollar exchange rate.

**CUSIP:** acronym for Committee on Uniform Securities Identification Procedures.

**CUSIP Number:** a specific, unique number assigned to virtually all series of Securities. The CUSIP system, which is owned by the American Bankers Association and operated by Standard & Poor's, facilitates the Clearing and Settlement process of Securities and Syndicated loans.

**Custodian:** a financial institution holding Securities in safekeeping for a client either as part of an issue of Securities or generally.

**Custody Agreements:** agreements signed by Selling Shareholders in IPOs or follow-on Equity transactions, along with Powers of Attorney. The custodian under the Custody Agreement is authorized to hold the share certificates between Pricing and Closing and deal with the Transfer Agent at the Closing. One principal purpose of the Power of Attorney and Custody Agreement is to allow the Underwriters to deal solely with the custodian (rather than with each Selling Shareholder) at the Closing. This is particularly important where there are individual people who are Selling Shareholders. These folks could get hit by a bus (or, more likely, crash their Ferraris) between Pricing and Closing. The Underwriters don't want a busted trade if that happens.

**D&O Policy:** an insurance policy covering claims made by shareholders or creditors against directors and officers of a corporation for alleged wrongful or improper conduct or acts. Also known as D&O Insurance.

**DACA:** acronym for deposit account control agreement. See Account Control Agreement.

**DAM:** acronym for Debt Allocation Mechanism. Also known as a Collateral Allocation Mechanism or CAM.

**Data Room:** the actual or virtual room established to allow Due Diligence. Not a very exciting place.

**DCM:** acronym for Debt Capital Markets.

**Deal Creep:** no, this is not a person (though if it were, on any given deal we would all know who it is). This is the process whereby over the course of negotiating a transaction, a deal term incrementally and imperceptibly becomes more and more burdensome on one of the parties, who finally wakes up and says they would never have agreed to the term if it had been proposed at the outset. Because each evolutionary step is usually justifiable, claiming Deal Creep does not always succeed in having the term scaled back.

**Deal Toy:** a gift (often made of lucite) handed out to deal participants after the Closing. It makes a nice decoration for your office. Will not biodegrade.

**Deal-Away Fee/Deal-Away Protection:** another name for the Alternative Transactions Language.

**Debenture:** a Bond with a maturity longer than 10 years. Bonds with a maturity of 10 years or less are usually called Notes.

**Debt Allocation Mechanism:** another name for Collateral Allocation Mechanism or CAM.

**Debt Prepayment:** another name for the Debt Sweep.

**Debt Sweep:** a specific type of Mandatory Prepayment. This provision in a Credit Agreement requires that Term Loans be prepaid with the net cash proceeds of certain debt issuances (generally excluding all Permitted Debt issuances). Of course, any non-Permitted Debt issuance is also an Event of Default under a Credit Agreement, so this provision is somewhat redundant (though it will result in the Term Loans being due without Lender action to Accelerate them). But if there is a Prepayment Premium required to be paid with all Mandatory Prepayments, this clarifies that the Prepayment Premium is expected to apply at the time of the Debt Sweep. The Debt Sweep provision will not be subject to a Reinvestment Right.

**Debt Test:** a reference to the Covenant restricting the incurrence of debt by the Issuer and its Restricted Subsidiaries. See also Ratio Debt.

**Debtor-in-Possession:** a debtor that has remained in possession of its Bankruptcy estate (as opposed to having, for instance, a Chapter 11 trustee appointed to run the Bankruptcy estate). In Chapter 11, a Debtor-in-Possession has most, if not all, of the powers that a Chapter 11 trustee of the debtor's estate would have if the trustee was in possession of the estate.

**Declared Default:** giving a notice that turns a Default into an Event of Default.

**Deemed Borrower Consent:** language in the assignment provisions of a Credit Agreement providing that a Borrower will be deemed to have consented to an Assignment of a Lender's loans and commitments if it has not objected within a certain period after receiving notice of the proposed Assignment.

**Deemed Dividend:** this tax issue is the reason you have to be very careful in structuring foreign subsidiary asset pledges, stock pledges and Guarantees for a US Borrower. A US Borrower whose loan receives support from its foreign subsidiaries, in the form of Security Interests, stock pledges and/or Guarantees, may be deemed to receive a dividend (a Deemed Dividend) for tax purposes from its foreign subsidiaries.

A pledge of stock of a foreign subsidiary will not result in a Deemed Dividend if the Lenders settle for a 65 percent stock pledge from “first tier” foreign subsidiaries only (*i.e.*, subsidiaries whose stock is held directly by the US parent or any of its domestic subsidiaries). Because of the Deemed Dividend issue, foreign subsidiaries generally do not provide Guarantees of US debt (although, depending on their tax status, in some instances foreign subsidiaries can provide such Guarantees). One common workaround for a US Borrower with significant operations overseas is for Lenders to make some (or all) of their loans directly to foreign subsidiaries. Because the Deemed Dividend rule does not apply to loans made to foreign subsidiaries, these foreign loans can be Guaranteed and secured by all the foreign subsidiaries and their assets, as well as by the US parent and its domestic subsidiaries. See Collateral Allocation Mechanism.

**Default:** the beginning of trouble. Indentures and Credit Agreements generally have three stages of trouble: the Default, the Event of Default and Acceleration. At stage one, the Default, the Issuer/Borrower has violated some provision of the Indenture or Credit Agreement. Left uncured for a specified period of time, together (in some cases) with notice from a disgruntled Lender or Bondholder, a Default will mature into an Event of Default (and the story continues in that definition).

**Default Interest:** extra Interest accruing on amounts under a Credit Agreement following an Event of Default. Sometimes Default Interest accrues on all outstanding amounts at the regularly applicable rate plus 200 Basis Points, but other times it only accrues on overdue amounts.

**Defaulting Lender:** name used to describe a Lender that fails to fund or becomes subject to insolvency proceedings. The consequences of becoming a Defaulting Lender vary between Credit Agreements but can include loss of entitlement to any Commitment Fee, inability to vote on Amendments and Waivers and/or being subject to the Yank-a-Bank.

**Defeasance:** this is a way to escape the Covenants governing Bonds even during a Non-Call Period. Defeasance is a process by which an Issuer may have the Covenants under its Indenture (and even its payment obligations in the case of Legal Defeasance) discharged if the Issuer irrevocably deposits with the Trustee enough money (or US Treasury Securities) to cover all Interest and principal payments on the Notes until either maturity or the first date on which the Notes are Optionally Redeemable. This can be very, very expensive. Defeasance can take the form of Covenant Defeasance or Legal Defeasance. Legal Defeasance is not an available option under current law because no law firm can give the required tax opinion (*i.e.*, “this defeasance will not be a taxable event to Bondholders”). There is no tax problem with Covenant Defeasance under current law because it does not let the Issuer off the hook from its payment obligations. See also Satisfaction and Discharge.

**Definitive Bond:** a physical certificate representing part of a new Securities issue and held in physical form by the Bondholder. Used for Bonds placed with retail investors (such as Belgian dentists) who wish to hold the actual Bond (usually under their mattress).

**Delaware 251(h):** a section of the DGCL that became effective in August 2013 eliminating the need for a stockholder vote if a majority of the Target's shares have been acquired in a successful Tender Offer. For details on 251(h)'s requirements and the implications for debt financing, see Latham & Watkins publication, Amendments to Delaware Merger Statutes: An Arrow in Your Quiver, Not a Silver Bullet (June 2013), available at [www.lw.com](http://www.lw.com).

**Delayed Draw Term Facility:** a Term Loan Facility that is available to be drawn, usually subject to a list of specified conditions, at a certain point subsequent to the Closing Date, or at various times for a period subsequent to Closing. In the Commitment Letter, the terms of any Delayed Draw Term Facility will be included in the Senior Secured Facilities Term Sheet. A Delayed Draw Term Facility is often intended to be used for specifically identified acquisitions or Capital Expenditure programs.

**Demand Registration Rights:** another name for Demand Rights.

**Demand Rights:** a type of Registration Right that entitles the holder, subject to certain agreed upon conditions, to force the Issuer to register the Issuer's Securities with the SEC. Compare Piggy Back Registration Rights.

**Dematerialize:** the term used to describe Securities moved to a Book Entry system (being "in dematerialized form").

**Deposit Account Control Agreement:** see Account Control Agreement.

**Depository Trust Company:** a member of the US Federal Reserve System and an SEC clearing agency that brings efficiency to the Securities industry by retaining custody of millions of Securities issues, effectively "dematerializing" most of them so that they exist only as electronic files rather than as countless pieces of paper. What does this mean? Basically, it's the reason real Securities trading is different than in the movies—the reason you don't have to keep actual physical Securities in the safe in your grandmother's basement. Instead, DTC takes custody of the Security (which is placed in DTC's vault) and then keeps an electronic record of who the real owners of the Security are. See Clearing System.

**Depreciation:** in accounting, a method of allocating the acquisition cost of a tangible asset over the expected useful life of the asset by attributing portions of such cost to the periods during which the asset is being "used up" to earn revenues. Depreciation is not a method of valuation but rather of cost allocation. The Depreciation of an asset for accounting purposes is not necessarily a reflection of the asset's current

market value. In accounting speak, a tangible asset Depreciates over time whereas an intangible asset Amortizes. See Amortization.

*Description of Notes:* a long-form summary of the Indenture provisions contained in the Offering Memorandum or Prospectus. For the important provisions, the Description of Notes is a verbatim recitation of what will be in the Indenture.

*Designated Underwriters' Counsel:* a law firm designated by the Issuer/Borrower to serve as counsel to any investment bank or other financial institution that serves as an Underwriter (or is hoping to serve as Underwriter) on that Issuer's Securities offerings (whether public or private) or that Borrower's Credit Facilities. Hear this phrase and think of Latham.

*DGCL:* acronym for the Delaware General Corporation Law.

*Diligence:* see Due Diligence.

*Ding the Basket:* making a payment or investment that would not be allowed by the Restricted Payments Covenant but for use of the amounts provided in a Builder Basket to complete the transaction.

*DIP:* acronym for Debtor-in-Possession.

*DIP Financing:* shorthand for Debtor-in-Possession financing, which is financing arranged for a company for the period during which it is in the Chapter 11 reorganization process. Notably, claims for principal, interest and fees under a DIP Financing typically take Priority over all existing debt, even pre-Bankruptcy Secured Debt. As long as certain conditions are met, the Bankruptcy Code allows Liens securing the DIP Financing to "prime" Liens securing the pre-Bankruptcy filing debt, in order to encourage Lenders to lend money to companies in Bankruptcy.

*DIP Lender:* the lender or lenders who agree to provide DIP Financing to a Debtor-in-Possession.

*Directed Share Program:* a plan put in place in connection with an IPO to let the Issuer's employees and other friends and family (including customers and suppliers) purchase a portion of the shares sold in the IPO. FINRA does not allow Underwriters or their counsel to buy in the Directed Share Program. Bummer.

*Discontinued Operations:* also known as Disco Ops. A component of a business that has been sold or listed for sale. The guidelines of the Financial Accounting Standards Board (FASB) and International Accounting Standards Board (IASB) require that the results of operations of qualifying disposed business components be classified as discontinued and reported as a separate item in the Income Statement so as to provide a more accurate description of the company's financial condition as an ongoing business. See Latham & Watkins Client Alert No. 1660, The Last Days of Disco Ops (March 11, 2014), available at [www.lw.com](http://www.lw.com).

**Discount Notes:** Notes that are issued for less than their face amount (Par Value). The important thing to remember is that although the Notes are issued below their face amount, the Issuer owes the face amount of the Notes when they mature. This means a holder of the Discount Note receives a return both off the Interest payment or Coupon (if there is one) and by having paid less than it will receive back at maturity. A Discount Note has an Accreted Value on the date it is issued equal to what was paid for it. The Accreted Value creeps up over time to equal the Par Value of the Bond. This creeping is called "accreting" and is treated as Interest expense to the Issuer (subject to the AHYDO Rules) and Interest income to the Bondholder. If you hold a Discount Note close to your ear, you can actually hear the accretion occurring.

**Disenfranchisement:** if an affiliate of the Borrower (including a Sponsor) enters into a Buy Back, it is likely to be subject to Disenfranchisement, meaning that it does not get to vote on Amendments and Waivers, receives no information sent to Lenders, can't attend Lender meetings, etc. The aim is to prevent Lenders with conflicting interests from disrupting the Syndicate. In Bond land, Affiliates of the Issuer (including any Sponsor of the Issuer) are always Disenfranchised.

**Disproportionate Impact Language:** many Business MAC provisions contain Carveouts specifying that certain declines in the business will not trigger a Business MAC. Examples include Material Adverse Changes triggered by problems specific to a particular industry, poor economic conditions generally, regulatory changes or an outbreak of war. In many cases, there is then a Carveout to this Carveout known as Disproportionate Impact Language, which states that even if the Business MAC was triggered by one of the causes mentioned in the list of Carveouts (e.g., industry decline or general economic conditions), a Business MAC will be deemed to have occurred if the events had a disproportionate impact on that particular company.

**Disqualified Lender:** the reference to a lender on the Blacklist. See Blacklist. Often includes competitors of the Borrower and their Affiliates.

**Disqualified Stock:** any stock which is or could be redeemable prior to the Maturity Date of the Bonds or Credit Facility plus a number of days (typically 91 days).

**Distressed Debt:** debt which is trading (well) below Par due to concerns about the financial health of the Borrower. See Loan To Own.

**Dividend Blocker Covenant:** see Limitation on Restrictions on Payment of Subsidiary Dividends Covenant.

**Dividend Stopper Covenant:** see Limitation on Restrictions on Payment of Subsidiary Dividends Covenant.

**Documentation Agent:** a title often granted to a Lender who takes a large portion of a loan commitment in the Syndication process.

The position generally does not require any actions or entail any responsibilities. Essentially, it is a means for a Lender to get its name on the cover of a Credit Agreement and receive League Table Credit.

***Dodd-Frank Act:*** the Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted in July 2010 in response to the financial crisis of 2008-2009. The Dodd-Frank Act represents the most significant legislative change to financial supervision in the US since the 1930s, contemplating more than 350 rule-making initiatives as well as numerous studies and reports “to promote the financial stability of the United States by improving accountability and transparency in the financial system.” Many of the significant rulemakings have been implemented and are affecting every financial institution that operates in the US and many that operate from outside the US.

***Double Luxco Structure:*** a structure involving two Luxembourg entities (Luxcos) sitting above a group of companies in France. The structure is intended as a means of protecting the rights of secured creditors against the stay on enforcement that would otherwise arise under French Sauvegarde, or restructuring law. The theory was that if two Luxcos were put in place above the first French company, with the top Luxco granting a Security Interest over the shares in the second Luxco that owns the French entity, then even though action against the shares of the French entity would be stayed under the French proceedings, under the EU Insolvency Regulation, assuming the center of main interest (COMI) of the top Luxco is Luxembourg, the enforcement of this Security Interest is allowed notwithstanding the opening of such French proceedings. Time to call Latham if your deal is going to involve a Double Luxco structure.

***Downstream:*** from a parent company to a direct or indirect subsidiary. For example, a Guarantee granted by the parent to support the debt of a subsidiary is a Downstream Guarantee. Compare Upstream and Crossstream.

***DQ List:*** another name for a Blacklist.

***Drag Along Rights:*** allow a majority shareholder to require that a minority shareholder participate in a sale to a third party. The idea is that a majority shareholder may not be able to recognize the full value of its holdings unless it can sell the entire company to a third party by dragging along minority shareholders. Drag Along Rights would generally provide that the minority shareholder receive the same terms as the majority shareholder. Compare Tag Along Rights.

***Drive By:*** outside of the criminal context, a Bond deal that is priced the same day it is announced (with very limited marketing).

***Drop Dead Date:*** the date on which the commitments set forth in the Commitment Letter will terminate if the Senior Secured Credit Facilities and the Notes or Bridge Loans (as applicable) have not funded pursuant

to the terms and conditions in the Commitment Papers. The Drop Dead Date is usually found towards the end of the Commitment Letter—usually set at one or more months after the date of the Commitment Letter. In an acquisition financing, the Drop Dead Date is usually the same as the Drop Dead Date in the acquisition agreement (*i.e.*, the date on or prior to which the acquisition needs to be consummated). Compare Countersign Deadline Date.

***DTC:*** acronym for the Depository Trust Company.

***Due Date:*** the anticipated end of a tough nine months and the beginning of an even tougher and longer period. Also the date on which Interest and principal is due to be paid to the Lenders.

***Due Diligence:*** what lawyers and bankers do to learn about a company. In the M&A context, the buyer (and its lawyers and bankers) does Due Diligence so it can understand what it is buying. In Securities and Capital Markets transactions, the bankers and lawyers do Due Diligence in order to establish a Due Diligence Defense. In the bank loan market, bankers and lawyers do Due Diligence to make sure the deal makes sense. Diligence activities are broad and range from a review of relevant documents (often in a Data Room) and Financial Statements to plant visits and interviews with management, outside accountants, counsel, customers and suppliers.

***Due Diligence Condition:*** a Condition Precedent that the commitment is subject to the satisfactory completion of Due Diligence by the Arranger. In most cases, the Arranger will be expected to complete its Due Diligence prior to the signing of the Commitment Letter, in which case this Condition Precedent will be removed prior to signing. In early drafts of the Commitment Letter, the Due Diligence Condition is often included in brackets with a footnote indicating that it is expected to be removed upon the satisfactory completion of Due Diligence.

***Due Diligence Defense:*** the Underwriters' principal defense in Securities offerings lawsuits. The Securities laws impose liability on certain persons and entities for damages resulting from any material untrue statement contained in, or omitted from, a Registration Statement. Issuers are strictly liable for the information in the Registration Statement, but other entities (including Underwriters and the board of directors) involved in the offering can avoid liability by demonstrating a Due Diligence Defense. Specifically, Underwriters and the board of directors have an affirmative defense to Section 11 and Section 12 liability if they have relied on experts for the Expertized Parts of the Prospectus and conducted a "reasonable investigation" for the other portions. Similar defenses are available to Rule 10b-5 claims made with respect to 144A Offerings and Regulation S offerings.

***Dutch Auction:*** an auction where each seller specifies the price at which it is willing to sell and the purchaser accepts offers to sell until it has spent the amount it intends to spend, starting with the lowest price

offered and working up the pricing ladder until the money to be spent is gone. In a “modified Dutch Auction,” the process is the same except that all sellers are paid the same price based on the lowest price that will allow the purchaser to spend the intended amount.

**DWAC:** acronym for Deposit/Withdrawal at Custodian. The automated system for deposits and withdrawals of Securities from DTC.

**Earn-out:** an adjustment to the acquisition price in the M&A context whereby the buyer has to pay more money after Closing if certain future profit targets are met.

**EBIT:** this acronym stands for earnings before Interest and taxes. See also EBITDA and Adjusted EBITDA.

**EBITDA:** this acronym stands for earnings before Interest, taxes, Depreciation and Amortization. Because it eliminates the effects of financing and accounting decisions, EBITDA is often used to assess a company's ability to service debt. See also Adjusted EBITDA.

**EBITDAR:** a cousin of EBITDA used for property-heavy companies where some or all of rental expense is added back as well.

**ECF:** acronym for Excess Cash Flow.

**ECM:** acronym for Equity Capital Markets.

**EDGAR:** acronym for the SEC's Electronic Data Gathering, Analysis and Retrieval system. This is where you can retrieve a company's periodic and other SEC filings. It can be found at [www.sec.gov](http://www.sec.gov).

**EEA:** acronym for European Economic Area.

**EEA Legend:** shorthand for European Selling Legend.

**Effective Subordination:** the situation that occurs when one Tranche of debt is effectively, but not contractually, senior to another Tranche of debt. A Senior Secured Credit Facility and unsecured Senior Notes are examples. Even though the Senior Notes are not contractually Subordinated to the secured borrowings under the Senior Secured Credit Facility, because the Credit Facility has Security and the Senior Notes do not, the Senior Notes are effectively Subordinated. See Subordination. Compare Contractual Subordination and Structural Subordination.

**EGC:** acronym for Emerging Growth Company. A new category of Issuer created by Title I of the JOBS Act. To qualify as an EGC, a company must not have priced its IPO prior to December 9, 2011 and must have annual revenue for its most recently completed fiscal year of less than \$1.0 billion. Qualification as an EGC allows the Issuer to utilize the so-called “IPO on-ramp,” a transition period from private to public company that eases certain burdens of the IPO process by scaling back financial disclosure requirements, permitting confidential

SEC submissions and pre-filing offers to Institutional Investors and allowing research analysts to publish reports on EGCs immediately after they become public companies. See Latham & Watkins Client Alert No. 1308, *The JOBS Act Establishes IPO On-Ramp* (March 27, 2012), available at [www.lw.com](http://www.lw.com). See also Latham & Watkins publication, *The JOBS Act, Two Years Later: An Updated Look at the IPO Landscape* (April 5, 2014), available at [www.lw.com](http://www.lw.com).

***Encumbrance:*** another word for Lien, typically used in the real estate context. Like a Lien, an Encumbrance does not have to be consensual and involves a claim against an asset that does not typically prohibit passing title but often impedes transferability by diminishing value or marketability. For example, an easement of a utility to run power lines over your property would be considered an Encumbrance.

***Engagement Letter:*** a letter that outlines the engagement of the Underwriters or Initial Purchasers to sell Securities on behalf of an Issuer. In a Commitment Paper package that contemplates a Bridge Loan component, an Engagement Letter is typically signed along with the Commitment Letter and the Fee Letter to ensure that the Borrower has retained responsible institutions to help it place the Securities to be issued to Refinance (or obviate the need for) the Bridge Loan. In a Bank-Only Deal, there will usually be no Engagement Letter, unless it is a Best Efforts Syndication of a Bank-Only Deal, in which case the Arranger will be engaged pursuant to an Engagement Letter instead of a Commitment Letter.

***Equal and Ratable:*** used in the context of Liens to mean that two secured creditors share the same (or equal) rights in the Collateral.

***Equitable Subordination:*** a power of a Bankruptcy court (which is a court of equity, after all) to subordinate a claim of a party who engaged in fraudulent or otherwise unsportsmanlike conduct, in order to provide a remedy for innocent creditors and shareholders that suffered an injury as a result of the bad conduct. Equitable Subordination is a remedial, not penal, measure. A claim is Subordinated only to the extent necessary to offset the harm caused by the culpable creditor. Claims by insiders are subject to more rigorous scrutiny for Equitable Subordination than are claims by non-insiders.

***Equity:*** a Security that represents an ownership interest in an entity.

***Equity Claw:*** this Bond and Optional Redemption provision allows an Issuer to redeem a percentage of the outstanding Notes (generally 35 percent) with the proceeds of certain types of Equity offerings during the Non-Call Period. The rationale for this exception to the Non-Call Period is that Bondholders will generally be happy if a portion of their Bonds is redeemed at a hefty premium (typically Par plus the Coupon) as a result of new Equity coming into the Issuer.

**Equity Commitment Letter:** in a Leveraged Buyout, the agreement pursuant to which the Sponsors commit to provide the Equity Contribution.

**Equity Contribution:** think of this as the “down payment” portion of the purchase price for the Target. It is the portion of the acquisition consideration that is paid using Equity money provided by the Sponsor fund. This is generally documented in the Equity Contribution letter, which is drafted by the M&A deal team (*i.e.*, it is not part of the Commitment Papers package). See Rollover Equity.

**Equity Cure:** an infusion of cash from stockholders in exchange for capital stock of the Borrower in order to cure a Financial Covenant Default. This is a negotiated feature that Sponsors often request. In the most common version of this provision, the proceeds of the Equity issuance are treated as EBITDA for purposes of determining Financial Covenant compliance. If a deal has Financial Covenants, Lenders want to be able to use those Covenants to police the Borrower's operating performance and call Defaults as appropriate. While infusions of junior capital are generally a positive event from a Lender's perspective, by allowing stockholders to inject Equity into the company after a Default and treating that Equity as if it were EBITDA, Lenders lose the ability to call a Default and to work with the Borrower to negotiate appropriate remedies (including potential changes to the structure, pricing, and Collateral provisions of the Credit Facilities). This masking of operational problems can be particularly harmful over consecutive periods. As a result, use of an Equity Cure is typically limited in amount and frequency based on negotiations. Note that more conservative versions of the Equity Cure allow the stockholders to inject Equity to pay down debt but not to count the new Equity as EBITDA.

**Equity Kicker:** an Equity interest offered to a debt provider (*i.e.*, a Lender under a Credit Agreement or a Bond buyer), sometimes in the form of Warrants issued by the company to such debt provider, typically as an incentive for such Lender or Bondholder to buy the debt.

**Equity Prepayment:** a specific type of Mandatory Prepayment. This provision in a Credit Agreement requires the loans to be prepaid with the net cash proceeds of certain Equity issuances by the “top” entity bound by a Credit Agreement, which in some cases may be the Borrower, but in other cases may be a Holdco Guarantor. Note that sales of Equity of subsidiaries will not be covered here, as such sales are covered in the Asset Sale Sweep because that Equity is an asset of the entity that owns the stock of the subsidiary in question. In a non-public deal, this provision will generally not apply to additional Equity issued to the existing equityholders in return for additional capital contributions.

**Equity Sweep:** another name for an Equity Prepayment.

**Equity-Linked:** Securities either convertible into, or with warrants to purchase, Equity interests of the Issuer or another company.

**ERISA:** acronym for the Employee Retirement Income Security Act, a US federal law covering private company employee benefit plans. ERISA establishes legal guidelines for pension benefit plans and welfare benefit plans, including guidelines concerning pension investments, pension loans, administration, setting standards for fiduciary conduct and making fiduciaries personally liable for breaches of responsibility.

**Escrow:** used colloquially to mean the holding of signed documents to prevent them becoming operative until a specified event, e.g., "We will hold the documents in Escrow until the Closing Date." Also means the holding of proceeds from an offering of Securities or a Credit Facility that are to be used for a specific purpose (usually an acquisition) until the closing of the transaction. Can be informal or governed by a written agreement, with or without a third party acting as Escrow agent. In an acquisition context, the Escrow arrangement would typically be documented pursuant to a written agreement with the Trustee or Security Agent acting as the Escrow agent.

**Ethical Wall:** see Chinese Wall.

**eToys:** an online retailer specializing in the sale of toys. Also the plaintiff in an important 2005 case where the court held that the lead Underwriter in a Firm Commitment Underwriting may have a fiduciary duty to the Issuer in certain circumstances. In light of the decision, most banks now include language (now known as eToys language) in their Commitment Letters and Underwriting Agreements specifically denying the existence of any such fiduciary duty. See *EBC I, Inc. v. Goldman, Sachs & Co.*, 832 N.E.2d 26 (N.Y. 2005).

**EU:** acronym for European Union.

**EURIBOR:** acronym for the Euro Interbank Offer Rate, which refers to the rate at which major financial institutions within the EU can borrow Euros from another participant bank in the EU money market. Most Credit Facilities and Floating Rate Notes have Interest Rates that are set at certain margins above EURIBOR or LIBOR (as applicable). See Applicable Margin and LIBOR.

**EURIBOR Floor:** same as a LIBOR Floor, but for Credit Facilities denominated in Euros and therefore using EURIBOR.

**Euroclear:** shorthand for Euroclear Bank S.A./N.V., one of the two primary European Clearing Systems, located in Brussels. See Clearing System.

**Eurodollar:** although this is technically a reference to the market for dollar-denominated loans outside the United States, it is most often used interchangeably with the term LIBOR to refer to an Interest Rate index determined in London. See LIBOR.

***Eurodollar Loans:*** loans made under the Eurodollar (or LIBOR) option for Interest Rates. See Applicable Margin and LIBOR.

***European Selling Legend:*** disclosure in the plan of distribution section of an Offering Memorandum or the underwriting section of a Prospectus that is inserted to make sure a US-based deal complies with the regulations across the pond.

***Event of Default:*** if you are experiencing one of these, things are not going well. As discussed in the definition of Default, Indentures and Credit Agreements basically have three stages of trouble: the Default, the Event of Default and Acceleration. At stage two, the Event of Default, the Default has matured into an Event of Default because the Issuer or the Borrower has failed to cure the Default (and in some cases a disgruntled Lender or Bondholder has provided a required notice) within a specified period of time (or Cure Period). Although note that certain Default events such as Bankruptcy Defaults are automatic Events of Default, or Hair-Triggers. So what happens now? See Acceleration.

***Evergreen:*** a provision in a contract that allows for the automatic renewal after the initial term of such contract for successive terms of an agreed upon length so long as neither party gives advance notice of an intent not to renew. Evergreen provisions are useful because they prevent you from having to renegotiate your entire agreement each year unless one party is demanding it.

***Excess Cash Flow:*** a calculation of how much extra cash the Borrower has generated during a particular period of time that can be used to pay down debt. It is a negotiated formula that starts with Adjusted EBITDA (or sometimes net income), plus some adjustments for changes in Working Capital, minus scheduled repayments of debt, Capital Expenditures, Interest expense and provisions for current taxes. See Excess Cash Flow Sweep.

***Excess Cash Flow Sweep:*** a provision in a Credit Agreement that requires the Borrower to prepay loans in an amount equal to a specified percentage of Excess Cash Flow. The Excess Cash Flow Sweep percentage is sometimes subject to Step Downs.

***Exchange Act:*** the Securities Exchange Act of 1934, as amended, which governs the continuing and reporting obligations of companies with registered Securities.

***Exchange Note Term Sheet:*** the Term Sheet for the Exchange Notes found in the Commitment Letter. This Term Sheet is generally an exhibit to the Bridge Facility Term Sheet.

***Exchange Notes:*** the first thing to know about Exchange Notes is that they are not the actual Bonds the Issuer intends to sell to finance the purchase of the Target (although the terms of the two are similar). So what are they? After the Bridge Loans mature (generally in one year),

they automatically convert into Term Loans (if the Bridge Loans have not yet been taken out). These Term Loans can then be “flipped,” generally at the option of a certain percentage of the Term Loan holders, into Exchange Notes, which are High Yield Notes, generally with Registration Rights and Call Protection. Note that in some bank forms, Bridge Loans flip automatically into Exchange Notes one year after the Bridge Loan Closing (*i.e.*, without an interim step as Term Loans). Note that Exchange Notes are not the same as Exchangeable Notes.

***Exchange Offer:*** a transaction where one Security is exchanged for another Security. In a 144A Offering with Registration Rights, refers to the exchange) of private Notes that were issued in a 144A Offering into SEC-registered Notes. An Exchange Offer is an SEC-registered process that takes place within a certain period of time after the Closing of a 144A Offering. In order to comply with its obligations under the Registration Rights agreement, the Issuer makes an offer to holders of the Rule 144A Notes to exchange those Notes for registered, freely tradable Notes (that otherwise have the same terms). Exchange Offers can be used for Investment Grade and High Yield Notes, but not Convertible Notes. Exchange Offers are also known as A/B Exchange Offers and Exxon Capital Exchange Offers. See Latham & Watkins Client Alert No. 669, *The Future of Registration Rights in Private Offerings of Debt Securities* (January 22, 2008), available at [www.lw.com](http://www.lw.com).

***Exchangeable Notes:*** the term used for Convertible Bonds that are convertible into the stock of an entity other than the Issuer (typically a parent or other Affiliate of the Issuer). These are not the same as Exchange Notes.

***Exit Financing:*** financing that takes place when a debtor is ready to confirm a plan and exit Bankruptcy. It is through Exit Financing that the debtor is able to fund its plan of reorganization. In most, if not all, plans of reorganization, Exit Financing is required to be available before a debtor can reach the effective date for its plan.

***Expertized Parts:*** generally, the audited Financial Statements contained in the Registration Statement. Under Section 11, the Underwriters and boards of directors can avoid liability for the expertized portion of the Registration Statement if they can show they had no reasonable grounds to believe, and no actual belief, that such statements were untrue or omitted material facts. Note that unaudited Financial Statements are not expertized.

***Extraordinary Gains or Losses:*** gains and losses that are presented separately in the Income Statement because they are unusual and infrequent. The separate presentation in historical financials distinguishes items that may distort the analysis of a company’s ongoing earning power.

**Exxon Capital Exchange Offer:** another name for Exchange Offer. The term derives from the Exxon Capital Holding Corp. SEC No-Action Letter dated May 13, 1988.

**Face Value:** another way to describe principal amount.

**Fair Market Value:** the price for which property can be sold in an "arm's length" transaction, that is, between informed, unrelated and willing parties, each of which is acting rationally and in its own best interest.

**Fairness Opinion:** seen in various contexts including the Affiliate Transaction Covenant in Indentures. Essentially this is an opinion from an independent internationally recognized investment bank, accounting or appraisal firm that a particular transaction is fair from a financial point of view.

**Fallen Angel:** can refer to (i) the Issuer of a Bond that was once Investment Grade but has since been reduced to Junk Bond status or (ii) a stock that has fallen substantially from its all-time highs.

**FCPA:** acronym for the Foreign Corrupt Practices Act. This statute prohibits US companies from bribing foreign governmental officials in exchange for contracts, concessions or other benefits conferred by the foreign government.

**Federal Funds:** immediately available funds (*i.e.*, a wire transfer that lands in the recipient's account on the day it is sent).

**Fee Credit:** this is how companies get some of their money back under the Fee Letter if/when they end up issuing the High Yield Bonds after borrowing a Bridge Loan. Fee Credit refers to provisions that are sometimes agreed to in a Fee Letter (or separate Fee Credit Letter) whereby (i) a portion of the Funding Fee is refunded or credited against the Placement Fee if the High Yield Bond deal occurs after the Bridge Loans are funded and/or (ii) a portion of the Rollover Fee is refunded or credited against the Placement Fee if the High Yield Bond deal occurs after the Rollover Fee is paid (when the Bridge Loan converts to a Term Loan). Certain institutions have strong preferences for whether this should be structured as a credit or as a refund.

**Fee Credit Letter:** some banks provide the Fee Credit in a separate letter called the Fee Credit Letter. Other banks include the Fee Credit terms in the Fee Letter itself or in the Engagement Letter.

**Fee Letter:** the part of the Commitment Papers package that sets forth the fees and contains the Market Flex and Securities Demand provisions. This is a separate letter that outlines certain fees to be paid in connection with the various Credit Facilities (including the Bridge Facility) contemplated by the Commitment Letter. Note that this is a separate letter from the Commitment Letter and is often not shared with the seller or the Target (among others) or is shared in a redacted form. Always be careful as to whom this letter is distributed.

**Fee Rebate:** see Fee Credit.

**Fiduciary Out:** a provision in a merger agreement that allows the board of directors to terminate a proposed merger if a "better" deal arises with another party.

**Final:** "the Final" is a reference to the Final Offering Memorandum or Prospectus. The Final is printed after Pricing and includes all the pricing terms. Compare Red, and see Pricing Supplement.

**Finance Subsidiary:** a subsidiary of a parent company that conducts the financing operations for the larger enterprise.

**Financial Assistance:** a number of European jurisdictions have laws that prohibit companies or their subsidiaries from providing Financial Assistance (*i.e.* by providing a Guarantee, Security or otherwise) in connection with the purchase or issuance of the parent company's shares. Certain jurisdictions permit Financial Assistance by private companies in these circumstances if certain logistical and board approvals processes, known as a Whitewash, are followed.

**Financial Buyer:** generally, a Sponsor that is acquiring a company as an investment rather than to achieve strategic Synergies. Compare Strategic Buyer.

**Financial Covenants:** the most famous kind of Maintenance Covenants. See Interest Coverage Ratio, Fixed Charge Coverage Ratio and Leverage Ratio.

**Financial Statements:** the Income Statement, Balance Sheet and Cash Flow Statement of a company. See Latham & Watkins publication, Financial Statement Requirements in US Securities Offerings: What You Need to Know (September 2013), available at [www.lw.com](http://www.lw.com).

**Financing Out:** a Condition Precedent in the merger agreement or Stock Purchase Agreement that makes the acquisition transaction subject to financing. The consequence of a Financing Out is that the acquiror does not have to consummate the acquisition if the loan commitments (as set forth in the Commitment Letter) do not fund. The Financing Out is a big deal and is hugely important to the overall structure of the financed acquisition transaction because a Financing Out effectively incorporates into the acquisition agreement all the Conditions Precedent in the Commitment Letter. Without a Financing Out, the acquiror will insist on fewer Conditions Precedent in the Commitment Letter because the acquiror knows it is contractually obligated to consummate the purchase whether or not the financing is available on the Closing Date.

**Financing Statement:** the first thing to know is that these are not the Financial Statements. The purpose of Financing Statements is to Perfect a Security Interest in many classes of personal property. A Financing Statement is used in a secured financing and is a simple document that contains the name and address of each of the debtor and the Secured

Party and contains a brief description of the Collateral as well as other statutorily required information. The Financing Statement serves as public notice of the Security Interest. To be effective, the Financing Statement must be completed properly (particular attention must be paid to the exact legal name of the debtor) and be filed in the proper filing office. It is always advisable to file a Financing Statement as soon as possible, but in any event, within ten days of the Closing Date, in order to avoid Preference concerns if the debtor were to file for Bankruptcy.

**FINRA:** acronym for Financial Industry Regulatory Authority, Inc. FINRA is the result of the consolidation of what used to be the National Association of Securities Dealers, Inc. (NASD) and the New York Stock Exchange, Inc.'s (NYSE) member regulation, enforcement and arbitration operations. FINRA is responsible for regulatory oversight of Securities firms. Underwriters must make FINRA filings in connection with IPOs and certain secondary Equity offerings of newly public companies. See Public Offering System.

**Firm Commitment Underwriting:** this is the type of structure we see in virtually all underwritten deals, whereby upon signing the Underwriting Agreement the Underwriters make a firm commitment to buy the Securities (rather than just agreeing to use their best efforts to find buyers for them).

**First Lien:** shorthand for "first priority Lien," this Lien has Priority over other Liens, subject to a negotiated list of exceptions for other Liens permitted under the Credit Agreement and/or Indenture.

**First Lien Facilities:** these sit at the top of the Capital Structure. First Lien Facilities are Senior Secured Credit Facilities (usually a Term Loan Facility and a Revolver) that have a First Lien on the Collateral. In a Commitment Letter, the terms of the First Lien Facilities are contained in the Senior Secured Facilities Term Sheet.

**First Out Facility:** a type of Credit Facility where a subset of the Lenders (most often the revolving Lenders) is paid out ahead of other equally and ratably secured Lenders. First Out Facilities are often put in place to make the debt more attractive to revolving Lenders.

**Fitch:** Fitch Ratings, a subsidiary of Fimalac, S.A. Fitch is a Ratings Agency.

**Fixed Assets:** assets that have a useful life of more than one year and are not intended to be consumed by or sold to customers. Examples include equipment, machinery, buildings and land. Under GAAP, Fixed Assets are recorded on a company's Balance Sheet at their acquisition cost minus an accumulated charge for Depreciation.

**Fixed Charge Coverage Ratio:** the ratio of EBITDA (or Adjusted EBITDA) to Fixed Charges. Most High Yield Indentures permit Issuers to incur debt in instances where, Pro Forma for the incurrence of such

debt and the use of the proceeds therefrom, the Issuer's Fixed Charge Coverage Ratio would be above a certain threshold—generally 2.00 to 1.00. The basic idea here is that the Issuer can incur more debt if, after taking into account the newly incurred debt, the Issuer would have at least two dollars of cash flow (or EBITDA) on a trailing twelve-month basis for each one dollar of Interest expense.

**Fixed Charges:** a more comprehensive way to define Interest expense for Covenant purposes. Fixed Charges are generally defined in an Indenture or Credit Agreement to mean the sum of consolidated Interest expense plus certain dividends on Preferred Stock. A portion of consolidated lease expense is also sometimes included. Note that some form Credit Agreements include scheduled principal payments and Capital Expenditures in the definition of Fixed Charges.

**Fixed Income Security:** Bonds or Notes are (usually) a type of Fixed Income Security because the Interest Rates are generally fixed. By contrast, Credit Agreements generally have Interest Rates that “float,” meaning they are a certain margin above LIBOR, which is a moving target. See Applicable Margin.

**Fixed Rate:** an Interest Rate that is locked in upon issuance of the debt and does not change over the life of the debt. Most (but not all!) Bonds are Fixed Rate debt. Compare Floating Rate.

**Fixture:** a type of personal property defined in Article 9. Fixtures are goods that are so related to real property that an interest in them arises under real property law. The boiler that heats a building is an example of a Fixture.

**Flex:** another name for Market Flex.

**Float:** soft drink with ice cream floating in it, often with whipped cream and a bright red cherry on top. In the corporate world, the name given to taking a company public, “floating” its shares on the applicable stock exchange.

**Floating GAAP:** GAAP in effect from time to time, rather than as fixed at the time an agreement is entered into. For contrast, see Frozen GAAP. The advantage of Floating GAAP is that Covenant compliance can be measured based on GAAP Financial Statements, even if GAAP moves (so that a company doesn't have to keep two sets of books). The advantage of Frozen GAAP, by contrast, is that changes in GAAP won't, on their own, cause a company to fall out of Covenant compliance.

**Floating Rate:** an Interest Rate that periodically adjusts based on a market index rate, such as the Base Rate or LIBOR. Most Term Loans and Revolving Loans are Floating Rate debt. Compare Fixed Rate.

**Floating Rate Note:** a Note with a Floating Rate. These protect investors against a rise in Interest Rates (which have an inverse relationship with Bond prices), but also carry lower yields than Fixed Rate notes of the

same maturity. Often secured and used as Senior Debt (often in lieu of bank financing).

**FMV:** acronym for Fair Market Value.

**Follow-On Offering:** an offering of common shares subsequent to the Initial Public Offering.

**Forbearance:** a deal the Borrower cuts with its Lenders where the Lenders agree to refrain from accelerating the debt for a limited period of time while the Borrower endeavors to get its act together. In a typical situation, Lenders might agree not to exercise remedies while giving the Borrower time, beyond any available Cure Period, to improve performance, find a new financing source or otherwise agree upon an appropriate Amendment to the Credit Facility to reflect the new (and usually unpleasant) circumstances. The Lenders will want to make sure that other creditors (such as Bondholders) have similarly agreed not to exercise remedies during the same time period. The Lenders will typically seek to tighten various terms, such as demanding additional Collateral, increased pricing and stricter financial reporting, in exchange for their Forbearance.

**Forbearance Agreement:** the agreement documenting a Forbearance.

**Force Majeure:** the happening of events outside the control of the parties, for example, material adverse changes in financial markets, suspension of trading of securities on stock markets, and natural disasters or the outbreak of war. It is usual for parties to provide in an Underwriting Agreement that such events will enable the Underwriters to terminate the Underwriting Agreement.

**Foreign Exchange Risk:** the risk that the value of a particular currency will fluctuate relative to another currency. The risk arises when somebody earns revenue in one currency but has obligations payable in another. For example, Icelanders are paid their wages in local currency, the Krona. During boom times, many built new homes, taking out mortgages in Euros. On January 1, 2008, it took 92 Krona to buy a Euro. On January 1, 2009, it took 173. Ouch.

**Foreign Private Issuers:** certain Issuers of Securities in the United States (other than a foreign government) organized in a jurisdiction outside of the United States. Foreign Private Issuers are treated differently than US domestic Issuers in several important respects, including the types of Financial Statements they are required to file with the SEC. See Latham & Watkins publication, *Accessing the US Capital Markets from Outside the United States: an Overview for Foreign Private Issuers and Their Advisors* (September 2013), available at [www.lw.com](http://www.lw.com).

**Form 8-K:** form used to file current reports under Section 13 or 15(d) of the Exchange Act. The form (which you can pull up by googling "Form 8-K") must be filed when certain specified events occur (such

as the appointment of a new executive officer or the entering into of a material contract).

**Form Check:** the exercise of checking to make sure that a draft SEC form (such as a Form S-1 or a Form 10-K) complies with all the requirements of that form, including all the applicable provisions of Regulation S-K.

**Forward:** a contract in which a buyer agrees to buy, and a seller agrees to sell, a given quantity of an underlying asset on a specified future date at a price agreed to at the time the contract is entered into. A Forward is an Over-the-Counter transaction. Compare Future.

**FPA:** acronym for the Federal Power Act, which, among other things, regulates the rates, terms and conditions pursuant to which public utilities may sell electric energy or capacity or provide transmission service.

**FPI:** acronym for a Foreign Private Issuer.

**Fraudulent Conveyance:** see Fraudulent Transfer.

**Fraudulent Transfer:** a transfer made by a party (i) that was made with actual intent to hinder, delay or defraud that party's creditors or (ii) in which the party making the transfer received less than reasonably equivalent value in exchange and (a) was insolvent, (b) had unreasonably small capital or (c) intended to incur debts beyond its ability to pay them. A Fraudulent Transfer is subject to Clawback from the transferee under state Fraudulent Transfer laws and, if the party is in Bankruptcy, under the Bankruptcy Code provided that the statute of limitations has not expired. The statute of limitations is two years for actions under the Bankruptcy Code and is typically four years under state law.

**Free and Clear:** without Liens or other encumbrances. Under Bankruptcy Code Section 363(f), in certain circumstances, the debtor's assets may be sold free and clear of Liens or other interests held by third parties. Generally, the Liens or other interests are transferred to the proceeds of the sale and attach in the same manner and Priority as they did to the assets sold.

**Free Writing Prospectus:** a type of written document that the SEC made available as part of Securities Offering Reform. FWP's are short-form written Prospectuses that are typically used to supplement previously disclosed information. FWP's are an efficient means of disclosing additional information because they are not subject to the strict form and content requirements of full statutory Prospectuses. In most but not all cases, FWP's need to be filed with the SEC concurrently with first use. See Latham & Watkins publication, *Christmas in July—The SEC Improves the Securities Offering Process* (August 2005), available at [www.lw.com](http://www.lw.com).

**FRN:** acronym for Floating Rate Note.

**Fronting Bank:** the bank that issues a Letter of Credit or bank guarantee (often the bank that is the Administrative Agent but wearing a different hat) under a Revolving Facility. If the Fronting Bank is required to make a payment under the Letter of Credit or bank guarantee, it is entitled to be reimbursed by the revolving Lenders (if the Borrower does not do so) such that the risk is shared on a pro rata basis. The Fronting Bank receives an issuing (or fronting) fee for issuing and administering the Letter of Credit or bank guarantee. See Issuing Bank.

**Fronting Fee:** a percentage of the average stated amount of a Letter of Credit periodically paid by the Account Party to the Fronting Bank in consideration of the Fronting Bank issuing and administering the Letter of Credit and taking reimbursement risk.

**Frozen GAAP:** GAAP in effect at the time an agreement is entered into, rather than GAAP as it may be modified from time to time thereafter. Frozen GAAP explicitly prevents accounting changes from affecting compliance with financial covenants. The advantage of Frozen GAAP is that changes in GAAP won't, on their own, cause a company to fall out of covenant compliance. The advantage of Floating GAAP, by contrast, is that covenant compliance can be measured based on GAAP financials even if GAAP moves (so that a company doesn't have to keep two sets of books).

**Full Disclosure Rep:** another name for the Representation Regarding Accuracy of Disclosed Information.

**Funding Fee:** a fee provided for in the Fee Letter that is paid to the Arranger of a Bridge Loan if and only if the Bridge Loan is funded. Also known as a Takedown Fee.

**Funds Flow Memorandum:** the Closing document that tells everybody where the money is going. In more complex transactions, the memorandum is often executed or initialed by the Issuer/Borrower, particularly when the funding bank is directed to apply the funds in some manner on the Issuer's/Borrower's behalf.

**Funds Flow Statement:** another name for the Funds Flow Memorandum.

**Fungible:** used to describe Securities or loans which are substantially identical to other Securities or loans of the same issue but which are issued at a later date and become Fungible with the original issue at some future date. Fungible Securities are regarded by the market as being of equal commercial value and trade with the same CUSIP numbers in the Clearing Systems. See Latham & Watkins Client Alert No. 1417, New Treasury Regulations Make it Easier to Issue Tack-On Bonds or Loans (February 2013), available at [www.lw.com](http://www.lw.com).

**Future:** similar to a Forward, except that a Future is based on a standardized set of terms (rather than being specifically negotiated between two parties) and is traded on an exchange.

***FWP:*** acronym for Free Writing Prospectus.

***GAAP:*** acronym for “generally accepted accounting principles.” GAAP represents a set of authoritative standards for recording and reporting accounting information and is the standard by which US companies report their Financial Statements. US GAAP refers to GAAP in the United States.

***GDR:*** acronym for Global Depository Receipts.

***General Basket:*** a Basket that is expressed as a fixed amount, or in some cases as a percentage of asset value, that is not tied to any specific use. For example, the Indebtedness Covenant may have a specific Basket for finance leases up to a Cap but also a General Basket for any other debt up to a further Cap.

***General Corporate Purposes:*** code phrase meaning generally anything the law allows. This is the loosest way to designate the Use of Proceeds. Note that if dividends are permitted to be made from debt proceeds, this should be specifically designated as a Use of Proceeds, as reasonable minds differ on whether dividends are general in nature.

***General Intangible:*** a type of personal property defined in Article 9. General Intangibles are the catch-all category for any property subject to Article 9 that does not fall into any of the other specific definitions of property used in Article 9. Most contracts are General Intangibles.

***Global Depository Receipts:*** like American Depository Receipts but without the US connection. For more information regarding GDRs listed in the UK, see Latham & Watkins Client Alert No. 1024, Changes to the UK Listing Regime: Reclassification of Listed Securities and Additional Continuing Obligations for Overseas Companies With GDR Listings on the London Stock Exchange (May 11, 2010), available at [www.lw.com](http://www.lw.com).

***Global Note:*** in Bond land, the Issuer will sign a single note (or maybe two or three notes depending upon the rules of the Clearing System) at Closing for the entire amount of debt. These Notes will be indirectly deposited with the Clearing System. The Clearing System will then allocate Book Entry interests in this Global Note. This is how we avoid trading lots of bits of paper.

***Go Shop Period:*** specified period following the execution of an acquisition agreement during which the Target company's board of directors is permitted to actively solicit competing bids.

***Going Dark:*** a euphemism for exiting the SEC reporting system. This can be done by filing a Form 25 if the company's reporting obligation stems from Section 12(b) of the Exchange Act (for classes of Securities listed on a national exchange) or a Form 15 if the reporting obligation stems from Section 12(g) (for classes of Equity Securities held by more than 500 record holders where the Issuer has more than \$10 million of assets). Section 15(d) reporting requirements (imposing a reporting obligation on an Issuer that has sold Securities pursuant to an effective

registration statement under the Securities Act) may also be suspended, either (i) automatically at the start of any year in which the Security had fewer than 300 record holders, or (ii) via application of Rule 12h-3, which, among other requirements, allows for the suspension of reporting obligations based upon the number of record holders at any time during the fiscal year upon the filing of a Form 15. See Latham & Watkins publication, *Going (to the) Dark (side); or, if Yoda Practiced Securities Law* (April 2010), <http://sharepoint.lw.com/sites/CM/WoW/April%204.aspx>.

**Good Standing (Certificate):** refers to whether a particular statutorily created company, such as a corporation, limited liability company or limited partnership, has paid the annual registration fees due to its state of formation, and whether any type of company (statutorily created or not) has paid applicable annual fees to any states in which fees must be paid for the company to do business in that state. For a fee (naturally), states will issue a certificate of Good Standing, and those certificates are included in the closing conditions. Lack of Good Standing can affect a company's ability to enforce contracts in that state, and in some cases can have other adverse consequences.

**Grace Period:** another name for a Cure Period.

**Grantor:** an entity (usually a Borrower or a Guarantor) who "grants" to the applicable Secured Parties a Security Interest in its assets pursuant to a Security Agreement.

**Green Shoe:** a special type of purchase Option named in honor of the Green Shoe Company—the first Issuer to have this provision. Green Shoe is the nickname for the Over-Allotment Option granted to the Underwriters in the Underwriting Agreement. The Green Shoe is an Option, typically for up to 30 days, to allow the Underwriters to purchase up to 15 percent (a Cap imposed by FINRA rules) more shares than the original number sold by the Issuer in the offering. The purchase price per share for exercising the Green Shoe is the same price as in the related offering. The Green Shoe provides protection that allows Underwriters to "over-allot," meaning to sell more shares than the number being sold in the offering. The Underwriters can later use the Green Shoe to cover the Syndicate Short position created by the Over-Allotment sales if the Option price is less than the then prevailing market price per share. Underwriters generally use the Over-Allotment Option when demand for a Security proves higher than expected and therefore it is too expensive to buy additional shares back in the open market to cover the Syndicate Short position. Also referred to as "the Shoe." Note the 15 percent Cap does not apply to 144A Offerings. See Naked Short and Refreshing the Shoe.

**Grid Based Pricing:** when the Applicable Margin in a Credit Agreement fluctuates based upon a certain metric set forth in a grid (usually known as the Pricing Grid) in the Credit Agreement. Specifically, Grid Based

Pricing refers to having the Applicable Margin move based either on the Credit Rating or the Leverage Ratio (or any other agreed upon metric) of the Issuer.

**Gross Physical Settlement:** see Physical Settlement.

**Gross-Up:** shorthand for the Tax Gross-Up.

**Guarantee:** just like when your parents “guarantee” your lease or Mortgage, a Guarantee is a promise by an entity that is not the direct obligor of the debt to be responsible for that debt. For instance, the Issuer’s/Borrower’s obligation under an Indenture/Credit Agreement are frequently guaranteed by the Issuer’s/Borrower’s subsidiaries. See Guarantors.

**Guarantee Limitation Language:** in certain jurisdictions unlimited Guarantees can be illegal or invalid. Accordingly, Guarantee Limitation Language specific to Guarantors incorporated in each relevant jurisdiction is typically inserted into a Guarantee to limit the obligations of the Guarantors to the extent necessary to ensure their legality and validity.

**Guarantor Coverage Test:** a requirement of many Credit Facilities (and some High Yield Indentures) that at least an agreed percentage (usually not lower than 80 percent but often higher) of the Credit Group’s EBITDA and net assets are attributable to the Guarantors. Ensures that the Lenders have recourse to a substantial portion of the entities in the Borrower group. Notwithstanding the Guarantor Coverage Test, all Material Subsidiaries are typically required to be Guarantors in any event.

**Guarantor Financial Statements:** Financial Statements by Guarantors of debt Securities. A Guarantee of a Security (such as a Guarantee of a debt or preferred Equity Security) is itself a Security that must be registered under the Securities Act, absent an applicable exemption. As a result, under Regulation S-X Rule 3-10(a), the general rule is that Guarantors are required to present the same audited and unaudited Financial Statements as the Issuer of the Guaranteed Securities. There are a number of provisions that can relieve Issuers of this onerous requirement, so be sure to consult Latham & Watkins publication, Financial Statement Requirements in US Securities Offerings: What You Need to Know (September 2013), available at [www.lw.com](http://www.lw.com).

**Guarantors:** subsidiaries or parent entities that Guarantee the debt incurred by the Issuer/Borrower. See Guarantee. In Commitment Letters, both the Senior Secured Credit Facilities and the Bridge Facilities will usually have the same Guarantors, which will be described in the Term Sheets. Generally, Credit Facilities are Guaranteed by all domestic subsidiaries and any parent holding companies of a US Issuer/Borrower. For tax reasons, foreign subsidiaries of the Issuer/Borrower generally do not Guarantee the Credit Facilities of US Borrowers. See Deemed Dividend.

**Gun Jumping:** the solicitation, offering (including any activity that could be construed as an offering) or sale of Securities before the registration statement relating to the initial public offering has been approved by the SEC. Gun jumping can take the form of many types of communication including (i) written or oral communication (e.g., conference calls, press releases, television interviews and social media posts) made before the filing of the registration statement and (ii) written offers made other than by means of a prospectus complying with the Securities Act or a Free Writing Prospectus. The SEC has provided certain safe harbors from these prohibitions, allowing the IPO issuer to release limited information that will not constitute gun jumping.

**Haircut:** banker slang for a discount.

**Hair-Trigger:** certain Defaults under a Credit Agreement that have no Grace Period—these Defaults are automatic Events of Default upon their occurrence.

**Half a Turn:** see Turn. This is half of it.

**Happy Meal:** the repurchases of stock made by an Issuer from hedge funds or other Convertible Bond buyers with the proceeds of a Convertible Bond offering. This transaction earned its name because of the convenience to all parties, as stock repurchases are a frequent Use of Proceeds in Convertible Bond offerings and hedge funds frequently Short the Issuer's Common Stock when purchasing its Convertible Bonds. Happy Meals also generally come with a free toy.

**Hard Call:** a Prepayment Premium that has to be paid both for Voluntary Prepayments and Mandatory Prepayments. Even a Hard Call provision may include negotiated exceptions for certain Mandatory Prepayment provisions, such as the Excess Cash Flow Sweep. Compare Soft Call.

**Headroom:** with respect to any Basket, the additional amount that can currently be incurred. For example, if \$20 million of a \$25 million Basket has been spent, then there is a remaining \$5 million of Headroom. Also the name given to the percentage above forecast EBITDA in the base case model by which certain Financial Covenants are set for purposes of the Credit Agreement.

**Hedge:** an investment or strategy that attempts to reduce the impact of adverse fluctuations in the price of one asset by taking an offsetting position in another asset. For instance, many companies Hedge their foreign exchange exposure by entering into a Currency Swap.

**High Yield:** the Interest Rate (and Yield) on High Yield Bonds. Also used as shorthand to refer to the universe of High Yield Bonds and High Yield Bond offerings.

**High Yield Bonds:** Bonds rated below Investment Grade by the Ratings Agencies.

**Highly Confident Letter:** letter from a bank or financial institution indicating that it is “highly confident” that it will be able to provide or arrange financing for a particular deal. Although this letter does not constitute a contractual obligation to provide financing, it is commonly understood to mean that the bank or financial institution is expressing a high level of confidence that financing can and will be secured for the subject transaction. Often issued at an early stage in a transaction pending receipt of more detailed Due Diligence and other information enabling the bank or financial institution to issue a Commitment Letter.

**Hold:** another name for Target Hold. Typically results in a 10-yard penalty.

**Hold Harmless Letter:** in connection with accounting Due Diligence, a letter sometimes requested by auditors (typically outside of the US) from the investment bank releasing them from liability for potential claims.

**Holdco:** another name for Holding Company.

**Holdco Debt:** debt at the Holdco level. Holdco Debt is an interesting creature. It is generally not Guaranteed by any of the Operating Companies below it. So from the Holdco Debt Holders’ perspective, Holdco Debt is debt. But from the lower operating company perspective, the Holdco Debt is essentially Equity—because payments on the Holdco Debt can only be paid with dividends up from the Operating Companies. The ability to incur new debt at a Holdco level depends on whether the Operating Company Indentures and Credit Agreements restrict Holdco Debt and permit sufficient Restricted Payments to service the Holdco Debt.

**Holdco Flex:** a type of Structure Flex that permits the Arranger to restructure a portion of the debt that was originally to be borrowed by the Operating Company and move it to debt at the Holding Company level. See Holdco Debt.

**Holdco Guarantor:** any parent entity of a Borrower or Issuer that acts as a Guarantor of the Borrower’s or Issuer’s debt. See also Downstream.

**Holder in Due Course:** a party who purchases a Negotiable Instrument in good faith for value without notice that the instrument is defective or has been dishonored or claimed against by others. Generally, when a party sells a Negotiable Instrument with a non-apparent defect to a Holder in Due Course, that Holder in Due Course takes good title to the Negotiable Instrument despite the competing claims of another person, subject to certain defenses such as fraud or duress (known as “real defenses”).

**Holding Company:** a company that sits on top of (or “holds” the stock of) the Operating Subsidiary that is directly below it. This concept sometimes connotes a company that does nothing else (*i.e.*, has no

operations). See Holdco Debt and Holdco Guarantor. Bidcos are often Holding Companies and financing documentation will often contain a Negative Covenant preventing Bidco and other Holding Companies from doing anything other than entering into the transaction documents and otherwise providing customary Holding Company services.

**Hung Bridge:** a Bridge Loan that actually has to be funded because the underlying Bond offering could not be accomplished within the Caps set out in the Commitment Letter and Fee Letter.

**Hybrid Security:** Securities which combine both debt and Equity characteristics. They often pay a predictable (fixed or floating) rate of return or dividend until a certain date, at which point the holder has a number of options including converting the Hybrid Security into a common Equity interest. More broadly, any Security that combines two or more different financial instruments.

**IAASB:** acronym for International Auditing and Assurance Standards Board.

**IASB:** acronym for International Accounting Standards Board.

**ICA:** acronym for Intercreditor Agreement.

**IFRS:** acronym for International Financial Reporting Standards issued by the IASB. This is the international equivalent of US GAAP. More than 100 countries permit or require use of IFRS financial reporting standards for listed companies. See Latham & Watkins Client Alert No. 667, SEC Accepts Financial Statements From Foreign Private Issuers Without Reconciliation to US GAAP If Prepared Under International Financial Reporting Standards (January 16, 2008), available at [www.lw.com](http://www.lw.com). See also Latham & Watkins and KPMG publication, Financial Statement Requirements in US Securities Offerings: What Non-US Issuers Need to Know (September 2013), available at [www.lw.com](http://www.lw.com).

**In the Money:** a stock Option is In the Money when the holder can exercise it for a profit. A Convertible Bond is In the Money when its Conversion Value exceeds its Par Value.

**Income Statement:** a Financial Statement on which a company reports its results of operations over a period of time (usually monthly, quarterly or annually). Also commonly referred to as a Profit and Loss Statement or P&L Statement. Think of an Income Statement as a movie and a Balance Sheet as a snapshot. See Balance Sheet.

**Inconsistent Information Out:** this Condition Precedent lets the Lenders out of their commitment if they discover any new, materially adverse information. This is a Condition Precedent to the financing commitment to the effect that the Arranger has not become aware of any new or inconsistent information with respect to the Target since the date of the Commitment Letter that the Arranger deems materially adverse in relation to the information made available prior to the

signing of the Commitment Letter. Also referred to as the No New Information Out.

***Incremental Facility:*** a post-Closing addition to an existing Credit Facility on substantially the same terms as the existing Credit Facility. Incremental Facilities are typically used to finance acquisitions, investments or even dividends. The existing Lenders do not pre-commit to provide the Incremental Facility, but do pre-approve the incremental leverage. At the time a Borrower desires to add on to the existing Credit Facility, it must seek new commitments (from existing or new Lenders). Incremental Facility debt is additional Secured Debt that shares Collateral with the pre-existing First or Second Lien debt. Lenders focus intently on the amount of the pre-approved incremental secured leverage because of potential implications for Credit Ratings and recovery. Also of material relevance to Junior Debt holders as the Incremental Facility will rank ahead of them. Further, if the loans under the Incremental Facility have terms that are more favorable to the incremental Lenders than the terms of the existing loans, then the existing loans may lose value as Lenders trade out of the existing Credit Facilities and into the Incremental Facility. This is why Incremental Facilities sometimes include an MFN Pricing provision, so that if the Incremental Facility is priced more richly than the existing loans, the margin on the existing loans is automatically increased. At the Commitment Papers stage, some terms of the Incremental Facility are set forth in the Senior Secured Facilities Term Sheet. See MFN Pricing. Also known as an Accordion Feature.

***Incumbency Certificate:*** incumbency is the state of being in office. So an Incumbency Certificate is a certificate by the company secretary that such and such persons hold such and such offices in the company. Contract counterparties then look at the board resolutions, which authorize certain officers to take actions on behalf of the company (like sign a Credit Agreement). If the person who signs has the title stated in the Incumbency Certificate and the person of that title is authorized by the resolutions to bind the company, that closes the loop.

***Incurrence Covenants:*** Negative Covenants (such as an Indebtedness Covenant or a Restricted Payments Covenant) that prohibit a Borrower or Issuer from engaging in voluntary actions except under agreed conditions or subject to specified Caps. Compare Maintenance Covenants.

***Indebtedness Covenant:*** this Incurrence Covenant restricts the incurrence of additional indebtedness. This Covenant is generally structured to restrict the incurrence of additional debt unless either a Pro Forma Ratio Test is met or a Permitted Debt Basket is available.

***Indemnification Provisions:*** the terms of the indemnification that must be provided by the Borrower to the Arranger as a condition to the offering of the commitment. Often in the text of the Commitment

Letter, sometimes in an annex to the letter. Similar provisions will often appear in the Engagement Letter relating to indemnification in favor of the investment bank.

**Indenture:** the governing document for a series of Bonds. Generally drafted on a punishing timeframe after the Description of Notes is finalized, the Indenture is a contract between the Issuer and the Trustee (who acts as a sort of Bondholder representative) pursuant to which Bonds are issued. Indentures are generally governed by New York law. Individual investors hold Notes in Book Entry form through the Clearing Systems rather than actually signing this document.

**Independent Contractor Provisions:** provisions in the text of the Commitment Letter stating that the Arranger is an independent contractor and that nothing in the Commitment Letter will be deemed to create an advisory, fiduciary or agency relationship. Also called No Fiduciary Duty Provisions. See eToys.

**Independent Director:** directors who do not have a material relationship with the listed company—*i.e.*, they are outsiders, and certainly not employees. Sarbanes-Oxley and the rules adopted by the stock exchanges have a complex set of requirements as to who qualifies as independent. In general, you know one when you see one. SEC rules require that the Audit Committee of a company be comprised entirely of Independent Directors. Stock exchange rules require that the full board of directors be comprised of a majority of Independent Directors.

**Index-Linked Pricing:** the concept of providing an alternative to Base Rate and LIBOR-based pricing in a Credit Facility. Index-Linked Pricing tracks some form of alternative index that is appropriate for the Borrower in question. In deals featuring Index-Linked Pricing, the applicable Interest Rate is generally the greater of LIBOR plus a given margin and the alternative index plus a given margin.

**Information Rep or Info Rep:** representation by the Borrower in the Commitment Letter and Credit Agreement relating to the accuracy and completeness of information provided by the Borrower and relied upon by the commitment parties and Lenders in the syndication process. This is often limited to written information and is subject to other qualifications. See Representation Regarding Accuracy of Disclosed Information.

**Initial Public Offering:** the first public offering of shares of Common Stock of a company. Following an Initial Public Offering, a company becomes a Reporting Company (if it wasn't already).

**Initial Purchasers:** in a Rule 144A Financing and Regulation S offering, Initial Purchasers play essentially the same role that Underwriters play in a registered transaction. Rule 144A provides a resale exemption from the registration requirements of the Securities Act, permitting the investment banks that initially purchase the Securities from the Issuer in a Section 4(a)(2) offering to resell to big institutions (known as QIBs)

without being deemed to be Underwriters under Section 2(a)(11) of the Securities Act. Since we can't call them Underwriters, we call them Initial Purchasers.

***Insolvent:*** a debtor that is not solvent. There are two basic tests for insolvency: (i) the balance sheet test — generally, liabilities exceeding assets — and (ii) the equitable test — generally, inability to pay debts as they become due.

***Institutional Investor:*** organization which is in engaged in investing its own assets and assets held for others, e.g., insurance companies and pension funds.

***Institutional Term Loan:*** a Term Loan Facility intended to be sold to non-bank Institutional Investors. Historically, Institutional Term Loans have longer maturities and back-end-loaded repayment schedules. See Tranche B Term Loans.

***Insurance Proceeds Prepayment:*** a specific type of Mandatory Prepayment. This provision in a Credit Agreement requires the loans to be prepaid with the excess proceeds of casualty insurance or condemnation events, beyond amounts applied to rebuild the affected asset or otherwise reinvested in the business.

***Insurance Proceeds Sweep:*** another name for an Insurance Proceeds Prepayment.

***Integration:*** a doctrine whereby purported Private Offerings are "integrated" with SEC-registered offerings, thereby blowing the Private Placement exemption. It is important to look at the applicable law and lore whenever you have a public and Private Offering close in time.

***Intercreditor Agreement:*** an agreement that sets forth the rules of engagement between two groups of Lenders and/or Bondholders with respect to shared Collateral or other intercreditor relationship matters. Think of this as a prenuptial agreement between two classes of creditors. Apart from addressing the obvious point that the First Lien Lenders get paid out first from Collateral proceeds and the Second Lien Lenders get paid out second in First Lien/Second Lien deals, Intercreditor Agreements also lay out a number of important provisions regarding the right of each Lender and/or Bondholder group to take action with respect to the Collateral and the Borrower generally. For example, in the Mezz market, the terms of the Subordination are set forth in an Intercreditor Agreement between the Mezz Lenders and the Administrative Agent under the Credit Agreement. Intercreditor Agreements can also govern the relationship between two or more classes of creditors that share in the Collateral on a Pari Passu basis.

***Interest:*** an amount the Issuer/Borrower pays for borrowing money under the Credit Facility/Notes, generally described as a percentage of the principal amount that is to be paid each year.

**Interest Coverage Ratio:** often used as another name for the Fixed Charge Coverage Ratio found in most High Yield Indentures. In Credit Agreements, an Interest Coverage Ratio includes only Interest in the denominator, whereas the Fixed Charge Coverage Ratio denominator includes all sorts of other fun stuff. See Fixed Charges.

**Interest Payment Date:** the date stated in an Indenture or Credit Agreement when an Interest payment is due. See Interest Period.

**Interest Period:** the period of time under an Indenture or Credit Agreement during which the Interest associated with a particular Interest payment accrues. In most (but not all) Indentures, there are two Interest Periods per year. In Credit Agreements, the number of Interest Periods per year can vary widely, especially if the Borrower chooses to have LIBOR Loans (which may bear Interest based upon 1, 3, 6 or 12-month LIBOR).

**Interest Rate:** the rate of Interest paid by the Issuer/Borrower.

**Interest Rate Swap:** an arrangement entered into by a company to Hedge its Interest Rate exposure. Companies frequently use Interest Rate Swaps to effectively convert their Floating Rate debt instruments into Fixed Rate debt instruments.

**Interim Facility:** the Credit Facility made available under an interim loan agreement. Also another name for a Bridge Facility.

**Internal Controls and Procedures:** a company makes a big sale out of its Wichita office. How does that company ensure that the sale properly flows through its accounting books and records and ultimately its Financial Statements (which are assembled at its headquarters in California)? The answer is by having effective Internal Controls and Procedures. The SEC defines Internal Controls and Procedures as a process designed by the CEO and CFO of a company and put into place by the board of directors and management of the company to provide reasonable assurances about the reliability of financial reporting and the preparation of Financial Statements. See SOX Section 404.

**International Accounting Standards Board:** the independent body that is responsible for developing and publishing IFRS and promoting the use and application of these standards.

**Investment Company:** generally, a company whose main business is holding Securities of other companies purely for investment purposes. As defined in the Investment Company Act, an Investment Company is (i) engaged primarily in the business of investing, reinvesting or trading in securities (or holds itself out as being in that business); (ii) owns "investment securities" which constitute more than 40 percent of the value of its assets on an unconsolidated basis (excluding US government securities and cash items) and (iii) is not entitled to any exemption from registration. A typical example of an Investment Company is a mutual fund, which is an entity organized to accept

money or assets from investors, pool those assets, and invest the assets on behalf of the investors.

***Investment Company Act:*** the Investment Company Act of 1940, as amended, which governs mutual funds and companies that primarily invest in or trade in Securities and whose own Securities are offered to the public.

***Investment Grade:*** a rating of Baa3 or better by Moody's, BBB- or better by S&P or BBB- or better by Fitch. For a discussion of Investment Grade Bond Covenants, see White Paper, Improving Covenant Protections in the Investment Grade Market (December 17, 2007), published by the Credit Roundtable in association with the Fixed Income Forum, available at [www.creditroundtable.org](http://www.creditroundtable.org).

***Investment Grade Bonds:*** Bonds with an Investment Grade rating that traditionally have significantly fewer Covenants than High Yield Bonds.

***Invitation Telex:*** at the start of the marketing of an IPO, a telex, fax or, most often, email communication summarizing the key terms of the offering and sent out to invite Underwriters into the Syndicate and which can also modify or add to the terms of the Master Agreement Among Underwriters. As the name suggests, this used to be a telex but most people now don't even know what a telex is, let alone how to send one.

***IPO:*** acronym for Initial Public Offering.

***IPO Clawback:*** another name for the Equity Claw.

***ISDA:*** acronym for International Swaps and Derivatives Association.

***ISDA Master Agreement:*** a master agreement in the form published by ISDA. This is a form agreement used by parties to hedges that was designed by ISDA to be a balanced and easily administered agreement. The idea was to make it so palatable to all that there would be few non-standard provisions required by any market player. The second generation ISDA Master Agreement was published in 1992 and the third generation was published in 2002. However, the 1992 form is more commonly used than the new form. The ISDA Schedule is part of the ISDA Master Agreement — there is no such thing as an ISDA Master Agreement without an ISDA Schedule. Any two entities in the world that may want to enter into hedges across from each other are supposed to have just one ISDA Master Agreement between them, which by itself has no economic effect until they enter into one or more transactions, which incorporate by reference their ISDA Master Agreement.

***ISDA Schedule:*** the part of an ISDA Master Agreement that includes the specific choices/elections made by the counterparties, as well as notice information and any exceptions and addenda the parties wish to make to the preprinted form.

**ISIN:** acronym for International Securities Identification Number. The ISIN is an identification number unique to each issue of Bonds with each code prefixed by the country of issue. Generally used in European markets.

**Issue Price:** the gross price (before deduction of commissions and expenses payable to Underwriters or Initial Purchasers) that is placed on a new issue of Bonds and which is expressed as a percentage of the principal amount of the Bonds. So, for instance, a Bond with an issue price of 100 percent is issued "at par," a Bond with an issue price greater than 100 percent is issued "at a premium," and a Bond with an issue price lower than 100 percent is issued "at a discount."

**Issuer:** the company that is the seller (or Issuer) of Securities.

**Issuing Bank:** the financial institution that issues Letters of Credit under the Credit Agreement. Also called Fronting Bank, LC Issuer, LC Bank or other variations.

**Item 10:** shorthand for Item 10 of Regulation S-K, which imposes additional disclosure requirements and restrictions when a non-GAAP financial measure is included in certain formal SEC filings. See also Regulation G.

**Itemized Flex:** another name for Closed Flex.

**JLA:** acronym for Joint Lead Arranger.

**JOBS Act:** the Jumpstart Our Business Startups Act, signed into law in April 2012. The JOBS Act made significant changes to the US Securities laws. Most significantly, Title I of the JOBS Act provides for an IPO on-ramp, streamlining the IPO process for EGCs, a new category of Issuer. The other Titles of the JOBS Act introduced a number of additional changes to the Securities laws, including directing the SEC to (1) modify Regulation D under the Securities Act of 1933 to remove prohibitions on "general solicitation" in connection with Rule 506 offerings to accredited investors and (2) expressly permit general solicitation in connection with 144A Offerings. See Latham & Watkins publication, *The JOBS Act, Two Years Later: An Updated Look at the IPO Landscape* (April 5, 2014), available at [www.lw.com](http://www.lw.com).

**Joint and Several Liability:** where two or more parties assume liability and each is treated as having assumed the obligation both collectively and individually for itself. A third party may proceed against any one or more of the co-obligors for the full performance of the obligation, irrespective of which of them caused the breach. Guarantors typically will have Joint and Several Liability. See also Several Liability.

**Joint Lead Arranger:** in transactions with more than one Arranger, where no particular one of them lays sufficient claim to be the sole Lead Arranger, they all get the JLA designation. In practice, even in these cases, it is rare for a deal to not have one particularly prominent arranger.

**Judgment Currency:** in Credit Agreements with a non-US Borrower or where there are one or more Tranches payable in different currencies, there are typically provisions that acknowledge that a judgment may be obtained in a currency different than the currency in which the loans were made and are required to be repaid. This alternative currency is known as the Judgment Currency. The Judgment Currency provisions exist because, although Credit Agreements generally provide for payments in a specified currency, it is important to have a conversion mechanism to deal with the possibility that a judgment may nevertheless be awarded in an alternative currency.

**Jump Ball:** under a “jump ball” approach to underwriter economics, the allocation of the sales commission among the underwriters is based on how many shares they actually place with institutional investors in the offering. For instance, if two underwriters have a relationship with the same institutional investor, that investor can designate credit for the shares they purchase to the syndicate members of its choice based on factors such as quality of service offered. The reasoning behind “jump ball” economics is that it motivates the underwriters to earn their fees by making actual sales. In the absence of a “jump ball” economics and the more standard approach, the underwriters agree to a fixed allocation of the selling concession for sales to institutional investors regardless of the shares actually placed by each underwriter.

**Junior Debt:** a general reference to a Slug of debt that is “lower” in the Capital Structure than other debt. For example, if a company has both Senior Subordinated Notes and Senior Notes, the Senior Subordinated Notes are “junior,” even though the word “senior” appears on the cover of the Indenture because those holders have agreed to be Subordinated in right of payment to the Senior Notes. Compare Senior Debt.

**Junk Bond:** another name for a High Yield Bond or Non-Investment Grade Bond. “Junk Bond King” Michael Milken pioneered the use of Junk Bonds for corporate financing and M&A deals, but his novel approach to the interpretation of relevant legal regulations earned him a stint in federal prison and a life-time ban from being involved in the Securities industry.

**KFC:** used to be an acronym for Kentucky Fried Chicken. Not to be confused with KYC.

**KYC:** acronym for “Know-Your-Customer;” refers to a policy implemented to conform to a customer identification program mandated under the USA PATRIOT Act. KYC policies have become increasingly important globally to prevent identity theft, fraud, money laundering and terrorist financing.

**L Plus:** shorthand for “LIBOR plus,” used in stating the Applicable Margin in respect of a Floating Rate of Interest that is to be tied to LIBOR, such as “L+300 bps.”

*L/C*: shorthand for a Letter of Credit.

*Large Accelerated Filer*: a category of Issuer created by SEC rules. An Issuer's status as a Large Accelerated Filer, as opposed to an Accelerated Filer, a Non-Accelerated Filer or a Smaller Reporting Company, determines when its Financial Statements go Stale and when it has to comply with SOX Section 404. An Issuer qualifies as a Large Accelerated Filer if (i) its Public Float is greater than \$700.0 million as of the last business day of the second quarter of the Issuer's preceding fiscal year and (ii) it has been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for at least 12 months, including the requirement to file an annual report. Once an Issuer is in Large Accelerated Filer land, its Public Float has to fall below \$500.0 million to get out. See Latham & Watkins Desktop Staleness Calendar, available at [www.lw.com](http://www.lw.com).

*LBO*: acronym for Leveraged Buyout.

*LBO Fund*: another name for a Sponsor.

*LC Bank/LC Issuer*: see Issuing Bank.

*Lead Arranger*: in a transaction with more than one Arranger, the primary or original Arranger engaged by a Borrower or Sponsor in connection with structuring a particular financing. There can sometimes be several Joint Lead Arrangers in deals with more than one Arranger, and the one with Lead Left placement will generally play the primary role in negotiating the deal.

*Lead Left*: see Left Placement.

*Lead Manager*: in bank land, another name for the Lead Arranger. In Securities land, another name for the Lead Managing Underwriter.

*Lead Managing Underwriter*: the Underwriter designated by the Issuer as the Lead Managing Underwriter will generally run the show for the Underwriters, selecting counsel, actively participating in the drafting and serving as Bookrunner for the Syndication. The Lead Managing Underwriter will receive Left Placement on the cover of the Prospectus and in any tombstone advertisement. The Agreement among Underwriters authorizes, among other things, the Lead Managing Underwriter to execute (and therefore negotiate) the Underwriting Agreement on behalf of all the Underwriters.

*League Table Credit*: league tables are lists kept by certain institutions and publications, such as Thomson Financial and Bloomberg, that keep track of deal volume and deal size by investment bank and law firm. League Table Credit refers to receiving credit for a specific deal for purposes of determining the rankings.

*Left*: see Left Placement.

**Left Placement:** in a Securities offering, the Lead Managing Underwriter receives Left Placement—meaning its name is placed on the left of the top line of the list of Underwriters on the back and front cover of the Prospectus (or for a 144A Offering, the list of Initial Purchasers on the covers of the Offering Memorandum). Getting Left Placement is a big deal because such placement means the bank will serve as Lead Managing Underwriter. Similar concept for a bank deal—all the Arrangers want to have Left Placement, as the one with Left Placement generally runs the show.

**Left-Side Arranger:** another name for a Lead Arranger whose name appears on the left side of all marketing materials relating to the Credit Facilities with respect to which it is the Lead Arranger.

**Legal Defeasance:** one of two types of Defeasance. The other is Covenant Defeasance. In theory, Legal Defeasance allows an Issuer to get completely out from under its payment obligations under a series of Notes by depositing in an escrow account enough money (or US treasuries) to make all principal and Interest payments on the Notes through maturity. Practically, Legal Defeasance is not a real option because all Indentures require, as a condition to Legal Defeasance, the delivery of a tax opinion stating that holders will not suffer an acceleration of income as a result of the Legal Defeasance—and this is not possible under current tax law.

**Lender Counterparty:** a Lender, Agent or Arranger, or an Affiliate of a Lender, Agent or Arranger, that is a counterparty to a Hedge agreement entered into for the purpose of Hedging foreign currency or commodities pricing risk or Interest Rate exposure associated with the Borrower's and its subsidiaries' operations. Also known as a Qualified Counterparty.

**Lenders:** the financial institutions party to a Credit Agreement as lenders (*i.e.*, the ones lending the money).

**Letter of Credit:** most Revolving Facilities provide that a portion of such facility may be used in the form of Letters of Credit. A Letter of Credit, or L/C, essentially acts as a Guarantee by one of the Lenders (*i.e.*, the Issuing Bank) under the Revolving Facility that kicks in if the Borrower (the "account party") does not meet an obligation to a third party (the "beneficiary"). A Borrower may post a Letter of Credit in favor of a third party as a Guarantee to that third party that it will pay out on an obligation if needed, or will fulfill a governmental requirement, etc. If the third party requires payment, the Issuing Bank must pay under the L/C, and can look to the other revolving Lenders for reimbursement as if the payout were a revolving Loan made by all the revolving Lenders as a group. The two main types of Letters of Credit are Commercial Letters of Credit and Standby Letters of Credit.

**Level of Comfort:** used in Comfort Letters, this phrase refers to which Tick Mark an auditor provides with respect to a given number in an Offering Memorandum or Prospectus. For instance, one type of Tick Mark might say that the accountants had “compared the number in the disclosure to the audited financials and found them to be in agreement.”

**Leverage Ratio:** an important measurement of the “leverage” of a company, which compares the company’s overall debt level as of a particular date to the EBITDA the company generated over the most recently completed four-quarter period. Investors and analysts care about the Leverage Ratio because it measures the company’s debt level against the company’s cash performance measure. In the leveraged finance context, the Leverage Ratio is the ratio of indebtedness to EBITDA (or Adjusted EBITDA). Credit Agreements traditionally (although not always) have Maintenance Covenants requiring a Borrower to maintain a certain Leverage Ratio. See Covenant Lite. In addition, in Bond land, this ratio is used as an alternative to the Fixed Charge Coverage Ratio for incurrence of Ratio Debt by companies that are highly leveraged, for example, in the media and telecommunications industry. For such companies, the Fixed Charge Coverage Ratio often would not provide sufficient borrowing capacity.

**Leveraged Buyout:** a transaction in which a Sponsor or Leveraged Buyout Firm uses debt to buy a Target company. The secured portion of the debt is secured exclusively by the stock and assets of the Target company and any Guarantors. The transaction allows Sponsors to finance large acquisitions while only putting up a small portion of the purchase price in the form of Equity capital.

**Leveraged Buyout Firm:** another name for a Sponsor.

**LIBOR:** acronym for the London Interbank Offered Rate, which refers to the rate at which major financial institutions can borrow from each other in the London interbank market. Most Credit Facilities have Interest Rates that are set at certain margins above LIBOR. See Applicable Margin.

**LIBOR Floor:** a concept in a Credit Facility that prevents LIBOR, for purposes of that Credit Facility, from falling below a certain threshold—even if actual LIBOR does drop below that threshold. The idea is to protect Lenders under Floating Rate Credit Facilities in environments where LIBOR is abnormally low due to world events and changes in monetary policy.

**LIBOR Loan:** another name for Eurodollar Loan.

**LIBOR Tranche:** a collective reference to LIBOR Loans under a particular Credit Facility having Interest Periods starting on the same date and ending on the same date. Credit Agreements generally limit the number of LIBOR Tranches a Borrower may have outstanding at any time. A typical Credit Agreement will permit the Borrower to convert

Base Rate Loans into LIBOR Loans (and vice versa) and to “continue” LIBOR Loans as LIBOR Loans upon the expiration of any Interest Period applicable to such LIBOR Loans, so that the Borrower need not repay a LIBOR Loan at the end of the chosen 1, 3, 6 or 12-month Interest Period, but rather can simply begin a new Interest Period by rolling existing loans into a new LIBOR Tranche. For instance, one LIBOR Tranche might consist of (i) LIBOR Loans that were funded at the start of a given 3-month Interest Period; (ii) Base Rate Loans previously outstanding that were converted into LIBOR Loans at the beginning of the same Interest Period; and (iii) existing LIBOR Loans continued at the start of that same Interest Period. In such an instance, this single LIBOR Tranche would then share the same 3-month Interest Period that starts and ends on the same date.

*Lien:* depends on the context. Often used interchangeably with Security Interest; however, Lien is a broader term and includes non-consensual encumbrances on property such as tax Liens or Liens in favor of warehousemen or carriers as well as consensual Security Interests.

*Lien Subordination:* the Subordination of Second Lien debt to First Lien debt. Here, both Tranches of debt may be Pari Passu in terms of payments, and secured by the exact same Collateral, but the Second Lien is Subordinated because its beneficiaries agree that in the case of the receipt of any proceeds of sales of that Collateral in a Bankruptcy or otherwise, the First Lien Lenders will be paid prior to any payouts on the Second Lien debt from those proceeds. See Subordination.

*Liens Covenant:* a Covenant that restricts the incurrence of Liens and serves to protect the seniority position of debt by preventing more Secured Debt from either getting ahead (this is what unsecured Senior Notes are worried about) or becoming Pari Passu (this is what the Lenders under a secured Credit Agreement are worried about). Senior subordinated Lenders will want protection that prevents Security over any other Subordinated Debt. See also Negative Pledge.

*Limitation Language:* another name for Guarantee Limitation Language.

*Limitation on Restrictions on Payment of Subsidiary Dividends Covenant:* a Covenant that protects the flow of cash from a company's subsidiaries to the company by preventing subsidiaries from being subject to dividend blocking arrangements in other agreements. You need to pay particular attention to this Covenant in Holding Company deals where there is debt at the Operating Company level, because if the Operating Company debt prevents dividends to the Holding Company, the Holding Company may not be able to meet its obligations when they come due. Also known as the Dividend Blocker Covenant or Dividend Stopper Covenant.

**Limited Recourse Financing:** a type of financing in which the Lender has limited (or no) ability to make claims against the Borrower's equityholders if the Collateral for a defaulted loan is insufficient to repay the debt. Compare Non-Recourse Financing.

**Liquidity:** the degree to which an asset can be converted into cash. While US treasuries are considered highly liquid, a 49 percent interest in a Malaysian paper mill probably is not. The term can also be used to refer to a company's ability to meet its near-term payments.

**Listed Company:** the term given to any company whose shares or Securities are traded on a national Securities exchange.

**Loan To Own:** a strategy whereby a Lender purchases Distressed Debt with the aim that in a restructuring it will acquire the Equity interests in the Borrower in exchange for a full or partial write-off of its debt claims.

**Lockup:** required by the Underwriters in connection with IPOs and other Equity offerings, Lockups "lock-up" the shares of officers, directors and other insiders as well as the Issuer so that no new shares will hit the market during a certain period following the Closing of the offering. The purpose of the Lockup is to help stabilize the stock price following the offering by controlling supply. See also Booster Shot Provision.

**Lockup Agreements:** the letters signed by officers, directors and other insiders setting forth the terms of their Lockups. These are usually negotiated in connection with the Underwriting Agreement (which is where the Issuer's Lockup can generally be found).

**Lockup Letters:** another name for Lockup Agreements.

**Long:** the opposite of Short. You have a Long position in a particular Security if you own the Security.

**LSE:** acronym for the London Stock Exchange.

**LSTA:** useful for standard forms or fighting speeding tickets in Louisiana, this is an acronym for many associations, including the Loan Syndication and Trading Association and the Louisiana State Troopers Association. The former is a non-profit organization dedicated to promoting the development of a fair, efficient, liquid and professional trading market for corporate loans originated by commercial banks and other similar private debt. A number of standard forms and market practice documents and publications can be found at [www.lsta.org](http://www.lsta.org). The latter is an association of state troopers.

**LTM:** acronym for "latest twelve months" that refers to an accounting period consisting of the latest 12 months. The term is usually used to refer to the most recently completed four-quarter period (even if that is not the latest 12 months). Financial Covenants are often referred to as being calculated on a rolling LTM basis (even though they are typically tested quarterly).

**Luxco:** a company incorporated in Luxembourg, often used in Leveraged Buyouts in Europe for tax efficiency reasons, including Luxembourg's extensive network of double taxation treaties and favorable Withholding Tax rules (attributes shared by a number of other jurisdictions in Europe), and now increasingly for Security Interest efficiency reasons under Double Luxco Structures.

**Luxembourg Stock Exchange:** the main stock exchange of Luxembourg, which specializes in the listing of international Bonds.

**M&A:** shorthand for mergers and acquisitions.

**MAC:** acronym for Material Adverse Change.

**MAE:** acronym for Material Adverse Effect.

**MAE Qualifier:** this is an exception to what would otherwise be an absolute assertion or representation, for example: "I have not been drinking, except to such extent as would not be likely to have a Material Adverse Effect on my drafting." See Material Adverse Change and Material Adverse Effect.

**Maintenance Covenant:** a contractual provision in a Credit Agreement that requires a Borrower to maintain a certain state of affairs, for example, to meet or exceed various financial performance measures. Financial Covenants are one category of Maintenance Covenants. Financial Covenants generally require the Borrower to meet an agreed-upon threshold of its projections. Credit Facilities (other than Covenant Lite Credit Facilities) generally contain Financial Covenants, while Indentures do not. Maintenance Covenants (including Financial Covenants) are also sometimes found in Second Lien Term Loans, Bridge Loans and Mezzanine Financings. See also Fixed Charge Coverage Ratio, Interest Coverage Ratio and Leverage Ratio.

**Make-Whole:** shorthand for a "make whole call" feature, which allows the Issuer of a series of Bonds to redeem those Bonds without the consent of the Bondholders at a "make whole price" that is the sum of the present values of each remaining payment on the Bonds (until maturity or until the date on which the Bonds otherwise become redeemable at a fixed price, if applicable). These present values are calculated using a discount rate equal to the Comparable Treasury rate plus a spread (usually 50 Basis Points). The sum of the present values of the remaining payments on a High Yield Bond can often substantially exceed the principal amount of the High Yield Bond. A "make whole price" of 120 percent of principal amount is not unheard of in the context of a make whole redemption of a High Yield Bond. This feature is generally available to Issuers during the Non-Call Period. Also increasingly seen in Mezzanine Financings that are Non-Call.

**Management Buy-In:** an LBO where an outside management team acquires the Target, with or without a Sponsor.

**Management Buy-Out:** an LBO where the existing management team acquires the Target, with or without a Sponsor.

**Management's Discussion and Analysis:** shorthand for Management's Discussion and Analysis of Financial Condition and Results of Operations. This is a textual discussion in a Prospectus, Offering Memorandum or Periodic Report that provides information that the Issuer believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. The MD&A also includes a discussion of Liquidity and capital resources and segment information. The purpose of the MD&A is to provide color and context to the Financial Statements. The MD&A is required disclosure, and the SEC has provided substantial guidance on how MD&A should be drafted.

**Mandatory Offer to Purchase:** provisions in Indentures that require the Issuer to make an offer to purchase the Notes after certain designated events, generally following asset sales or a Change of Control.

**Mandatory Prepayments:** provisions in a Credit Agreement that require the prepayment of Term Loans (and sometimes the prepayment of Revolving Loans and the cash collateralization of Letters of Credit, with or without permanent reduction of commitments under a Revolving Facility) with certain cash of the Borrower. Generally includes one or more of the following: Debt Sweep, Asset Sale Prepayment, Insurance Proceeds Prepayment, Equity Prepayment and Excess Cash Flow Sweep.

**Margin:** see Applicable Margin.

**Market Flex:** a provision included in the Fee Letter portion of the Commitment Papers that allows the Arranger to change the terms, conditions, pricing and/or structure of the facilities provided in the Commitment Letter if the Arranger determines that the changes are advisable to ensure the Successful Syndication of the facilities the Arranger has agreed to provide to the Borrower, or if it determines that a Successful Syndication cannot be achieved. The exact terms of Market Flex will be heavily negotiated and usually are limited to specified items (called Closed Flex). See also Pricing Flex, Structure Flex, Open Flex and Closed Flex. Market Flex is included in the Fee Letter because potential syndicate banks do not see the Fee Letter. If everybody knew Market Flex were part of the deal, of course the market would demand better terms.

**Market MAC:** this is a reference to a Condition Precedent that there shall not have been any disruption or adverse change to the financial, banking or Capital Markets generally, or the particular market (*i.e.*, the Syndicated loan or High Yield markets in which the applicable debt is being Syndicated, specifically). Compare Business MAC.

**Market Maker Prospectus:** an arcane animal that is a creation of a funny provision in Section 2(11) of the Securities Act. That section defines an Underwriter to be anyone who buys from an Issuer with a view to distribution in a public offering. It also defines Issuer (for purposes of Section 2(11) only) to include Affiliates of the Issuer. This creates a technical problem for a Broker-Dealer that wants to make a market in the Securities of one of its Affiliates. Technically, regular investors who buy from a Broker-Dealer that is Affiliated with the Issuer will be treated as Underwriters for purposes of the Securities Act. That is major league bad news for those regular investors and doesn't really make any sense. In practice, the SEC has solved this glitch by requiring the Broker-Dealer to deliver a Prospectus in all such market making transactions involving Securities of an Affiliate of the Broker-Dealer. That Prospectus is called a Market Maker Prospectus and must be kept up-to-date by the Issuer and its Broker-Dealer Affiliate for so long as the Broker-Dealer is making a market in the Issuer's Securities. The regular investor who buys from the Broker-Dealer does not have to do anything special here, notwithstanding the literal reading of Section 2(11).

**Marketing Period:** see Minimum Marketing Period.

**Mark-to-Market:** an accounting requirement to write assets down (and in some cases up) to update the value of a financial instrument to its current market price. This is required by GAAP for certain assets in certain industries.

**Master Agreement Among Underwriters:** a generic agreement among Underwriters that many investment banks have signed up to. Most banks have their own master form of Agreement among Underwriters, and most banks have signed on to every other bank's master form of Agreement among Underwriters. The terms of a particular Master Agreement Among Underwriters are made applicable to a specific offering by acceptance by an Underwriter of an Invitation Telex from the Lead Managing Underwriter to join the Syndicate.

**Master Limited Partnership:** simply put, an MLP is a partnership that is publicly traded and listed on a national Securities exchange. Breaking those requirements down: first, it is necessary for the MLP to be a state law entity that can be treated as a tax passthrough entity. Thus, most commonly the MLP is formed as a Delaware limited partnership. Alternatively, the MLP may be a state law limited liability company or even a state law trust, such as a Delaware statutory trust. Although the governance structure may differ among these entity types, any of these entities may be treated as partnerships for federal income tax purposes. Second, the MLP must be publicly traded. Owners of MLP units have the ability to buy and sell interests in the MLP. The publicly traded element of an MLP simply provides for the same type of liquidity (or

float) that is enjoyed by a public corporation—although for the most part float and trading volume of MLPs are relatively small as compared to the float and trading volume for publicly traded corporations. This is largely because of the nature of MLP unitholders. The majority of MLP units are held by retail investors seeking yield. Moreover, given certain tax limitations, these investors are typically domestic, rather than foreign. Institutional ownership of MLPs has been limited (although growing in recent years), mainly because MLPs generate income that is not conducive to ownership by tax-exempt investors. Third, the MLP must be listed on one of the major exchanges. Today, the most common Securities exchange for MLPs is the NYSE, although quite a few MLPs are listed on the NASDAQ. MLPs are sometimes referred to for tax purposes as Publicly Traded Partnerships, or PTPs.

**Material Adverse Change:** just like it sounds, this phrase refers to a “material adverse change” in something—generally either the business (see Business MAC) or the market (see Market MAC). This term is used in two general contexts: either (i) as a Condition Precedent (for instance, a seller would not have to close on an acquisition if there had been a Material Adverse Change to the business) or (ii) as a qualifier to a Representation and Warranty (for instance, the environmental representation is limited to instances where violations of the representation could (or would) lead to a Material Adverse Change). However, when used as a qualifier to a Representation and Warranty, most agreements use the term Material Adverse Effect. See MAE Qualifier.

**Material Adverse Effect:** just like it sounds, this refers to a material adverse effect and is just another way of expressing the concepts embedded in the phrase Material Adverse Change.

**Material Non-Public Information:** another expression for “insider information” in the context of insider trading laws, which prohibit the trading of certain types of securities on the basis of such information.

**Material Subsidiary:** a concept used in Indentures and Credit Agreements to define Subsidiaries that are, well, not immaterial. Certain restrictions and provisions in these debt documents, such as qualifying to be a Restricted Subsidiary, having to provide Guarantees, and application of covenants, may apply only to Material Subsidiaries. The definition of Material Subsidiary in a given document is a negotiated point.

**Maturity/Maturity Date:** the date on which a Bond or amounts outstanding under a Credit Facility must be repaid in full.

**Maximum Leverage Ratio Condition:** basically a bright-line version of the Company MAC, this Condition Precedent requires the company’s Leverage Ratio to be below a specified maximum threshold or else the Lenders will not be required to fund.

**MBI:** acronym for Management Buy-In.

**MBO:** acronym for Management Buy-Out.

**MD&A:** shorthand for Management's Discussion and Analysis of Financial Condition and Results of Operations.

**Merger Covenant:** an Indenture Covenant that contains conditions to a merger of the Issuer and to the transfer of All or Substantially All the Issuer's Consolidated assets. The most important condition is that the merger/sale cannot take place unless the Indenture follows to the new entity (*i.e.*, becomes the obligation of the new entity). Credit Agreements also contain Merger Covenants, which are generally more restrictive than those found in Indentures.

**Mezz:** shorthand for Mezzanine Financing.

**Mezz Lenders:** shorthand for the Lenders in a Mezzanine Financing.

**Mezzanine Financing:** an unsecured debt instrument with certain Equity-like characteristics. The Mezzanine component of a Capital Structure is Subordinate in right of payment to Senior Debt and carries a Coupon similar to High Yield Bonds. Mezzanine debt is often issued at the Holdco level. Mezzanine debt often has Equity features, frequently referred to as Equity Kickers, which may take the form of Warrants that permit the holder to purchase Equity at a preset price, or conversion features upon certain events (such as a Change of Control). The combination of the debt Coupon and the Equity Kicker gives Mezz investors a higher return than High Yield Bonds.

**MFN Pricing:** shorthand for Most Favored Nation Pricing. See Incremental Facility.

**Mini Perm:** in the context of a construction financing, a type of short-term loan, typically three to five years, used by a Borrower to pay off construction financing or initial acquisition financing during the period a project is being completed or becoming stabilized as an income-producing asset. Borrowers enter into Mini Perms during this phase because long-term financing is not yet available as the project has an insufficient operating history. Mini Perms typically have Balloon Payments at the end of their terms that are intended to be Refinanced by long-term financing. In the context of coiffures, a Mini Perm is a partial perm that can be done to achieve body or curl in a particular area so that just the right amount of volume and control is obtained.

**Minimum EBITDA Condition:** basically a bright-line version of the Company MAC, this Condition Precedent requires a minimum EBITDA level as a condition of funding.

**Minimum Hold:** the minimum percentage of a particular series of loans that the Arranger agrees to hold (meaning not assign) for some agreed upon period of time. Borrowers like a Minimum Hold in the

context of Bridge Loans because it keeps the Bridge Loans in the hands of the friendly relationship banks, potentially making it easier to get a necessary vote in favor of an Amendment to the Bridge Facility should the need arise. Contrast to Target Hold.

**Minimum Marketing Period:** a Condition Precedent in the Commitment Letter that the banks will have a period of a certain number of consecutive days (generally 20 to 30, depending on the transaction and the anticipated length of the Road Show) following receipt of the Offering Memorandum to place the Notes. This is the Bond land cousin of the Minimum Syndication Period.

**Minimum Syndication Period:** a Condition Precedent in the Commitment Letter that the banks will have a period of a certain number of consecutive days or business days following the launch of the general Syndication of the facilities (usually starting on the day of the Bank Meeting or the receipt by the Arrangers of the Bank Book, or the materials needed to create the Bank Book, from the Borrower) to Syndicate the Credit Facilities prior to the Closing Date. This is the bank land cousin of Minimum Marketing Period (and is often referred to as the Minimum Marketing Period as well).

**MLP:** acronym for Master Limited Partnership. Sometimes referred to as a Publicly Traded Partnership or PTP.

**MNPI:** acronym for Material Non-Public Information.

**Money Market:** the global financial market for short-term borrowing and lending. Short-term paper such as Treasury Bills and Commercial Paper are bought and sold in the Money Market.

**Monoline Bond Insurance:** insurance provided by a triple-A-rated insurance company that insures the payment of Interest and principal on Bonds. Companies that provide this type of insurance are commonly referred to as Monoline insurance companies because Bond insurance is their only line of business.

**Moody's:** Moody's Investors Service, Inc., a subsidiary of Moody's Corporation. Moody's is one of the two most powerful Ratings Agencies. S&P is the other big one. Fitch is hot on their heels.

**Mortgage:** a Security Agreement that grants a Security Interest in a real property right, whether that real property is owned outright in "fee simple" (a "fee Mortgage") or leased (a "leasehold Mortgage"). Leasehold Mortgages are less commonly required to be provided in secured deals than fee Mortgages.

**Most Favored Nation Pricing:** usually a condition to funding an Incremental Facility, requiring that the existing Term Loans receive "most favored nation" treatment— so that if the new Incremental Facility has an Interest Rate higher than, or often more than 50 bps higher than, the existing Term Loans, then the existing Term Loans will

be repriced upon the Closing of the Incremental Facility to receive the same (higher) Interest Rate as the incremental loans, usually less that 50 bps difference.

**Munis:** shorthand for “municipal Securities,” which are tax-exempt Bonds issued by state and local governments, typically to finance large capital projects.

**Naked Short:** in the underwriting context, a Naked Short refers to the portion of a Syndicate Short position that is not covered by the Over-Allotment Option—in other words, the Underwriter has taken orders for a number of shares in excess of all the shares the Issuer is obligated to sell to the Underwriter even once you take into account the Over-Allotment Option. Consider an example. There is an IPO for 1.0 million shares of ABC Co., where the Underwriter has an Over-Allotment Option to purchase an additional 150,000 shares of ABC from ABC at the offering price. The Underwriter, unsure of the total demand for the shares and concerned with post-offering market support, builds a book (takes orders) for 1.2 million shares. The Underwriter now owes investors 200,000 more shares than it is buying from the Issuer in the initial offering. It’s as if a florist took orders for 120 bouquets of roses on Valentine’s Day, but only ordered 100 from the supplier. The Underwriter is Short 200,000 shares (and the florist is Short 20 bouquets). Remember, though, that the Underwriter has an Option to purchase an additional 150,000 shares from ABC at the offering price (and the florist has on reserve an extra 15 bouquets that can be purchased from its supplier). So, the Underwriter’s Naked Short is the remaining 50,000 shares (the florist’s Naked Short is five bouquets), *i.e.*, the number not covered by the Shoe. Simple, right?

**Nancy Reagan Defense:** the Gipper’s wife just says no to drugs. In the M&A context, the Nancy Reagan Defense refers to a potential Target of an acquisition just saying no to the proposal (or proposals) of a potential acquiror.

**NASD:** acronym for the (now former) National Association of Securities Dealers, Inc., which was consolidated with the NYSE’s member resolution, enforcement and arbitration operation to create FINRA. See FINRA.

**NASDAQ:** the Nasdaq Stock Market, Inc. NASDAQ is the largest electronic screen-based Equity Securities market in the United States. In August 2006, the Nasdaq Stock Market commenced operations as a registered national Securities exchange for Nasdaq-listed Securities. NYSE and NASDAQ are the two principal market centers for buying and selling Equity Securities in the United States.

**NC:** acronym for Non-Call. If a Bond is NC4/103/102/101, it is Non-Call for the first four years (*i.e.*, the Non-Call Period is four years from the Closing Date), and then becomes optionally redeemable at a Call

Premium of 3 percent in year five, 2 percent in year six, and 1 percent in year seven.

**NDA:** acronym for Non-Disclosure Agreement. See Confidentiality Agreement.

**Negative Assurance:** in a Securities deal, a reference to what the auditors say in the Comfort Letter about the quarterly financials and the period since the end of the last quarter (hopefully that there have been no material changes). This is a “we didn’t see anything” standard, not a promise that everything is actually okay.

**Negative Assurance Letter:** a letter provided by both Issuer’s and Underwriters’ counsel at the Closing of a Securities offering. The letter states that based on the lawyers’ Due Diligence efforts, nothing has come to their attention indicating that the Prospectus (for registered deals) or the Offering Memorandum (for 144A deals) contains any misstatements of material facts or any material omissions. This is not an opinion, but it is sometimes incorrectly referred to as a “10b-5 opinion.” Also known as a “10b-5 Letter.”

**Negative Covenant:** a contractual provision in an Indenture or a Credit Agreement that prohibits the Issuer/Borrower from engaging in specified activities, such as making investments, incurring new debt or Liens, selling assets or making acquisitions. Think of these as the “Thou Shalt Not” Covenants. Negative Covenants can be highly structured and customized to an Issuer’s or Borrower’s specific condition. Compare Affirmative Covenant.

**Negative Pledge:** a variant on the Liens Covenant that allows the Issuer to place Liens on its assets that would not otherwise be allowed by the Baskets so long as the Issuer gives an Equal and Ratable Lien to the Bondholders, therefore putting the “on/off” switch for the Lien in the hands of the other investors. This Covenant is typical in Investment Grade Bond deals. In Credit Agreements, generally refers to a Covenant that provides that a Borrower cannot give a Security Interest in certain specified assets to anyone (because the Lenders are not getting a Security Interest in those assets).

**Negotiable Instrument:** a financial instrument stating that the holder thereof is entitled to receive (or direct) payment of a specified amount of money on a specified date, or on demand. A party obtains rights as the entitlement holder under a Negotiable Instrument by having possession of it. Negotiable Instruments can be transferred without the knowledge or permission of the Issuer thereof, usually by physical delivery or endorsement. Promissory Notes and bearer Bonds are common examples of Negotiable Instruments.

**Net Debt:** a measure of a company’s total debt minus its unrestricted cash and Cash Equivalents (or some agreed portion of it).

**Net Lease:** a lease under which the tenant is required to pay, in addition to fixed rent, some or all the property expenses that are normally paid by the property owner. A tenant pays (i) rent plus taxes under a single Net Lease; (ii) rent plus taxes and insurance under a double Net Lease and (iii) rent plus taxes, insurance and maintenance costs under a triple Net Lease.

**Net Proceeds:** what is left over from the sale of an asset after subtracting the costs associated with the sale (such as taxes, marketing costs or brokerage fees). If assets sales are subject to Mandatory Prepayment, this is the amount that needs to be prepaid.

**Net Share Settlement:** a settlement mechanic for Convertible Bonds where the Conversion Value up to the principal amount of the Bond is settled in cash, with the remainder settled in stock (or sometimes stock or cash at the Issuer's option).

**No Fiduciary Duty Provisions:** another name for Independent Contractor Provisions.

**No New Info:** banker nickname for a No New Information Out.

**No New Information Out:** another name for the Inconsistent Information Out.

**NOLs:** acronym for net operating loss(es). In general, a corporation generates NOLs for US federal income tax purposes in a taxable year when its allowable tax deductions exceed its taxable gross income, resulting in tax losses for such taxable year. Such NOLs generally may be used to reduce the US federal taxable income of the 2 prior taxable years (potentially resulting in a refund) and the 20 following taxable years. The ability to utilize NOLs is subject to various limitations, including limitations that arise when a corporation experiences certain changes in ownership.

**Non-Accelerated Filer:** a category of Issuer created by SEC rules. An Issuer's status as a Non-Accelerated Filer, as opposed to a Large Accelerated Filer, an Accelerated Filer or a Smaller Reporting Company, determines when its Financial Statements go Stale and when it has to comply with SOX Section 404. An Issuer qualifies as a Non-Accelerated Filer if (i) its Public Float is less than \$50.0 million as of the last business day of the second fiscal quarter of the Issuer's preceding fiscal year or (ii) it has not otherwise qualified as an Accelerated Filer or Large Accelerated Filer. See Accelerated Filer and Large Accelerated Filer. See Latham & Watkins Desktop Staleness Calendar, available at [www.lw.com](http://www.lw.com).

**Non-Call:** term used when describing the terms of Bonds or loans that cannot be optionally redeemed (in the case of Bonds) or voluntarily prepaid (in the case of loans). See NC.

**Non-Call Period:** a period during which the Non-Call provision applies. The Optional Redemption provisions (for Bonds) or Voluntary Prepayment provisions (for loans) kick in at the end of the Non-Call Period. This period generally lasts for four years on a seven year Bond and five years on a 10 year Bond. The Non-Call Period allows Bondholders to lock in their Yield during the Non-Call Period. If a Bond is NC4/103/102/101, it is Non-Call for the first four years (*i.e.*, the Non-Call Period is four years from the Closing Date), and then becomes optionally redeemable at a Call Premium of 3 percent in year five, 2 percent in year six, and 1 percent in year seven. Most Credit Facilities do not have Non-Call Periods, but some Second Lien Facilities may have these provisions.

**Non-Deal Road Show:** series of meetings with existing or likely investors for informational purposes only and outside of the context of a particular offering.

**Non-Disclosure Agreement:** also known as a Confidentiality Agreement, it is the document binding those to whom confidential information is conveyed not to disclose it to persons other than those closely involved with the transaction.

**Non-GAAP Financial Measures:** financial measures such as Adjusted EBITDA and EBITDA that are not based on GAAP metrics. See Regulation G. See Latham & Watkins Client Alert No. 988, Adjusted EBITDA Is Out of the Shadows as Staff Updates Non-GAAP Interpretations (February 22, 2010), available at [www.lw.com](http://www.lw.com).

**Non-Investment Grade:** rated Ba1 or lower by Moody's, BB+ or lower by S&P or BB+ or lower by Fitch.

**Non-Recourse Financing:** a type of financing in which the Lender has no ability to make claims against the Borrower in excess of the value of the Collateral if such Collateral is insufficient to repay the debt. Compare Limited Recourse Financing.

**No-Shop Provision:** an agreement by one or both companies involved in a merger only to deal with its merger partner and not to solicit other bids or provide information to other possible bidders.

**Notes:** another name for Bonds with a maturity of 10 years or less.

**Novation:** the name given to the process by which obligations as well as rights are transferred by one party to another. Contrast with Assignment.

**Numbers:** sometimes used as banker and lawyer shorthand for Financial Statements. See Latham & Watkins publication, Financial Statement Requirements in US Securities Offerings: What You Need to Know (September 2013), available at [www.lw.com](http://www.lw.com).

**Numerosity:** a Bankruptcy plan of reorganization is deemed accepted by a class of creditors or equityholders if that plan is accepted by (i) more than one half of the creditors/equityholders in the class who actually voted and (ii) holders of at least two-thirds in amount of the claims/Equity interests in the class who actually voted. The requirement described in subsection (i) of the previous sentence is known as the Numerosity requirement.

**NYSE:** the New York Stock Exchange—now part of NYSE Euronext, which was formed in April 2007. The NYSE dates back to the Buttonwood Agreement of 1792, which was signed when 24 prominent brokers and merchants gathered on Wall Street to create a mechanism for trading Securities. In contrast to more modern exchanges, NYSE transactions are still conducted on a trading floor located on Wall Street.

**Obligor:** Borrowers and Guarantors.

**OC:** acronym for Offering Circular.

**OFAC:** the US Treasury Department's Office of Foreign Assets Control, the agency responsible for administrative enforcement of US economic sanctions. Compliance with OFAC sanctions program regulations is an important aspect of Due Diligence for Securities offerings and bank deals. Underwriting Agreements, Purchase Agreements and Credit Agreements will most typically include OFAC reps, including that none of the proceeds of the offering or loans will be received by a "Blocked Person" or "Specially Designated Nationals" under OFAC regulations.

**Off Balance Sheet Arrangements:** refer to methods of financing used to keep debt or liabilities off of a company's Balance Sheet. Rules adopted in connection with SOX require that the MD&A portion of a Prospectus or Periodic Report include a distinct section listing and explaining all Off Balance Sheet Arrangements.

**Offering Circular:** some investment banks call the Offering Memorandum an Offering Circular. It's the same thing.

**Offering Memorandum:** the equivalent of a Prospectus for a 144A Financing. This is the marketing and legal disclosure document. Some investment banks call it an Offering Circular.

**OID:** acronym for Original Issue Discount.

**OM:** acronym for Offering Memorandum.

**OMD:** acronym for Orchestral Manoeuvres in the Dark (1980s pop music fans will know).

**OMR:** acronym for open market repurchase.

**One-on-One:** a meeting between a potentially large investor in a Securities offering and the Issuer. One-on-Ones usually occur during the Road Show.

**Opc:** shorthand for Operating Company.

**Open Flex:** Market Flex structured so that the Arranger may change all terms, conditions, pricing and/or structure as are reasonably necessary for Successful Syndication (usually subject to some limits, *e.g.*, the total amount of the facilities may not be changed and pricing is Capped at some level). Compare Closed Flex.

**Open Kimono:** an unfortunately graphic term used to describe the act of sharing all the previously undisclosed information about a company, structure or situation. For example, when a company gives Underwriters, Lenders or opposing counsel full access to its books, records and Due Diligence information, it has "opened the kimono." Also used to describe a situation or meeting where participants are expected to hold no secrets from one another, and are expected to share, well, their "private" information.

**Operating Company:** another name for an Operating Subsidiary.

**Operating Expense:** the ongoing and day-to-day costs incurred in operating a business. Unlike Capital Expenditures, which are Capitalized, Operating Expenses are "expensed," meaning that they are recorded as current expenses in the Income Statement as incurred.

**Operating Subsidiary:** a subsidiary of a Holding Company that holds assets and runs operations.

**Opinion Letter:** a legal opinion from lawyers on a discrete matter which will be relied on by another party (either the Lenders in a loan transaction or the Underwriters in a Bond transaction). A typical example of an Opinion Letter would be an opinion given as to whether a particular agreement is valid and enforceable in a particular jurisdiction or whether a particular party (typically the Issuer/Borrower) has the capacity and authority to enter into certain agreements. Practice differs between the US and the different European jurisdictions, and between the Bond and loan worlds, as to whether or not Opinion Letters are provided by counsel to the Arranger or counsel to the Borrowers or by both.

**Option:** a contract that gives the owner of the contract the right, but not the obligation, to purchase (in the case of a Call Option) or sell (in the case of a Put Option) an asset at a future date at an agreed price (known as the "exercise price" or "strike price"). When a Call Option's strike price is below the current market price of the underlying asset, or when a Put Option's strike price is above the current market price of the underlying asset, the Call Option or Put Option is In the Money. When a Call Option's strike price is above the current market price of the underlying asset, or when a Put Option's strike price is below the current market price of the underlying asset, the Call Option or Put Option is Out of the Money. Being In the Money is better.

**Optional Prepayment:** another name for Voluntary Prepayment.

**Optional Redemption:** an Indenture feature that allows the Issuer to redeem Bonds at the Issuer's option. The Optional Redemption provisions become available to the Issuer at the end of the Non-Call Period. The specifics of the Optional Redemption provision are finalized at Pricing. In a typical 10 year deal, the Optional Redemption price would be Par plus half the Coupon in year six, reducing to Par at the end of year eight.

**Ordinary Shares:** see Common Stock.

**Org ID Number:** a company's organizational identification number. Not to be confused with Tax ID Number, the Org ID Number is a unique number assigned to a registered organization by its jurisdiction of organization. In most jurisdictions, Org ID Numbers are required to be included in Financing Statements. Note, however, that the State of Delaware does not require Org ID Numbers to be included in Financing Statements (even though it issues Org ID Numbers). In addition, the State of New York does not assign Org ID Numbers. Compare Tax ID Number. Isn't this fun?

**Org Meeting:** shorthand for Organizational Meeting.

**Organizational Meeting:** in a Securities offering, the initial meeting among the Issuer, the investment banks that are serving as Underwriters or Initial Purchasers, the auditors and the lawyers. This is where the agenda for the deal is set and the initial Due Diligence with management is performed. Generally considered the beginning of the Quiet Period in public offerings.

**Original Issue Discount:** discount relative to Par at which Bonds or loans may be sold to an investor. OID increases the all-in Yield to investors and accordingly facilitates the Syndication of the Bonds or loans. OID is considered a form of unstated interest so tax issues are implicated. See Closing Fee and Discount Notes.

**OTC:** acronym for Over-the-Counter.

**Out of the Money:** a stock Option is Out of the Money when the holder cannot exercise it for a profit. A Convertible Bond is Out of the Money when its Conversion Value is less than its Par Value. See Option for other examples.

**Outs:** Conditions Precedent to the Lenders' obligation to fund a financing in a Commitment Letter. If the Borrower does not fulfill one of the Conditions Precedent, the committed Lender gets "out" of funding its commitment.

**Outside Date:** another term for Drop Dead Date.

**Over-Allotment Option:** see Green Shoe.

**Over-the-Counter:** the trading of financial instruments directly between two parties pursuant to a bilateral contract rather than on an exchange or through an intermediary.

**P&L Statement:** shorthand for Profit and Loss Statement.

**Par/Par Value:** in Bond land, Par Value is the stated value or face value of a Bond. So if a \$1,000 Bond is redeemed at Par, it is redeemed for the full \$1,000 (plus accrued Interest up to the redemption date). Bonds are said to be redeemed "above Par" or "below Par" if redeemed for more or less (as applicable) than their Par Value. The term is also used in loan world to describe the stated principal amount of a loan.

**Pari Passu:** equal in right of payment or Collateral (depending on the context).

**Pari Passu Bonds:** Bonds which rank Pari Passu with the Credit Facilities of the same entity/ies rather than being Subordinated.

**Parity Trigger:** in Convertible Bond land, refers to a Contingent Conversion trigger based on the trading price of the Bonds.

**Participation:** a contract between a Lender and another financial institution where the latter is given some of the benefits and burdens of being a Lender under a particular Credit Facility, other than actually being a party to the Credit Agreement. The Borrower still deals only with the Lender (not its participant) and that Lender remains on the hook to perform its obligations under the Credit Agreement. Compare Assignment.

**Patriot Act Provisions:** provisions in the Commitment Letter notifying the Sponsor, the company and the Target that pursuant to the USA PATRIOT Act, each Lender may be required to obtain, verify and record certain information.

**Patriot Act Requirements:** general reference to the information (e.g., name, address, Tax ID Number, etc.) that Lenders and Agents are required to obtain under KYC and Anti-Money Laundering rules and regulations, including the USA PATRIOT Act.

**Pay-In-Kind:** this feature allows the Issuer to pay Interest (or dividends) in the form of additional Bonds (or shares of Preferred Stock) in lieu of paying in cash. See AHYDO Rules.

**Payment Blockage Provision:** a standard feature in a Subordination contract for a Subordinated High Yield deal (and other types of Subordinated Debt). It provides that the Issuer of the Subordinated Debt is forbidden from making payments on the Subordinated Debt in certain circumstances (for example, when the Senior Debt is in Default). Note that this is not the same as a Remedy Bar or a Standstill Period. If the Subordinated Debt does not get paid when it is supposed to be paid because of a Payment Blockage Provision, the Subordinated creditors can pursue all available remedies unless they are also subject to a Remedy Bar.

**Payment Date:** another name for an Interest Payment Date.

**PD:** acronym for Prospectus Directive.

**PD-Compliant:** refers to a Prospectus that complies with the public offering disclosure provisions of the Prospectus Directive (or, more generally, refers to an offering that complies with such provisions).

**Perfect** or **Perfection:** what a holder of a Security Interest (*i.e.*, the Lender) has to do to make that Security Interest enforceable against third parties. A Security Interest that is valid and enforceable but has not been Perfected is enforceable against the debtor but not third parties. In order for a Security Interest to be enforceable against other creditors of the debtor, including any Bankruptcy trustee, Perfection is required. While parties can create a Security Interest that is valid between the parties simply by executing a Security Agreement and giving value, typically Perfection requires another act. There are five basic methods of Perfection under Article 9: filing of a Financing Statement, Control, possession (either directly or through a third party), temporary perfection and automatic perfection. The easiest and most common method of Perfection is the filing of a Financing Statement. Filing a Financing Statement is sufficient to Perfect a Security Interest in most (but not all) UCC Collateral. See also Control.

**Perfection Certificate:** this is how a Lender finds out what assets a company has and where to find them. It is a certificate signed by the authorized officers of the Borrower and each other Grantor under the Security Agreement, which sets forth certain information regarding the Borrower, the other Grantors and their respective assets. The Perfection Certificate typically grants the Collateral Agent authority to file UCC Financing Statements in order to Perfect the Secured Parties' Lien on the Collateral. See Collateral Questionnaire.

**Perfection under Article 9:** can be accomplished by the filing of a Financing Statement, Control, possession (either directly or through a third party), temporary perfection and automatic perfection. The easiest and most common method of Perfection is the filing of a Financing Statement. Filing a Financing Statement is sufficient to Perfect a Security Interest in most (but not all) UCC Collateral.

**Periodic Reports:** the annual report on Form 10-K and the quarterly reports on Form 10-Q required to be filed with the SEC by all US public companies. The federal Securities laws specify precisely who is required to file these reports, but as a general matter they are filed by companies that have completed an IPO, have Securities listed on an exchange, or have a class of Securities registered under the Exchange Act.

**Permanent Securities:** the Securities (usually High Yield Bonds) that are intended to be issued to finance an LBO. These are the Securities that the Bridge Loans "bridge" in case the offering of Permanent Securities is unsuccessful. Generally addressed in the Engagement Letter.

**Permitted Debt:** a concept in the High Yield version of the Indebtedness Covenant referring to a series of Carveouts for debt that can be incurred even where the Ratio Test cannot be satisfied. In the Credit Agreement context, may just refer to all of the Baskets in the Indebtedness Covenant.

**Permitted Liens:** in Indentures and Credit Agreements, there is always a Negative Covenant prohibiting the Issuer/Borrower from incurring or suffering to exist any Liens. But "Lien" is defined so broadly that even operating companies with no consensual Liens outstanding would get tripped up by the covenant. Thus, Permitted Liens are an exception to the covenant. They are those types of Liens that would normally not bother a Lender, such as easements on the Issuer's/Borrower's land, mechanics' Liens while the work is still in progress, in some cases existing consensual Liens (*i.e.*, Liens in favor of other secured creditors), and other negotiated exceptions.

**Physical Settlement:** in Convertible Bond land, refers to settlement of a conversion in stock. "Gross" Physical Settlement is thus settlement entirely in stock. Compare Net Share Settlement.

**Piercing the Corporate Veil or Piercing:** when a creditor of a corporate, LLC or LP subsidiary finds out that the subsidiary does not have sufficient funds to pay the creditor, it might try to Pierce the Corporate Veil. Generally, the law respects the distinct personhood of a corporate entity and enforces the statutory limited liability features for the benefit of its owners. However, plaintiffs may allege that the corporate entity was a mere formality for the ultimate owners. Factors a court may consider in evaluating whether a plaintiff can Pierce the Corporate Veil include (i) the parent company/shareholder did not respect necessary statutory formalities such as conducting shareholder and board meetings periodically, (ii) the subsidiary was not sufficiently capitalized in light of its expected business and (iii) there was intermingling of assets between parent/shareholder and the subsidiary, among other somewhat squishy factors. If a Piercing argument succeeds, the creditor can reach assets of the parent/shareholder to satisfy the debt of the subsidiary.

**Piggy Back Registration Rights:** Registration Rights that permit holders of private Securities to "piggyback" into a Registration Statement originally filed by the Issuer for a separate purpose. These rights give the holder the ability to "jump onto" an offering that another party (either the Issuer itself or another Security holder) initiated. Compare Demand Registration Rights.

**PIK:** acronym for Pay-In-Kind.

**PIK Notes:** Notes with a PIK feature. See also Capitalize and Pay-In-Kind.

**PIK Toggle:** an Interest Rate feature that gives the Issuer/Borrower the option to pay all, half or none of the Interest for any period (generally during the Non-Call Period) in kind. Typically, an Interest Rate Step Up will apply to any portion of Interest that is paid in kind. PIK Toggles are attractive to Issuers/Borrowers because of the ability to “toggle” out of cash Interest payments in times of a Liquidity crunch—meaning if the Issuer/Borrower is short on cash, it can stop making cash Interest payments and just let the interest PIK. See AHYDO Rules. See also Latham & Watkins Client Alert No. 598, The AHYDO Rules and the PIK Toggle Feature (May 16, 2007), available at [www.lw.com](http://www.lw.com).

**PIK Toggle Notes:** Notes with a PIK Toggle feature. See AHYDO Rules. See also Latham & Watkins Client Alert No. 598, The AHYDO Rules and the PIK Toggle Feature (May 16, 2007), available at [www.lw.com](http://www.lw.com).

**Pink:** an offering document that is used prior to the launch of a Road Show and the printing of the Red.

**PIPE:** acronym for “private investment in public equity.” In a PIPE transaction, a public company issues equity Securities to Accredited Investors in a Private Placement and undertakes to register the equity Securities for public resale promptly after the transaction closes.

**Placement Agent:** in a Private Placement, the Placement Agent is responsible for introducing the Issuer to QIBs and Accredited Investors that may purchase Securities of the Issuer on the terms and conditions set forth in the Private Placement memorandum and the Note Purchase Agreement.

**Placement Fee:** a fee paid to the investment bank when the Bond placement occurs (*i.e.*, when the Bond deal closes). This fee is provided for in the Engagement Letter.

**Plain English Rules:** SEC rules that require certain portions of the Prospectus be written in Plain English. The six basic SEC Plain English principles are: use short sentences; use definite, concrete, everyday words; write in an active voice; utilize bullets, tables and charts where possible; eliminate legal jargon or unnecessarily technical business terms; and avoid using double negatives. Also, don’t use sentences with lots of semicolons.

**Pledge Agreement:** how Lenders take the shares of a Borrower or its subsidiaries as Collateral. This is an agreement that creates a Security Interest in equity interests owned by a Pledgor in favor of the applicable Secured Parties. In many instances, the pledge of equity interests is included in the Security Agreement and a separate Pledge Agreement will not be required.

**Pledgor:** an entity that “pledges” the equity interests it owns in its subsidiaries to the applicable Secured Parties as Security for the

payment or performance of obligations under a Credit Agreement and other debt documents.

***Plug and Play:*** a feature in Collateral Trust Agreements and many Intercreditor Agreements that allows a new group of Lenders or Noteholders, pursuant to a new Credit Facility or Indenture, to become party to (or "Plug-and-Play into") an existing Collateral Trust Agreement or Intercreditor Agreement without having to execute and re-negotiate a new set of intercreditor documents.

***Poison Pill:*** an action taken by a company to make its equity less attractive to potential acquirors in order to prevent being acquired in a hostile takeover. Two common types of Poison Pills are the "flip-in," whereby a company allows current shareholders to purchase additional shares at a discount as a way to dilute the share ownership of the company, thereby making the acquisition of a controlling interest in the company more difficult and expensive, and the "flip-over," whereby, in the event of a takeover, shareholders are allowed to buy the acquiring company's shares at a discount.

***Portfolio Company:*** a company that has been purchased by a Sponsor and now sits in that Sponsor's "portfolio."

***Possessory Collateral:*** this is Collateral in which possession by the Collateral Agent is a permissible method of Perfection. All Collateral that is capable of Perfection by possession may also be Perfected by the filing of a Financing Statement; however, possession generally results in a higher Priority. Although all tangible Collateral (including goods) can be Perfected by possession, generally only certificated Securities, promissory Notes and negotiable documents are required to be delivered to the Collateral Agent. Yes, this means actual possession. The Collateral Agent actually has to take the certificates and put them in its safe.

***Post-Closing Flex Letter:*** a letter executed by the Arranger and the Borrower prior to the funding of the loans in which the Borrower consents in advance to cooperate fully with the Arranger's Flex rights after Closing. The Post-Closing Flex Letter is used when the Credit Facility has not been fully Syndicated prior to Closing and the Fee Letter allows for Post-Closing Flex. The letter is important because in contrast to plain-vanilla pre-Closing Flex, Post-Closing Flex is exercised after the facilities have funded. The Post-Closing Flex Letter reaffirms that the Flex rights still exist and sometimes puts into place the mechanics for amending the Credit Facilities in order to implement such Flex.

***Post-Effective Period:*** in a registered Securities offering, this period begins right after Pricing when the Registration Statement is declared effective by the SEC. The Underwriters then confirm orders using the Pricing Supplement, and then shares begin trading the next morning. Closing generally happens three business days later. See T+ Legend.

**Power of Attorney:** an instrument permitting an individual to serve as the attorney or authorized agent of the grantor. In the Secondary Offering context, Selling Shareholders will generally grant a Power of Attorney to someone (often a company officer) authorizing that person (an "attorney-in-fact") to sell to the Underwriters the number of shares listed in the Underwriting Agreement and to execute the Underwriting Agreement. Generally signed in combination with a Custody Agreement.

**Precedent:** the transactions or transaction documents that are being used as an example for the new deal. Always be careful with Precedent, as every transaction is different.

**Pre-Closing:** the night before Closing when you complete all the work so you can have a smooth Closing the next day. Don't plan on getting much sleep.

**Preemptive Rights:** the rights given to existing shareholders to have first refusal on the transfer of existing shares or the issue of new shares by a company.

**Preference:** transfers made during the 90 days preceding a bankruptcy filing (or one year for transfers to insiders, in each case the "Preference Period") (i) to a creditor; (ii) on account of an antecedent debt owed by the transferor before the transfer is made; (iii) while the transferor was insolvent; and (iv) that enable the creditor to receive more than it would have received in a Chapter 7 liquidation case under the Bankruptcy Code. Preferential transfers are subject to Clawback, but creditors may avail themselves of certain defenses to a Clawback action such as the "ordinary course of business defense" and the "new value defense." One rationale behind Preference rules is that they prevent creditors from making a mad grab for assets when they learn that the debtor is becoming insolvent and prevent debtors from favoring some creditors over others as Bankruptcy nears. See Clawback.

**Preference Period:** see Clawback and Preference.

**Preferred Stock:** Equity that sits in between debt and Common Stock in the Capital Structure. Preferred Stock has Priority over Common Stock in a liquidation, generally pays a fixed dividend (the equivalent of the Interest paid on debt) and does not share in the upside to the same degree as Common Stock.

**Prefiling Period:** in a registered Securities offering, once there is agreement in principle to go forward with an SEC-registered offering (generally at the Organizational Meeting), the Issuer enters the Prefiling Period. The Prefiling Period is the Quiet Period during which Gun Jumping is prohibited. Consequences of being "loud" during the Quiet Period include a cooling off period and a substantial delay in the deal timeline.

*Preliminary Offering Memorandum:* see Red.

*Preliminary Prospectus:* another name for a Red.

*Pre-Marketing:* the process of meeting with potential security holders prior to distributing a preliminary offering memorandum or prospectus. See Testing the Waters.

*Pre-Pack:* a "pre-packaged" Bankruptcy plan of reorganization. A Pre-Pack is a plan of reorganization that is formulated and agreed to between a company's shareholders and its creditors prior to the company's filing for Bankruptcy. In fact, votes on the plan are solicited even before the Bankruptcy case is filed. The Pre-Pack is filed with the Bankruptcy court at the time of the Bankruptcy filing and confirmation of the plan could follow a few weeks later. The purpose of a Pre-Pack is to shorten the duration of the Bankruptcy proceedings and reduce costs.

*Prepayment Premium:* seen in Term Loan Facilities, this is a fee paid by the Borrower for prepaying the loans. The fee is expressed as a percentage of the amount of the loans being prepaid. Typically, prepayment fees will be set on a sliding scale, for instance, 2 percent in year one and 1 percent in year two. The fee may be applied to all prepayments of Term Loans or only those made from a Refinancing or at the discretion of the Borrower. See Call Premium, Hard Call and Soft Call.

*Present Value:* the discounted value of a payment or stream of payments to be received in the future, taking into consideration an agreed "discount rate." Another way of looking at this is, if you started with the Present Value and used the discount rate as an Interest Rate earned by the Present Value, you would end up with exactly the "payment or stream of payments" mentioned in the first sentence.

*Price Talk:* near the end of the Road Show, a couple of days before Pricing, the Lead Managing Underwriter's capital markets desk will put out Price Talk to Accounts. This is the Lead Managing Underwriter's best guess range on where the deal should price. Price Talk serves to open the discussions with Accounts and also begins the Book Building process.

*Pricing:* the moment at which the Securities are priced—*i.e.*, at which the price of the shares is set in Equity deals and the Coupon (Interest Rate) and any discount is set in Bond deals. In most underwritten and 144A deals, this corresponds with the time the contract for the sale of the Securities is confirmed. See Pricing Term Sheet. For a discussion of Pricing outside the range, see Latham & Watkins Client Alert No. 546, Recirculation and IPOs—Pricing Outside of the Range (October 14, 2006), available at [www.lw.com](http://www.lw.com).

**Pricing Flex:** a Flex provision that allows the Arranger to change the pricing of the Credit Facilities. Pricing Flex refers to the changes that the Arranger may make to the Interest Rates, OID or other pricing terms if needed to facilitate the Successful Syndication of the Credit Facilities. Pricing Flex typically includes limitations, e.g., that the rate may not be increased by more than 2 percent. See also Market Flex and Structure Flex.

**Pricing Grid:** see Grid Based Pricing.

**Pricing Supplement:** a term sheet distributed to Accounts immediately after the Pricing of Securities. In addition to the price, the Pricing Supplement contains any other material information that has not already been disclosed to Accounts. The Pricing Supplement came into fashion in response to Rule 159 adopted in connection with Securities Offering Reform. See Latham & Watkins publication, Christmas in July—the SEC Improves the Securities Offering Process (August 2005), available at [www.lw.com](http://www.lw.com).

**Pricing Term Sheet:** another name for Pricing Supplement.

**Primary Obligor:** when a guaranty is in place, this refers to the person whose obligations are being guaranteed.

**Primary Offering:** an offering of shares by the Issuer itself (rather than by Selling Shareholders).

**Printer:** refers to the professional financial printers who specialize in printing Offering Memoranda and Prospectuses. Once the draft is in reasonably good shape, everyone agrees to “dump it” onto the Printer’s system. Further drafting sessions are then often held at the Printer’s conference rooms — essentially an excuse to hang out there, eat sushi and play video games while waiting for the next turn of the document.

**Priority:** as among two or more creditors, the ranking of their Security Interests or their rights to receive payments. Generally, unless otherwise agreed, the first Secured Party to file a Financing Statement or otherwise Perfect will be entitled to Priority. In a First Lien/Second Lien transaction, the holders of Second Lien obligations expressly agree in the Intercreditor Agreement that the holders of the First Lien obligations are entitled to Priority upon the realization of the Collateral.

**Private Lender:** Lenders in a Credit Facility financing that may see non-public information about the Borrower and related companies. See Public/Private Information Undertaking.

**Private Offering:** another name for Private Placement.

**Private Placement:** a Private Placement of Securities (rather than a Public Offering) done pursuant to an exemption from Section 5 of the Securities Act. See Section 4(2) and Regulation D.

**Pro Forma:** means “for the sake of form” in Latin. In the leveraged finance and Securities offering context, Pro Forma refers to Financial Statements calculated to reflect the impact of contemplated future events as if they had already occurred. These are the “what if?” Numbers. For example, a company could have \$1.0 million of debt on its Balance Sheet as of December 31. If that company plans to borrow another \$1.0 million of debt in January, the company’s December 31 debt, Pro Forma for the January borrowing, would be \$2.0 million.

**Pro Rata:** means in proportion, or prorated.

**Profit and Loss Statement:** another name for Income Statement.

**Project Finance:** a type of Non-Recourse Financing or Limited Recourse Financing whereby debt is incurred by a project developer (known as the “project company,” which is formed by a “project Sponsor”), often in combination with equity contributed by the project Sponsor, to finance the development and construction of a capital-intensive project, such as a power plant or toll road, typically by means of construction loans that later convert to Term Loans upon completion of the project. A primary feature of Project Finance is that the Lenders advance debt on the basis of their evaluation of the projected revenue-generating capability of the project, rather than the credit quality of the project Sponsor or project company. The equity of the project company and the project assets, including the project’s revenue-generating contracts and other cash flows, are pledged as Collateral for the debt.

**Prospectus:** registered or public offerings are effected through the use of a marketing document called a Prospectus that is included in the Registration Statement filed with the SEC. Plural is “prospectuses.”

**Prospectus Supplement:** a Shelf Registration Statement contains two parts: the Base Prospectus (which is in the initial filing) and the Prospectus Supplement (which is filed when the Issuer sells Securities in a Shelf Takedown).

**PTP:** acronym for Publicly Traded Partnership. See Master Limited Partnership.

**Public:** when a trader says he’s “public,” it means he is trading on publicly available information and does not have, nor does he want to receive, MNPI. See also Public Lender.

**Public Float:** the portion of a company’s outstanding shares that is not held by company insiders or controlling-interest investors, but rather is held publicly.

**Public Lender:** Lenders in a Credit Facility financing that are prohibited from seeing “private” (non-public) information about the Borrower and related companies (such as projections) because they want to retain freedom to trade in the Securities of those companies. Note that most Credit Facility transactions involve Public Lenders even

where the Borrower is not a “public” Reporting Company. See Public/Private Information Undertaking.

**Public Offering:** a distribution of Securities that is not exempt from registration with the SEC.

**Public Offering System:** POS for short, this is FINRA's online system for filing public offerings with the Corporate Finance Department for their review. In 2012, POS replaced the old and highly venomous COBRA filing system.

**Public/Private Information Undertaking:** a provision in the Commitment Letter that provides that the company will make two versions of the Bank Book: one for Public Lenders and one for Private Lenders. The public book will generally be the same as the private book, but will have been scrubbed of any Material Non-Public Information about the Target. Note that projections are almost always considered to be Material Non-Public Information. Note also that even deals for private companies will include Public Lenders and, therefore, will generally require two versions of the Bank Book.

**Publicity Guidelines:** a letter and set of procedures setting forth the guidelines and other requirements imposed on all of the participants in a Securities offering. The guidelines restrict communications of marketing or promotional information regarding the Issuer and the Credit Group to the press and public. The guidelines are designed to prevent Gun Jumping in an SEC-Registered Offering, to restrict the Issuer and other parties from inadvertently making FWP's and to preserve exemptions from the registration requirements of the US Securities Act (in non SEC-Registered Offerings).

**Publicly Traded Partnership:** a partnership that is traded on a national Securities exchange.

**Purchase Accounting:** this is an accounting method used for all business combinations, such as mergers, consolidations and stock acquisitions, initiated after June 30, 2001. Prior to June 30, 2001, there was an alternative method of accounting called “pooling of interests,” which simply added together the Balance Sheet items of the acquiror and the acquired company. Purchase Accounting treats the acquiror as having purchased the assets and assumed the liabilities of the acquired company on the date of the acquisition. The Book Values of the acquired assets and liabilities are reset to their respective fair market values as of the acquisition date, and the difference between the purchase price and the aggregate fair value of the assets acquired is attributed to goodwill.

**Purchase Agreement:** the equivalent of the Underwriting Agreement in a Rule 144A Financing. Also shorthand for a Stock Purchase Agreement in an M&A deal. Make sure you know which is being discussed.

**Push-Down Accounting:** an accounting method that requires the Financial Statements of a subsidiary to reflect the costs or debts incurred at a Holding Company level.

**Put Bond:** another endearing banker nickname for the Securities Demand.

**Put Bond Holiday:** another name for a Securities Demand Holiday.

**Put Option:** a financial contract between a buyer and a seller, where the seller has the right or Option to sell a specific quantity of a Commodity, Security or other financial instrument to the buyer at prices and within time periods that are stated in the contract. Compare Call Option.

**Put Right:** in the leveraged finance context, an Option giving Bondholders a right to force the Issuer to buy back its Bonds at a specified amount. High Yield Bonds and some Investment Grade Indentures generally provide Bondholders with this right upon a Change of Control of the Issuer. See Change of Control Covenant and Change of Control Put.

**QIB:** acronym for Qualified Institutional Buyer.

**QIU:** acronym for Qualified Independent Underwriter. Under FINRA Rule 5121, an Underwriter will be deemed to have a conflict of interest in connection with an offering if, for example, the Underwriter is an Affiliate of the Issuer or it or one of its Affiliates will receive 5 percent or more of the net proceeds from the offering (including in connection with the repayment of an outstanding Credit Facility with the proceeds from the offering). If such a conflict exists, in certain circumstances, a QIU must be engaged to participate in the preparation of the offering document and exercise the usual standards of due diligence in connection therewith. Another member of the syndicate may act as the QIU as long as it does not itself have a conflict under Rule 5121.

**Qualified Counterparty:** another name for a Lender Counterparty.

**Qualified Institutional Buyer:** large Institutional Investors that must have at least \$100.0 million invested in Securities or under management. Qualified Institutional Buyers are the permitted purchasers of Securities in 144A Offerings. See Rule 144A.

**Qualified Purchaser:** parties the SEC has deemed to be rich and/or sophisticated enough not to need the protection of state registration when they are offered or sold Securities in an offering by an Investment Company Issuer. Section 3(c)(7) of the Investment Company Act provides an exemption from registration if all of the Security holders of the Investment Company Issuer are Qualified Purchasers. The four categories of persons who possess the minimum standards of financial sophistication to be considered a Qualified Purchaser are: (i) individuals who own \$5 million in investments, (ii) Institutional Investors and other companies who own \$25 million in investments, (iii) family owned

companies that own \$5 million in investments and (iv) certain trusts in which the trustee and each settlor are Qualified Purchasers.

**Quiet Period:** in a registered Securities offering, the Prefiling Period for the Issuer is a Quiet Period—so called because the Issuer must be very careful not to make any oral or written offers prior to filing the Registration Statement. Consequences of being “loud” during the Quiet Period include a cooling off period and a substantial delay in the deal timeline. See Prefiling Period and Gun Jumping.

**Ranking:** the level of Priority that a particular Tranche of debt occupies in the overall Capital Structure. See Subordination, Junior Debt and Senior Debt.

**Ratings Agencies:** see Fitch, Moody’s and S&P. Ratings Agencies rate companies, Securities and loans on a risk spectrum. The ratings received will directly impact the cost of borrowing. As a result, the Ratings Agencies are feared by companies and bankers alike.

**Ratings Condition:** a Condition Precedent in the Commitment Letter that makes the commitment subject to the company either obtaining or using its commercially reasonable efforts to obtain ratings for the new Credit Facilities. Note that the term Ratings Condition does not necessarily require the Issuer/Borrower to obtain a particular rating—it may just require that some/any rating be obtained. Despite the name, this may often actually be a Covenant rather than a Condition Precedent.

**Ratings-Based Flex:** a Flex provision that gives the Arranger certain increased Market Flex rights if the Credit Facilities are not rated above a certain threshold. For example, such a provision might allow the Arranger to increase the pricing (Interest Rate) on the Credit Facilities if a certain level of ratings is not obtained.

**Ratio Debt:** most High Yield Indentures permit Issuers to incur debt in instances where, Pro Forma for the incurrence of such debt, the Issuer’s Fixed Charge Coverage Ratio would be above a certain threshold—generally 2.00 to 1.00. Debt so incurred is often referred to as Ratio Debt. The purpose of the Ratio Test is to allow the Issuer to incur more debt as the Issuer’s credit improves in proportion to the Issuer’s ability to cover Interest expense.

**Ratio Test:** the Fixed Charge Coverage Ratio based debt incurrence test in most High Yield Indentures. See Ratio Debt.

**Real Estate Investment Trust:** a company that owns primarily income-producing real estate, Mortgages or other real estate-related assets. REITs are often described as “mutual funds” for real estate and allow investors, through their ownership of REIT stock, to acquire an interest in a large portfolio of real estate-related assets. Some REITs (often referred to as “equity REITs”) invest primarily in real estate (or specific

types of real estate such as offices, multi-family residences, hotels, shopping centers, datacenters or health care facilities), whereas other REITs (often referred to as “mortgage REITs”) invest in Mortgages or real estate Securities. Many REITs are listed on public stock exchanges, but they may also be private or non-traded. In order to qualify as a REIT, a company must meet a number of requirements set forth in the Internal Revenue Code related to the nature of its assets, income, distributions and organizational structure, among other things. Provided a company qualifies as a REIT, it is entitled to deduct the dividends it pays to its shareholders, substantially eliminating the “double taxation” that ordinarily results from investment in a regular C corporation. Although a REIT generally does not pay income tax on the income it currently distributes to its shareholders, a REIT’s taxable shareholders will be required to pay tax on the dividends they receive from the REIT. Because REITs typically distribute all or substantially all of their taxable income, investments in REITs can provide investors with regular dividends and attractive yields.

**Reconciliation:** in the Securities offering context, a reconciliation of the differences between a Non-GAAP financial measure presented and the most directly comparable financial measure calculated in accordance with GAAP. Most offering documents contain a reconciliation from EBITDA and/or Adjusted EBITDA to Net Income. See Regulation G.

**Record Date:** Indentures set forth Record Dates and Interest Payment Dates. The Record Date is the date when the Trustee determines which Bondholders are entitled to receive a given Interest payment on the related Interest Payment Date. The Record Date is generally 15 calendar days prior to the related Interest Payment Date.

**Red:** the Preliminary Prospectus or Preliminary Offering Memorandum (which has the red font legend printed horizontally on the left margin of the cover page) stating that the Preliminary Prospectus or Preliminary Offering Memorandum is subject to completion. This is the document used for the Road Show, before the Pricing information is inserted.

**Red Herring:** another name for the Red.

**Redemption Price:** the price at which a Security is, in the case of mandatory redemption, or may be, in the case of Optional Redemption or a Put Option, redeemed prior to its Maturity Date. The Redemption Price is set when the Securities are issued and is usually either at Par or at some premium to Par.

**Refinancing:** the repayment of existing debt with the proceeds of a new debt issuance. Any Refinancing will require a careful review of existing Indentures and Credit Agreements to make sure the debt being Refinanced can, in fact, be repaid and to verify that any debt being left in place permits the incurrence of the new debt. Indenture and Credit Agreement debt Baskets will generally allow the Refinancing of existing debt, but subject to certain conditions that must be read

carefully. See Latham & Watkins Client Alert No. 696, Restructuring High Yield Bonds: Getting Ready for the Next Phase of the Cycle (April 21, 2008), available at [www.lw.com](http://www.lw.com).

***Refreshing the Shoe (or Reloading):*** the situation where the Underwriter has covered part or all of its Syndicate Short position through open market repurchases and then shorts the stock again up to the full amount of the Over-Allotment Option. Consider the example provided in the definition of Naked Short. There is an IPO for 1.0 million shares of ABC, with an Over-Allotment Option for 150,000 additional shares. This time, the Underwriter commits to provide to accounts 1.15 million shares. The stock initially drops, and so rather than exercising the Green Shoe, the Underwriter buys a portion of the 150,000 shares on the open market (because they are cheaper on the open market than through the Over-Allotment Option, which is at the offering price less the Underwriting Discount). Then the stock price rises above the initial offering price. The Underwriter then Refreshes the Shoe, meaning the Underwriter immediately sells (or Shorts) the shares it purchased at the lower price in the open market—and meaning the Underwriter is again dependent on the Over-Allotment Option to cover the extra 150,000 shares that were allocated.

***Reg Rights:*** shorthand for Registration Rights.

***Reg S:*** shorthand for Regulation S.

***Registered (i.e., with the SEC):*** an offering that is registered with the SEC. See Public Offering.

***Registered Bonds:*** a Security for which ownership is recorded by the Registrar in the name of the holder or its nominee, and which can be transferred only by an entry on the register. Not to be confused with Securities that are registered on a Registration Statement filed with the SEC.

***Registrar:*** the agent of the Issuer whose principal task is to record ownership of the Registered Bonds in the register.

***Registration Rights:*** rights of a Security holder to force an Issuer to register its Securities with the SEC. These rights enhance the Liquidity of the Securities because registered Securities are freely tradable. Registration Rights (or Reg Rights) can take several forms. Holders of equity Securities obtained in a Private Placement often have rights to demand that the Issuer register their Securities or to piggyback onto an offering in which the Issuer is already engaging. See Piggy Back Registration Rights and Demand Registration Rights. In Private Offerings of High Yield and convertible debt Securities, Issuers customarily provide purchasers with Registration Rights to enhance the post-Closing Liquidity of the Securities sold in the offering and, in the case of private company Issuers, agree to become Reporting Companies under the Exchange Act.

**Registration Statement:** the document filed with the SEC in connection with a public offering of Securities. The Registration Statement contains the Prospectus.

**Regulation D or Reg D:** spells out the rules for a valid Private Placement. Under the Securities Act, any offer to sell Securities must either be registered with the SEC or made pursuant to an exemption. Regulation D provides a safe harbor for sales of Securities in transactions “not involving any public offering” within the meaning of Section 4(a)(2) of the Securities Act. Reg D also contains two more widely known exemptions from the registration requirements, which allow some companies to offer and sell their Securities without having to register the Securities with the SEC. Since Regulation D was adopted back in the stone age, the availability of the Rule 506 safe harbor thereunder has been subject to the condition that neither the Issuer nor anyone on its behalf will engage in any form of solicitation. The JOBS Act changed all this, and as of September 23, 2013, Rule 506(c) permits general solicitation in Regulation D Private Placements where certain conditions are met, including that the Issuer take “reasonable steps to verify” that purchasers are Accredited Investors. See Latham & Watkins Client Alert No. 1569, “You Talkin’ to Me?” (July 25, 2013), available at [www.lw.com](http://www.lw.com).

**Regulation FD:** the SEC fair disclosure regulation. It says that if you share material inside information with one person, you have to share it with everybody. When an Issuer discloses Material Non-Public Information to certain enumerated persons (in general, Securities market professionals and holders of the Issuer’s Securities who may well trade on the basis of the information), Regulation FD (or Reg FD) requires the Issuer to make public disclosure of that information. The timing of the required public disclosure depends on whether such Selective Disclosure (as it is known) was intentional or non-intentional: for an intentional Selective Disclosure, the Issuer must make public disclosure simultaneously; for a non-intentional disclosure, the Issuer must make public disclosure promptly.

**Regulation G:** requires specific disclosure and analysis around any non-GAAP financial measure contained in any public disclosure by an Issuer. Reg G says that non-GAAP Numbers generally must be reconciled to the most directly comparable GAAP financial measure. In other words, Reg G says it is okay to disclose your financial information in a non-GAAP sort of way as long as you explain (through numerical reconciliation) how what you disclosed differs from GAAP. Note that EBITDA is a non-GAAP measure. See Item 10.

**Regulation M:** SEC regulation intended to preclude manipulative conduct by persons with an interest in the outcome of an offering by prohibiting such interested parties from directly or indirectly bidding for, purchasing, or inducing others to bid for or purchase, covered

Securities for a specified restricted period following the offering. These interested persons include the Issuer and any selling Security holder in connection with a distribution of Securities by or on their behalf, as well as their respective "affiliated purchasers." Reg M also applies to distribution participants (including any underwriter, prospective underwriter, broker, dealer or any other person who has agreed to participate or is participating in a distribution) and their respective affiliated purchasers. See Latham & Watkins Client Alert No. 1531, What's the Deal with Regulation M? (May 30, 2013), available at [www.lw.com](http://www.lw.com).

**Regulation S:** provides an exemption from the registration requirements of Section 5 of the Securities Act for certain offshore transactions. Most Rule 144A Financings also have a Regulation S component to allow for offshore sales. Rule 144A/Regulation S financings do not have to be registered with the SEC because the purchasers are either QIBs buying pursuant to Rule 144A or outside the US and buying pursuant to Regulation S.

**Regulation S-K:** the heart of the SEC's integrated disclosure system, which provides the standard instructions for filing SEC forms. The SEC's registration forms (such as Form S-1) and periodic reporting forms (such as Form 10-K) will all have cross-references to Regulation S-K. Regulation S-K then provides an outline of all the detail that needs to go into these forms. See Form Check.

**Regulation S-X:** the SEC's accounting rules for the form and content of Financial Statements. All Financial Statements included in SEC filings must comply with Regulation S-X. Rule 144A Financings are not technically required to comply with Regulation S-X, although they generally come very close as a matter of industry custom. See Latham & Watkins publication, Financial Statement Requirements in US Securities Offerings: What You Need to Know (September 2013), available at [www.lw.com](http://www.lw.com). See also Latham & Watkins and KPMG publication, Financial Statement Requirements in US Securities Offerings What Non-US Issuers Need to Know (September 2013), available at [www.lw.com](http://www.lw.com).

**Reimbursement Agreement:** an agreement between an Issuing Bank and its Account Party under which the Account Party agrees to reimburse the Issuing Bank for any draws of outstanding Letters of Credit. A separate Reimbursement Agreement is used only if there are no other credit facilities involved; otherwise the reimbursement provisions are built into the Credit Agreement.

**Reinvestment Right:** sometimes included in an Asset Sale Prepayment and/or Equity Prepayment provision. This right usually gives the Borrower an option, within some specified number of days, to reinvest insurance proceeds or proceeds of asset sales or equity issuances into assets used or useful in the business, rather than applying such proceeds

to pay down Term Loans. Such Reinvestment Rights may be general, allowing reinvestment in any assets used or useful in the business, or may be specific, for example insurance proceeds being usable only for the replacement of the assets which were destroyed and resulted in the relevant claim. Reinvestment Rights on asset sales sometimes also allow the cash to be spent on acquisitions and/or Capex.

**REIT:** acronym for Real Estate Investment Trust.

**Release Clause:** one of the first provisions in a European-style Intercreditor Agreement to look at when heading towards a restructuring with a Credit Group which has Senior Debt and Subordinated Debt. It allows (subject to certain conditions) the release by the Senior Debt holders of Guarantees and Collateral held by, and liabilities owed by Obligors to, the holders of Subordinated Debt thereby enabling the group to be sold free and clear of claims from the Subordinated Debt holders.

**Reliance Letter:** letter that establishes that the named recipient may rely on certain provisions of an auditor's opinion, independent expert opinion or legal opinion, or an expert's Due Diligence report, as if the original opinion/report were addressed and delivered to the named recipient. Reliance Letters with respect to Due Diligence reports are typically given to original Lenders and those becoming Lenders in the initial Syndication.

**Remedy Bar:** a Subordination provision that is not found in regular High Yield deals but is found in certain kinds of Mezzanine Financings (usually only if the Mezz Lenders have the benefit of Financial Maintenance Covenants) and often in Second Lien Facilities. A Remedy Bar will prevent the Subordinated (or Second Lien) Lenders from taking certain (or possibly any) remedies during an agreed upon time-frame even if they are experiencing an Event of Default. Note that this form of Subordination is much more severe than a Payment Blockage Provision, which does not prevent the junior creditors from pursuing remedies (including putting the Borrower into Bankruptcy) if there is an Event of Default. Also called a Standstill.

**Rep:** shorthand for Representation and Warranty.

**Rep Letter** or **SAS 72 Letter of Representations:** a letter from the Initial Purchasers delivered to an Issuer's auditors in connection with an unregistered Securities offering requesting delivery of a Comfort Letter covering the financial information of the Issuer to be included in the offering document.

**Reporting Company:** a company that files Periodic Reports with the SEC.

**Reporting Requirements:** generic term used to describe the Covenants relating to provision of information found in an Indenture or a Credit Agreement.

***Representation and Warranty:*** an assertion of fact in a contract (such as a merger agreement, Credit Agreement or Underwriting Agreement). Representations and Warranties are the means by which one party to a contract tells the other party that something is true as of a particular date.

***Representation Regarding Accuracy of Disclosed Information:*** the representation by the company in the Commitment Letter that all information (other than financial projections) provided directly or indirectly by the Sponsor, the company or the Target in connection with the contemplated acquisition is and will be, when taken as a whole, complete and correct in all material respects and does not and will not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements contained therein not misleading. Also known as a Full Disclosure Rep or Info Rep. See Rule 10b-5 Representation and Information Rep.

***Repricing Amendment:*** an Amendment to a Credit Agreement only seen in improving markets, where the Interest Rate on an existing loan is lowered. This generally requires the affirmative vote of 100 percent of the existing Lenders (or replacement Lenders through the use of a Yank-a-Bank provision). This is sometimes (especially when not all existing Lenders are willing to agree to this type of Amendment but other Lenders would be willing to lend money at the new lower rate) accomplished by creating a new Tranche of Term Loans under the Credit Agreement, identical to the existing loans, but with a lower Interest Rate. The proceeds of the new loans are used to pay off the old loans in full, and the less expensive new loans live on.

***Repricing Event:*** the repayment of loans with the proceeds of debt that have a lower Yield than the loans being repaid or the Amendment of a Credit Agreement with a Repricing Amendment.

***Required Class Lenders:*** for any Class, the Lenders holding more than 50 percent of the aggregate principal amount of outstanding loans and unfunded commitments (if any) under a Credit Agreement with respect to such Class.

***Required Lenders:*** the Lenders holding more than 50 percent of the aggregate principal amount of outstanding loans and unfunded commitments under a Credit Agreement. Usually required for approval of Amendments and Waivers under a Credit Agreement, although certain Amendments require a 100 percent vote. See also Class Voting.

***Requisite Lenders:*** another name for Required Lenders.

***Research Guidelines:*** a set of procedures setting forth the guidelines and other requirements imposed on the Underwriters in anticipation of a Securities offering when the analysts at one or more of the Underwriters intend to publish research with respect to the Issuer prior to the offering.

**Reserve Adjusted Eurodollar Rate:** essentially, the same as LIBOR.

**Restricted:** when a trader says he is "restricted," he does not mean he is restrained (or enchained, for that matter), but rather that he is prevented from trading, likely because he is holding MNPI.

**Restricted Junior Payment or Restricted Payment:** dividends and other distributions on account of Equity interests, Equity repurchases and retirements or repayments of Subordinated Debt prior to their maturity. This term is designed to capture voluntary transfers of value to people lower down in the Capital Structure.

**Restricted Payments Covenant:** a Covenant that protects Bondholders' and Lenders' access to value by limiting undesirable Restricted Payments. Virtually all High Yield Indentures and Credit Agreements contain Covenants limiting the ability of Issuers/Borrowers to make Restricted Payments. In Indentures, certain investments in entities that are not Restricted Subsidiaries are included in the definition of Restricted Payments, whereas these investments are usually the subject of a separate investments Covenant in Credit Agreements.

**Restricted Securities:** Securities that have been issued on a private (unregistered) basis and are not yet eligible for public resale pursuant to Rule 144. See Latham & Watkins Client Alert No. 685, SEC Reduces Restrictions on Resale of Restricted Securities (March 25, 2008), available at [www.lw.com](http://www.lw.com).

**Restricted Subsidiary:** a defined term in an Indenture that captures the Issuer's subsidiaries to which the Covenants apply. Some Credit Agreements also have a concept of Restricted Subsidiaries. See Covenant Lite. Compare Unrestricted Subsidiary.

**Retained Cash:** the term given to Excess Cash Flow that is retained following the Excess Cash Flow Sweep. Credit Agreements will specify what this can be used for and Lenders may permit it to increase Baskets.

**Retained Cash Flow:** another name for Retained Cash.

**Reverse Breakup Fee:** in an M&A transaction, a fee paid by the buyer to the seller if the buyer decides not to consummate the transaction. When included in a transaction, the Reverse Breakup Fee can, in some cases, provide the buyer an option to back out of a transaction at a certain cost.

**Revolver:** shorthand for a Revolving Facility.

**Revolver Grid:** another name for a Pricing Grid, when only the Revolver (but not the Term Loans) has Grid Based Pricing.

**Revolving Facility:** a Senior Secured Credit Facility structured as a line of credit that can be borrowed, repaid and reborrowed at any time prior to Maturity, at the Borrower's discretion. A Revolving Facility can also often be used for the issuance of Letters of Credit. See Borrowing Base and Cash Flow Revolver.

**Revolving Loans:** loans under a Revolving Facility.

**Right:** see Right Placement.

**Right of First Offer:** an obligation by the seller of an asset to a rights holder to negotiate the sale of the asset with the holder, and attempt to reach an agreement, before offering the asset for sale to third parties. If the rights holder is not interested in purchasing the asset or cannot reach an agreement with the seller, the seller has no further obligation to the rights holder and may sell the asset freely. This is sometimes known as "Right of First Negotiation."

**Right of First Refusal:** generally, the exclusive right of one party to accept or refuse an offer before it is made to another party. In the context of Commitment Papers, the "ROFR" (typically found in the Fee Letter) protects the committing banks from losing the transaction to a competing institution, by providing an exclusive right of the Arranger/Underwriter to participate in a deal or be entitled to a specified percentage of the fees that would have been owed to it if the same deal is instead offered to another investment bank.

**Right Placement:** a managing Underwriter who has not received Left Placement is said to have Right Placement. Substantively, this means that the Underwriter is still a joint Bookrunner, but is not running the show to the same degree. From a cover perspective, it means that the name of that Underwriter still goes on the top line (in the big font) of the back and front covers of the Prospectus, but to the right of the Underwriter with Left Placement.

**Ring-fencing:** legal walling off of certain assets or liabilities within a company or Credit Group, as in a company forming a new subsidiary to protect (Ring-fence) specific assets from certain creditors. The concept includes a number of measures that may be implemented to protect the economic viability and credit ratings of companies and their Affiliates within a Holding Company structure.

**Risk Factors:** a section of the Offering Memorandum or Prospectus which summarizes the risks related to the Notes (or to owning the Issuer's shares), the Issuer and the Securities offering.

**Road Show:** the trip around the country (or around the world), often on private jets, that Issuers and bankers (but not lawyers) go on in order to meet with potential purchasers of the Securities being offered. This is the heart of the marketing process in a Securities offering. Also can refer to the investor presentation materials used at the investor meetings. See also One-on-Ones.

**ROFR:** acronym for Right of First Refusal.

**Rollover Equity:** in order to retain management or other insiders, certain acquiring companies will allow/ask management to "roll over" its equity in the Target, meaning such individuals will retain an equity

stake in the Target following the acquisition. Frequently limited by lenders in a LBO context to a maximum amount.

***Rollover Fee:*** a conversion fee paid on the first anniversary of the Closing of a Bridge Loan, when the Bridge Loans are converted into Term Loans. Also known as a Conversion Fee.

***Rollover Loans:*** another name for Term Loans into which the Bridge Loans can convert at their maturity on the first anniversary of the Closing of a Bridge Loan.

***Roll-up Financing:*** a type of DIP Financing whereby a Secured Lender's pre-petition debt claim is "rolled up" into a post-petition loan, with the proceeds of the post-petition loan being used to pay off the pre-petition claim.

***Rule 10b-5:*** the SEC rule regarding employment of manipulative and deceptive practices. This is one of the most important SEC rules. It seeks to prohibit fraud or deceit in connection with the purchase or sale of any Security, including insider trading.

***Rule 10b-5 Opinion:*** see Negative Assurance Letter.

***Rule 10b-5 Representation:*** also known as a 10b-5 Rep, this term is generally used as shorthand for a Representation and Warranty by an Issuer, Target or Borrower that the Diligence information provided is complete and correct in all material respects and does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements contained therein not misleading. This is "magic" language based on Rule 10b-5.

***Rule 10b5-1 Plan:*** a plan used by company insiders to sell shares in the company without running afoul of restrictions on insider trading. The title of the plan is derived from SEC Rule 10b5-1, which creates an affirmative defense to charges of insider trading when shares are sold pursuant to a qualifying plan. In general, qualifying plans must set forth in advance what shares will be sold and when. The basic idea is that the actual sales will then occur automatically irrespective of what information the seller may actually know or not know at the time of the sale.

***Rule 144:*** a rule under the Securities Act creating a safe harbor from Underwriter status for public sales of Restricted Securities. See Latham & Watkins Client Alert No. 685, SEC Reduces Restrictions on Resale of Restricted Securities (March 25, 2008), available at [www.lw.com](http://www.lw.com). See also Latham & Watkins Client Alert No. 669, The Future of Registration Rights in Private Offerings of Debt Securities (January 22, 2008), available at [www.lw.com](http://www.lw.com).

***Rule 144A:*** provides a resale exemption from the registration requirements of the Securities Act. The rule permits persons who purchase Securities in Private Placements to resell them freely in the

secondary market if (i) the subject Security is not listed on a national Securities exchange and (ii) the sales are to Qualified Institutional Buyers. See Rule 144A Financing for why this rule is so important.

**Rule 144A Financing:** a transaction where an investment bank buys Securities from an Issuer pursuant to a Private Placement and immediately resells the Securities to QIBs in reliance on Rule 144A. Virtually all High Yield Bond deals and many Convert Deals are structured as Rule 144A Financings. Rule 144A Financings are attractive to Issuers because these transactions can be consummated without SEC registration, allowing greater speed to market. In a 144A for Life Offering, there is an added bonus—there are no post-Closing Reg Rights, so the Issuer is never required to become a Reporting Company. See 144A for Life Offering and Registration Rights. Rule 144A Financings are often undertaken with a simultaneous Regulation S component. See Regulation S.

**Rule 144A for Life Offering:** refers to Securities issued in a 144A for Life Offering, or more generally to such an offering.

**Rule 159:** a rule under the Securities Act adopted in connection with Securities Offering Reform. The key implication of Rule 159 is that Section 12(a)(2) and 17(a)(2) liability are determined by reference to the total package of information conveyed to the purchaser in a Securities offering at or before the time of sale. What this means is that investors need to have all the material information about the Issuer before orders are confirmed (which happens directly after Pricing). Investors get all this information through a combination of the Red and the Pricing Supplement. Although only applicable to SEC-Registered Offerings, the general market practice in Rule 144A Financings/Regulation S offerings has been to follow the same Rule 159 practices as if the rule applied to these offerings. See Latham & Watkins publication, Christmas in July—the SEC Improves the Securities Offering Process (August 2005), available at [www.lw.com](http://www.lw.com).

**Rule 405:** contains the definitions of many terms used in other Securities Act Rules. Sort of like the SEC's Book of Jargon.

**Rule 506:** one of the Section 4(a)(2) safe harbors within Regulation D that permits a Private Placement of an unlimited amount of Securities. Rule 506(b) requirements include that (i) the Issuer cannot engage in any form of general solicitation and (ii) the Issuer may only sell to Accredited Investors and up to 35 non-Accredited Investors who have sufficient knowledge and experience in financial and business matters to make them capable of evaluating the merits and risks of the prospective investment. However, Rule 506(c) permits general solicitation provided all actual investors are Accredited Investors and the Issuer has taken reasonable steps to verify that the investors are Accredited Investors. Rule 506 exemptions are not available if the Issuer or certain associated persons are Bad Actors. See Reg D.

**S&P:** Standard & Poor's, a Division of The McGraw-Hill Companies, Inc. S&P is one of the two most powerful Ratings Agencies. Moody's is the other big one. Fitch is hot on their heels.

**Safe Harbor:** a special protection for certain circumstances providing an exception from the applicability of a rule or regulation. Safe Harbors exist in many contexts. In Securities regulation, for example, there are many safe harbors for the registration of Securities transactions with the SEC; e.g., Section 4(2) of the Securities Act is the Safe Harbor exempting a securities transaction that is not a Public Offering from the applicability of Section 5.

**Sale and Leaseback:** a transaction where a company sells an asset (usually to a financial services company of some kind) and then immediately leases back that same asset. Companies engage in Sale and Leasebacks for a variety of reasons including to raise cash, get assets off their Balance Sheets and shift the market risk on the underlying asset. Sale and Leasebacks are very similar economically to Secured Debt, and are therefore treated very similarly under Indentures and Credit Agreements.

**Sales Force Presentation:** the presentation given to the Underwriters' sales force by the management and banking teams to prepare them to sell the deal in a Securities offering. Generally can't begin until the Red is prepared. Serves as a dry run for the Road Show.

**Same Day Funds:** immediately available funds (i.e., a wire transfer that lands in the recipient's account on the day it is sent).

**Sarbanes-Oxley:** in response to the wave of corporate scandal that included Enron and Worldcom, Congress passed, and President Bush signed into law, the Sarbanes-Oxley Act of 2002, enacting a broad range of changes to the Securities laws that govern public companies and their officers and directors. See SOX Section 404.

**SAS:** acronym for Statements on Auditing Standards.

**SAS 100:** the SAS that applies to review of interim financial information, which provides detailed instructions regarding the text of the Comfort Letter.

**SAS 72:** this is the bible for Comfort Letters. SAS 72 is Statement on Auditing Standards number 72. SAS 72 was written by accountants for accountants and provides detailed instructions regarding the text of the Comfort Letter (but little guidance regarding Tick Mark procedures).

**Satisfaction and Discharge:** provisions that allow an Issuer to deposit a pile of cash with the Trustee equal to all amounts due under an Indenture and be immediately released from all the Indenture's requirements, including all Covenants and payment obligations. Satisfaction and Discharge is typically only allowed if the Bonds are coming due within one year, either because they are maturing or because they have been called for redemption. The key differences between Legal Defeasance

and Satisfaction and Discharge are (i) the “due-within-one-year” provision does not apply in the context of Legal Defeasance and (ii) Legal Defeasance is not actually possible under current law because no law firm can give the required tax opinion. There is no tax opinion requirement for a Satisfaction and Discharge. See Legal Defeasance.

**SEC:** acronym for the US Securities and Exchange Commission.

**Second Lien:** a second Priority Lien that comes behind the First Lien. See Second Lien Facilities.

**Second Lien Facilities:** a Senior Secured Credit Facility that has a second Priority Lien on the assets that secure the First Lien Facilities. Second Lien Facilities are included in some, but not all, transactions. In the Commitment Papers, the terms of the Second Lien Facility are usually contained in a separate Term Sheet attached as an annex to the Commitment Letter. See Latham & Watkins Client Alert No. 382, Second Lien Financings—Answers to the Most Frequently Asked Questions (April 15, 2004), available at [www.lw.com](http://www.lw.com).

**Secondary Offering:** an offering of shares in a registered transaction by Selling Shareholders. Compare Primary Offering.

**SEC-Registered Offering:** just what it sounds like: a Securities offering that is registered with the SEC.

**Section 11:** the section of the Securities Act that creates a private right of action in favor of any person acquiring a registered Security if any part of the Registration Statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading. This is the section of the Securities Act that matters when you are drafting the Prospectus. Issuers essentially have strict liability under Section 11. Officers, directors, Underwriters and experts have a Due Diligence Defense.

**Section 12:** this is the section of the Securities Act that creates a private right of action in favor of any purchaser of a Security against anyone that offers or sells the Security by means of a Prospectus or oral communication that includes an untrue statement of a material fact necessary to make the statements therein not misleading. The important practice point is that, in contrast to Section 11, Section 12 applies to the Road Show.

**Section 4(a)(2):** exempts from Section 5 of the Securities Act any offerings of Securities in “transactions by an Issuer not involving a public offering.” This is the statutory origin of Private Placements. Regulation D is the safe harbor that gives definition to this statutory provision. See Regulation D.

**Section 5:** a fundamental section of the Securities Act that requires, absent an exemption, that a Registration Statement covering a Security be filed with the SEC before any offer is made, and be declared effective

by the SEC before any sale is made. Section 5 divides the world into three distinct time periods: pre-filing (when no offers can be made), pre-effective (when no sales can be made) and post-effective (when sales can be made).

**Secured Claim:** a right of payment that is based upon Secured Debt. In bankruptcy, a Secured Claim is only secured to the extent of the value of the Collateral that secures it.

**Secured Creditors or Secured Parties:** those who hold or take the benefit of a given Security Interest or Secured Claim. Generally defined to include the lenders, the Administrative Agent, the Collateral Agent, the bank that issues the letters of credit under the credit agreement, the arrangers and often certain hedge counterparties, this group will incorporate all parties in favor of whom a grant of a Security Interest over assets has been made.

**Secured Debt:** indebtedness that is secured by a Lien on Collateral.

**Secured Lenders:** lenders who hold a given Security Interest. See Secured Creditors or Secured Parties.

**Secured Leverage Ratio:** the ratio of total Secured Debt of the Borrower as of a given date to EBITDA of the Borrower for the last four quarters. This is a Leverage Ratio that counts only the Secured Debt of the Borrower in the numerator.

**Securities Account Control Agreement:** see Account Control Agreement.

**Securities Act:** the Securities Act of 1933, as amended, which governs the registration of Securities.

**Securities Demand:** a negotiated right that enables the Broker-Dealer arm of the investment bank that provided the Bridge Loan to require the Borrower to market Permanent Securities, usually Bonds, to repay the Bridge Loan. The terms of the Securities Demand are documented in the Commitment Papers (usually, but not always, in the Fee Letter). Sometimes the Securities Demand also contains the right to require the Borrower to market new loans rather than Securities.

**Securities Demand Holiday:** the pause period sometimes negotiated before the Securities Demand can be exercised. In some cases, this period can be as long as 180 days after the funding of the Bridge Loans. Also referred to as a Put Bond Holiday.

**Securities Offering Reform:** a series of new and amended SEC rules that took effect on December 1, 2005 and dramatically reformed the Securities offering process. See Latham & Watkins publication, Christmas in July—the SEC Improves the Securities Offering Process (August 2005), available at [www.lw.com](http://www.lw.com).

**Securitization:** a structured finance transaction in which a party owning a pool of cash-flow producing financial assets (the “originator”) sells the assets to a Bankruptcy Remote Vehicle (the “issuer”) that then sells Securities to investors that are secured by those assets. In a Securitization transaction, the transfer of the pool of assets from the originator to the issuer is designed to be a True Sale rather than a financing so that if the originator goes Bankrupt, the assets of the Issuer will not be distributed to the originator’s creditors.

**Security:** definition depends upon the context. In Bond and Equity land, a Security is a thing that is regulated by the Securities laws. The Supremes know it when they see it. We hope it does not include a loan. See *Reves v. Ernst & Young*, 494 U.S. 56 (1990). In bank land, Security is a reference to the granting of a Lien on assets to secure a debt obligation. See Secured Debt and Security Interest.

**Security Agreement:** a contract that creates a Security Interest in favor of the applicable Secured Parties. Other terms for Security Agreement include: guarantee and collateral agreement, collateral agreement, and pledge and security agreement. In some instances, Security Interests in equity interests are dealt with separately in a Pledge Agreement.

**Security Interest:** a Lien created by a Security Agreement over certain assets (*i.e.*, the Collateral) to secure the payment or performance of obligations under a Credit Agreement, Indenture or other debt documents. A Security Interest gives the beneficiary of the Security Interest (*i.e.*, the Secured Parties) the right to foreclose upon the Collateral and use the proceeds thereof to repay its loan. It also significantly improves the Secured Parties’ rights in a Bankruptcy. For example, only Secured Parties are entitled to post-petition interest in a Bankruptcy. In short, it is better to be secured than unsecured.

**Security Package:** a reference to the full “collateral” package securing a particular Credit Facility or series of Notes.

**SEDAR:** the Canadian equivalent of EDGAR. The Web site ([www.sedar.com](http://www.sedar.com)) provides access to documents filed with the Canadian Securities Administrators. Not be confused with a “seder,” which is the traditional dinner held on the first and second nights of Passover.

**Selecteds:** a reference to the selected financial information section of the Offering Memorandum/Prospectus. This section is generally identical to the financial information included in the Summary, but excludes Pro Forma financial information and, in the US, includes additional years of financial information (five years as opposed to three).

**Selective Disclosure:** see Regulation FD.

**Selling Shareholders:** shareholders of the Issuer that are selling their shares in a registered Securities offering, as opposed to a Primary

Offering in which the Issuer is selling its own shares. See Secondary Offering. It is possible for an offering to be part Secondary Offering and part Primary Offering.

***Selling, General and Administrative Expense:*** a company's selling, general and administrative expenses that are reported on the Income Statement and that do not correspond with production. These include everything from salaries to rent to utility payments. As a general matter, it is better to have low SG&A.

***Senior Debt:*** a level of Ranking. This is not a specific type of debt, but rather a general reference to a Slug of debt that is "higher" in the Capital Structure than other debt. For example, if a company has both Senior Subordinated Notes and Senior Notes, the Senior Notes are "senior." If that company also has Secured Debt, the Secured Debt is effectively "senior" to the Senior Notes to the extent of the value of the Collateral granted in favor of the Secured Debt. Compare Junior Debt. It is better to be Senior Debt than Junior Debt.

***Senior Notes:*** Bonds that are structurally senior to Senior Subordinated Notes and any other Junior Debt.

***Senior Secured Credit Facilities:*** bank loans generally secured by the assets of the Borrower and its subsidiaries. See First Lien Facilities and Second Lien Facilities.

***Senior Secured Facilities Term Sheet:*** an annex or exhibit to the Commitment Letter that contains the terms of the Senior Secured Credit Facilities.

***Senior Subordinated Notes:*** Bonds that are Subordinated to any Senior Notes (or Senior Secured Credit Facilities), but senior to other Subordinated Debt.

***Set-off:*** can be a statutory right (or right under applicable insolvency rules or regulations) banks have to take money from the account of a depositor if the depositor is also a borrower from that bank and is in default on the loan. It can also be a contractual right agreed by the parties to allow a party which owes money to the other party under the contract to subtract anything the other party owes it first, before making payment.

***Settle:*** see Clear.

***Several Liability:*** the alternative to Joint and Several Liability and results in each party taking responsibility only for their own obligations and no one else's. Multiple Arrangers and Lenders will require Several Liability as they will not commercially agree to be on the hook for the obligations of other unrelated financial institutions.

***SG&A:*** acronym for Selling, General & Administrative Expense.

***Shelf Registration:*** a registration process that lets an Issuer complete most of the SEC registration procedures (including the filing of

a Registration Statement) before it is ready to go to market. The registrant can then “take Securities off the shelf” by filing a Prospectus Supplement when it is ready to launch an offering. See Automatic Shelf Registration and Shelf Takedown.

***Shelf Registration Statement:*** used for a Shelf Takedown, a Shelf Registration Statement contains two principal parts: the Base Prospectus (which is in the initial filing) and the Prospectus Supplement (which is filed, along with the Base Prospectus, when the Issuer takes down the shelf).

***Shelf Takedown:*** a public offering where you issue Securities that were previously registered in a Shelf Registration. See Shelf Registration.

***Shoe:*** another name for the Green Shoe.

***Short:*** someone who is Short a Security makes money if the value of that Security goes down. It is the opposite of being Long—which, in the most basic sense, means you own a Security and you benefit if its value goes up. An investor can take a Short position by selling a Security she does not own—this is sometimes called a Naked Short. Short has many uses in the finance world. See Syndicate Short for how it is used in the Securities offering context. The term also means not very tall.

***Sight Draft:*** a written demand for immediate payment. For example, when a beneficiary of a Letter of Credit decides to make a draw on the Letter of Credit, the beneficiary will submit a Sight Draft to the Issuing Bank demanding payment under the L/C.

***Silent Second:*** when Second Lien creditors agree by contract (usually in a Collateral Trust Agreement or Intercreditor Agreement) to defer to the First Lien creditors and effectively agree to be silent as to how certain rights of secured creditors will be exercised.

***Skim:*** the difference between what a Sponsor has agreed to pay an Arranger as an Upfront Fee and what the Arranger agrees to pass along to the other Lenders during the Syndication. Skim is usually attributable to the Lead Arranger having invested considerably more time and energy into a transaction than the other Lenders, or to some set of the Lenders having provided a commitment.

***Slug:*** technically, any land or aquatic gastropod mollusk without a shell. Universally detested by gardeners as an obnoxious and highly destructive pest. Think of a snail without a shell. In leveraged finance, people speak of a Slug of debt generally when they mean a Tranche of debt, or sometimes a large quantity of debt.

***Smaller Reporting Company:*** a category of Issuer created by SEC rules that took effect in February 2008. An Issuer that is otherwise a Reporting Company qualifies as a Smaller Reporting Company if its Public Float is below \$75.0 million as of the last business day of the second fiscal quarter of the Issuer's preceding fiscal year. Smaller Reporting Companies have scaled down reporting requirements

under Regulation S-K and later Staleness deadlines than other Issuers. See Latham & Watkins Desktop Staleness Calendar, available at [www.lw.com](http://www.lw.com).

**Soft Call:** generally, a Prepayment Premium payable only if a Repricing Event has occurred. What is covered by a Soft Call varies from deal to deal. Compare Hard Call.

**Solvency Certificate:** a certificate delivered at Closing and signed by a financial officer (typically the CFO) of the Issuer/Borrower, certifying that after giving effect to the transactions contemplated by the Indenture or Credit Agreement, the Issuer/Borrower and its subsidiaries (usually, on a consolidated basis) are and will be "solvent" (defined by reference to Bankruptcy law). This is a very important Condition Precedent in any set of Commitment Papers.

**Sovereign Wealth Fund:** an investment fund owned by a country.

**SOX:** shorthand for Sarbanes-Oxley.

**SOX Section 404:** under this section of Sarbanes-Oxley and the related SEC rules, most reporting companies (subject to certain phase-in requirements) must establish and maintain Internal Controls and Procedures. Compliance with Section 404 is extremely expensive, and has been a matter of considerable controversy.

**SPAC:** acronym for Special Purpose Acquisition Company.

**SPE:** acronym for Special Purpose Entity.

**Special Committee:** a special purpose committee consisting of members of the board of directors that is appointed by the board of directors to handle discrete issues, which may include the restructuring of the company.

**Special Interest:** See Additional Interest.

**Special Purpose Acquisition Company:** a company that raises money in order to pursue the acquisition of an existing company. Special Purpose Acquisition Companies are companies that have no operations but are formed and raise capital with the intention of merging with or acquiring a company with the proceeds of the SPAC's Securities offering.

**Special Purpose Entity:** another name for a Bankruptcy Remote Vehicle.

**Special Purpose Vehicle:** another name for a Bankruptcy Remote Vehicle.

**Specified Representations Language or Specified Reps:** a provision found in the text of the Commitment Letter. It states that notwithstanding anything else in the Commitment Letter, the only representations relating to the Target the accuracy of which are a condition to the Availability of the facilities on the Closing Date are (i) representations made with

respect to the Target (but only to the extent the Sponsor has the right to terminate or decline to close the acquisition as the result of a breach of such representations) and (ii) certain Specified Representations, as defined. The list of Specified Representations is a matter of some negotiation, but generally would include representations relating to incorporation or formation; organizational power and authority to enter into the documentation relating to the facilities; due execution, delivery and enforceability of such documentation; solvency; no conflicts with laws; charter documents or (in some instances) material agreements; Federal Reserve margin regulations; OFAC; FCPA; USA PATRIOT Act; the Investment Company Act; status of the Senior Facilities as First Lien Senior Debt; and Perfection of Security Interests. Also sometimes called SunGard Language.

**Spin-off:** the division of a business into two or more separate legal entities. Also the entirely unnecessary derivation of a film, television show or band from another such artistic endeavor, but with far less inspiration than the original (see, e.g., "Joey").

**Sponsor:** the private equity firm whose fund is the purchaser in a Leveraged Buyout, or the primary holder of the equity interests in a particular Issuer/Borrower. The Sponsor representative in a meeting will be the one asking why things can't be done faster.

**Sponsor/Borrower Buy Backs:** see Buy Back.

**Spot Market:** a market in which Commodities are purchased and sold for cash and delivered "on the spot" or very soon after the sale. Also called a "cash market." A sale on the Spot Market is known as a "spot sale." A company sells Commodities on a "contracted" basis rather than a "spot" basis if it enters into a contract to sell the Commodities over a period of time at a specified price or pursuant to a specified price generating formula.

**Spot Price:** the price paid to the seller of a commodity in a Spot Market, which price may fluctuate hourly or even minute-to-minute, depending on the structure of the Spot Market.

**Spread:** another name for the Underwriting Discount.

**SPV:** acronym for Special Purpose Vehicle.

**Stabilization:** the process by which a Lead Manager supports the immediate secondary market performance of a new issue of Securities. This can be done either by over-allotting Securities, or going "short," for the account of the syndicate where the shortfall is covered through secondary market purchases by the Lead Manager, or "going long" for the account of the syndicate, where the long position is subsequently either distributed to the syndicate or sold in the secondary market for the account of the syndicate.

**Stale:** see Staleness.

**Staleness:** a term referring to the dates on which Financial Statements go Stale. Once Financial Statements go Stale, they can no longer be included in an SEC filing (and the SEC will no longer declare the Issuer's Registration Statement effective), meaning the Issuer has to wait until the Financial Statements for the next quarter are completed in order to file a Registration Statement or have the SEC declare a Registration Statement effective. See Latham & Watkins Desktop Staleness Calendar, available at [www.lw.com](http://www.lw.com). See 135 Day Rule.

**Standard & Poor's:** another name for S&P.

**Standby Letter of Credit:** a Letter of Credit the purpose of which is to provide credit support only in the event of a performance Default by the account party (*i.e.*, the Borrower) or some other contingent event. Compare Commercial Letter of Credit.

**Standstill or Standstill Period:** when First Lien creditors and Second Lien creditors enter into an Intercreditor Agreement, the Second Lien creditors agree that even if their deal is in Default, they will not exercise remedies (*i.e.*, they will "Standstill") with respect to the Collateral for a certain period of time. If the Second Lien creditors are Lenders under a Credit Facility, the Standstill Period likely will be for a given number of days (often 180 days). If the First Lien creditors don't start exercising remedies on a material portion of the Collateral within the Standstill Period, then the Second Lien creditors get to do so. Practically speaking, the First Lien creditors will always start doing so before the expiration of the Standstill Period, so, effectively, having a Standstill Period that expires after a while encourages the First Lien to get things going. If the Second Lien creditors are Bondholders, the Standstill Period may continue until the First Lien obligations are discharged (although some Bond transactions do follow the practice under Credit Facilities). If the Standstill is permanent, the Second Lien is really agreeing to always let the First Lien run the show (which is sometimes known as a Silent Second).

**Staple Financing:** a financing package being offered up by the investment bank that is acting as the sell-side advisor in connection with the auctioning of a Target company. Called "staple" because the financing package (the Commitment Papers) is "stapled" to the bid materials that are sent out to potential buyers.

**Staple Papers:** Commitment Papers being used in a Staple Financing.

**Statements on Auditing Standards:** the rules directing auditors how to audit and report on private companies promulgated by the AICPA.

**Step Down:** reduction in the percentage used for purposes of the Excess Cash Flow Sweep (and sometimes the Equity Sweep) if the Borrower is able to achieve an agreed upon Leverage Ratio. Also used in Bonds

to describe the decrease in the Interest Rate that applies following an upgrade in the Ratings of the Issuer by one or more of the Ratings Agencies.

**Step Up:** the increase in Interest Rates on a Bridge Loan that occurs if the loan is still outstanding after certain increments of time. Also used in Bonds to describe the increase in the Interest Rate that applies following a downgrade in the Ratings of the Issuer by one or more of the Ratings Agencies.

**Stock Purchase Agreement:** the acquisition agreement pursuant to which the acquirer is purchasing the shares of the Target. This is sometimes referred to as the "SPA" or the "PSA" (which is an acronym for Purchase and Sale Agreement). Not to be confused with a Purchase Agreement in the Securities offering context.

**Straight-Line Basis:** to Amortize or Depreciate an asset on a "straight-line basis" means to Amortize or Depreciate the asset in equal amounts at regular intervals over the course of the Amortization or Depreciation calculation period.

**Strategic Buyer:** a corporate acquirer in an acquisition that is acquiring for strategic reasons (e.g., to eliminate a competitor or expand into a new market). Strategic Buyers often have an advantage in an auction since they usually expect to benefit from Synergies if the deal goes through and can therefore pay more for the Target. Compare Financial Buyer.

**Structural Subordination:** non-Contractual Subordination created where a Slug of debt is issued by a Holding Company or other parent entity, with no Guarantee from the Operating Subsidiary that is the Issuer/Borrower under other indebtedness, thereby becoming effectively Subordinated to the debt held closer to the operating assets (since all the Operating Subsidiary's debt gets paid in full in a Bankruptcy before anything is divided up to the Holding Company). See Subordination.

**Structure Flex:** the changes that the Arranger may make to the structure (i.e., the type of debt offered, or the location of the Borrower within the credit group) of the Credit Facilities provided for in the Commitment Letter if needed to facilitate the Successful Syndication of the Credit Facilities. Holdco Flex is a type of Structure Flex.

**Structure Memorandum:** a memorandum prepared by the tax advisors/counsel to the bidder in an LBO which describes the transaction structure and the tax consequences thereof. Provided to the Lenders (or at least those becoming Lenders in Syndication) with a Reliance Letter.

**Subordinate** or **Subordinated:** see Subordination.

***Subordinated Debt:*** sits in-between Senior Debt and equity in the Capital Structure. Generally raised by selling High Yield Bonds or through a Mezzanine Financing. Subordinated Debt always has looser Covenants than the Senior Debt, which is compensated for with a higher Interest Rate.

***Subordinated Intercompany Note:*** a promissory Note evidencing intercompany debt that provides for the Subordination of the intercompany debt to the obligations under the Credit Agreement and the other loan documents. Serves a variety of purposes such as clearly keeping Affiliate entities out of the same class of Lenders as Credit Agreement Lenders in a Bankruptcy, and also creating a piece of Possessory Collateral (the Note itself) that can be put into the Collateral Agent's vault.

***Subordination:*** types include Contractual Subordination, Lien Subordination, Structural Subordination and Effective Subordination. See also Junior Debt and Senior Debt.

***Subrogation:*** the substitution of one party in the place of another party with respect to a claim by that other party against a third party, so that the substituted party succeeds to the rights of the other party with respect to such claim. Confusing, isn't it? An example would be if an insurer pays an insurance claim to a third party payee on behalf of an insured party, and then "steps into the shoes of" the insured party to make a counterclaim against the third party payee in order to get back all or a portion of the payment.

***Subsidiary Guarantor:*** subsidiary of the Borrower that acts as a Guarantor.

***Substantive Consolidation:*** the pooling of the assets and liabilities of separate legal entities in a Bankruptcy. Creditors of substantively consolidated entities will have a claim against the single pool of assets and guaranty claims. The notion that a Bankruptcy court can order the Substantive Consolidation of the assets and liabilities of multiple Affiliate debtors dates back many years. The remedy of Substantive Consolidation is "equitable," not statutory, and is not the same thing as Piercing the Corporate Veil. Whether it will be ordered in a particular case will turn on how the court chooses among and applies standards that have developed as judge made law, rather than through analysis of a statute. Historically, Substantive Consolidation has been reserved for cases where (i) the financial affairs among Affiliates are so entangled, whether by design or sloppy business practices, that an accurate assessment of which entity is obligated to a particular creditor or group of creditors cannot be determined or could only be determined at undue cost or (ii) creditors generally had dealt with the enterprise as a single consolidated entity (rather than separate legal entities). Courts routinely state that Substantive Consolidation is to be granted "rarely," though courts routinely permit Substantive Consolidation

when it is consensual. Over time, a variety of standards or “tests” for when Substantive Consolidation should be ordered over an objection have been articulated. See *In re Owens Corning*, 316 B.R. 168 (Bankr. D. Del. 2004), reversed by 419 F.3d 195 (3d Cir. 2005 ), or just give Latham a call.

**Successful Syndication:** in Commitment Paper land, a number of things happen once the Arranger has achieved a Successful Syndication. For example, Flex rights terminate. Successful Syndication refers to the level of remaining commitment held by the Arranger. For example, if the original commitment is \$500.0 million, Successful Syndication may be defined as the point at which the Arranger has Syndicated (or assigned away) commitments such that it is only on the hook for \$50.0 million.

**Summary:** the summary section of the Offering Memorandum. It usually includes a short description of the Issuer, its strengths and strategy, a summary of the terms of the Securities and the offering and certain summary financial information. For Item 503 of SEC-Registered Offerings, Regulation S-K describes the information that should be included in the Summary. See also Box.

**SunGard Language:** another name for Specified Representations language, so-named because SunGard was the first deal to contain those provisions. Also includes a second part that provides that the failure to Perfect a Security Interest in any Collateral (other than Possessory Collateral which must be delivered, and Collateral that can be Perfected by filing a Financing Statement) will not be a Condition Precedent to Closing a financing unless the Borrower does not use some specified level of effort to Perfect.

**Superholdco:** a Holding Company that is the parent (or the parent’s parent, etc.) of another Holding Company. It is often seen wearing a cape and tights. A Superholdco is generally not a Guarantor under any Credit Agreement or Indenture for debt incurred or issued at any of its subsidiaries. See Holding Company.

**Supermajority Voting:** situation where a percentage of the Lenders under a Credit Agreement greater than a simple majority (usually 65 percent to 80 percent) is required for certain material Amendments.

**Suretyship:** the undertaking by a party (the “surety”) to be liable for the debts or other obligations of another party. The terms surety and Guarantor are often used interchangeably and a Guarantor is a type of surety under the UCC. Technically speaking, when the secondary obligor is directly liable under a three-party contract with the primary obligor and the obligee, such contract is considered a Suretyship contract, whereas if the secondary obligor is liable under a two-party contract with the obligee, with the primary obligor being obligated to the obligee separately, such contract is considered a Guarantee. A “Suretyship defense” is a defense under which a surety or Guarantor

claims that it is no longer liable under its secondary obligations due to changes to the underlying obligation between the obligee and the primary obligor.

**Swap:** an Over-the-Counter transaction in which the parties agree to exchange specified cash flows at specified intervals (e.g., one party agrees with the other party that it will exchange a Floating Rate for a Fixed Rate on a specified notional amount of principal at the end of each quarter). This is a tool that Borrowers use to manage their exposure to changes in Interest Rates, currency fluctuations and prices of Commodities.

**Swapping Seconds:** not as exciting as it sounds, typically refers to an Intercreditor arrangement whereby Term Lenders or Secured Note Holders have a First Lien on all fixed asset Collateral and a Second Lien on inventory, accounts receivable, and similar Collateral, and ABL Lenders have the inverse (a First Lien on all inventory, receivables, and similar Collateral, and a Second Lien on all fixed asset Collateral).

**Swing Line Loans/Swingline Loans:** not nearly as cool as they sound. This is a short-term revolving sub-facility provided as a convenience to Borrowers as part of a Revolving Facility. It permits smaller amounts to be borrowed on a same-day basis. All Swing Line Loans are Base Rate Loans.

**Syndicate:** as a verb, the process whereby an Arranger of a Credit Facility assigns (sells) the loans and commitments to other banks and funds. As a noun, the group of banks and funds that have become the Lenders under the Credit Facility or a group of broker-dealers who have become Underwriters for a stock or bond offering. See Bookrunner and Syndication.

**Syndicate Covering Transaction:** a transaction in connection with a Securities offering whereby the managing Underwriter places a bid or effects a purchase of shares on behalf of the underwriting Syndicate in order to reduce a Syndicate Short position.

**Syndicate Short:** managing Underwriters in public Equity offerings generally over-allot the shares—that is, they accept orders for more shares than are being sold by the Issuer in the offering. These extra orders are referred to as the Syndicate Short because the Underwriters are Short by this number of shares. A similar practice occurs in Convert Deals. See also Naked Short, Green Shoe and Refreshing the Shoe.

**Syndication:** the process by which the Arranger sells loans and/or commitments to a number of Lenders. Remember that the Arranger is in the distribution business and not the storage business.

**Syndication Agent:** a title granted to a Lender during the Syndication process that carries no responsibilities (similar to a Documentation Agent). Essentially, it is a means for a Lender to get its name on the cover of a Credit Agreement and receive League Table Credit.

***Syndication Agreement:*** an agreement among Arrangers (in a deal with more than one of them) as to how they will sell off their unsyndicated loan exposure after a transaction has closed. Under a Syndication Agreement, the Arrangers might agree that for a limited period of time (usually one to two months) none of them will sell the loans they share without giving the other Arrangers a right to sell on a pro rata basis. The purpose is to bring order to the Syndication process and avoid the chaos associated with a fire sale where all the Arrangers are simultaneously selling loans at varying prices.

***Syndication Date:*** the date on which Syndication closes.

***Synergies:*** the cost savings and other efficiencies that are projected to materialize when two companies in the same industry are merged. Examples include reduced SG&A, increased purchasing power, more efficient utilization of factories, warehouses and distribution centers, and headcount reduction in the sales force. See Strategic Buyer. Whether or not Synergies can be taken into account in the calculation of Financial Covenants is often hotly debated, and in particular whether or not any Synergies need to be verified by someone other than the Borrower. This debate arises most frequently in two situations: (i) when an acquisition has been made during a Financial Covenant testing period — in these circumstances the question is whether or not one should assume for calculation purposes that the acquisition was made at the start of the testing period and, if so, should the Borrower get the benefit of Synergies estimated to be, but not yet, realized; and (ii) when a Carveout to a restriction on acquisitions allows an acquisition if certain tests are met including pro-forma historic and/or future financial covenant compliance — again, the question here is should the Borrower get the benefit of anticipated Synergies in these calculations?

***Synthetic Letter of Credit:*** a Letter of Credit under a facility that has been “pre-funded” by the Lenders on the Closing Date (with the proceeds from such funding typically being deposited in a cash collateral account) rather than being funded on a later date upon the occurrence of a contingent event requiring payment under the L/C to the third party. See Letter of Credit.

***T+ Legend:*** under Rule 15c6-1 of the Exchange Act, trades in the secondary market are required to settle (*i.e.*, you are supposed to close) two business days after Pricing, unless the parties otherwise agree. So in any deal where the Closing is pushed out beyond the mandated two days, a T+ Legend should be included in the Prospectus or Offering Memorandum.

***Tack-On Offering:*** an issuance of Bonds with terms that are identical to a previously issued series of Bonds, under the same Indenture, such that the additional Bonds are (or will soon become) Fungible with the initial Bonds and hence, share a single CUSIP Number. With a single

CUSIP Number, the additional Bonds issued in the Tack-On Offering can trade interchangeably with the previously issued Bonds, which improves the pricing of the Tack-On Offering due to increased liquidity in the aftermarket. However, in order to ensure Fungibility, investors in the additional Bonds issued in the Tack-On Offering must buy them with accrued Interest in an amount equal to the amount of Interest that has accrued on the initial Bonds as of the date of purchase of the additional Bonds. So make sure to consult your Latham tax attorney when structuring a Tack-On Offering. See Latham & Watkins Client Alert No. 1417, *New Treasury Regulations Make it Easier to Issue Tack-On Bonds or Loans* (February 22, 2013), available at [www.lw.com](http://www.lw.com).

**Tag Along Rights:** the contractual rights of a minority shareholder to be included in (or to tag along in) a transaction where the majority shareholder is selling its interests to a third party. Compare Drag Along Rights.

**Tail Fee:** typically set forth in the Engagement Letter, the Tail Fee is an agreed amount to be paid to an Underwriter or Initial Purchaser when the offering contemplated by the Engagement Letter is not completed and the issuer subsequently consummates another offering with a different Underwriter or Initial Purchaser. See Right of First Refusal. Tail Fees and other deferred compensation arrangements for Underwriters in connection with public offerings are subject to regulation by FINRA.

**Tail Period:** the survival period in the Engagement Letter, often used to refer to the period of time the Issuer is on the hook to pay the fees specified by the Alternative Transactions Language.

**Tail Provision:** term included in an engagement letter (usually of an investment banker) that allows a professional to be paid in certain instances notwithstanding the fact that the engagement has ended.

**Take and Hold:** the basis on which a Lender acquires loans and/or commitments without the intention to resell. Contrast to Syndication.

**Takedown Fee:** another name for Funding Fee.

**Target:** the company or business being purchased in a transaction.

**Target Hold:** the principal amount of a Credit Facility that a Lender wants to sell down to during Syndication. If all of the Lenders sell down to their Target Hold, it is a Successful Syndication. Contrast to Minimum Hold.

**Target MAC:** a Business MAC focused specifically on the Target.

**Tax Gross-Up:** a provision in a Credit Agreement that increases the amount of any payment by a Borrower to a Lender so that, after payment of applicable withholding taxes, the Lender receives what it would have received if no withholding taxes had been imposed. A Tax Gross-Up generally protects Lenders that are not otherwise subject to

tax in the Lender's jurisdiction from the possible imposition, after the Closing Date, of withholding taxes by a taxing authority.

**Tax ID Number:** a company's Federal Employer Identification Number (FEIN). One of the items of information a Lender must obtain from the Borrower in order to comply with Patriot Act Requirements.

**Tax Redemption:** under an Indenture, if the Issuer (and sometimes a Guarantor) is required to pay Withholding Taxes on payments on the Notes (or a Guarantee) as a result of future changes in applicable tax laws, the Issuer may redeem all but not part of the Notes at par. In loan world, this is covered by the Yank-a-Bank.

**T-bills:** shorthand for Treasury Bills.

**Technical Amendment:** an Amendment that is necessary for technical reasons, perhaps because a Credit Agreement inadvertently prohibits a certain activity that the Borrower has always engaged in. To be distinguished from a substantive Amendment that, for instance, would be entered into to allow the Borrower to incur more debt or make more investments. In many cases, the difference between a Technical Amendment and a substantive Amendment is very much in the eye of the beholder. Both types of Amendment will be subject to the Amendment mechanics (including a Required Lender vote) of the Credit Agreement.

**Tender Offer:** an offer by tender by an Issuer to purchase its own Securities typically for cash or sometimes for other Securities or a combination of cash and Securities.

**Tenor:** the length of time between the creation of a Credit Facility or Bond and its final maturity.

**Term Loan:** a loan for a specific amount that the Borrower borrows on day one and then pays back according to a predetermined schedule. In Commitment Papers that include both Bridge Loans and Senior Secured Credit Facilities, there are generally two types of Term Loans: (i) the Term Loan component of the Senior Secured Credit Facility and (ii) the Rollover Loans into which the Bridge Loans flip at their maturity (generally one year after the Closing Date). See Term Loan Facility. Compare Revolver.

**Term Loan A:** another name for a Tranche A Term Loan.

**Term Loan B:** another name for a Tranche B Term Loan.

**Term Loan Facility:** a Senior Secured Credit Facility consisting of Term Loans, which are generally borrowed in their entirety at Closing and repaid according to an Amortization Schedule or a Bullet Maturity. See, however, Delayed Draw Term Facility.

**Term Loan Term Sheet:** generally, the Term Sheet for the Rollover Loans (see Term Loan) provided for in a Commitment Letter. This Term Sheet is generally an exhibit to the Bridge Facility Term Sheet.

**Term Sheet:** in the Commitment Letter context, the exhibits and annexes attached to a Commitment Letter that detail the terms of the Senior Secured Credit Facilities and the Bridge Facility.

**Term-Out Option:** an option of a Borrower to convert a Revolver (commonly a short-term Revolver of 364 days) to a Term Loan.

**Testing the Waters:** technically, in the context of a registered Securities Offering by an EGC, the process of making oral or written offers to Qualified Institutional Buyers and institutional accredited investors before or after the initial filing of a Registration Statement. See JOBS Act. The term is also used more broadly in the context of public and private offers to refer to meetings with investors prior to the distribution of a Red.

**Third Party Beneficiary:** an entity that is entitled to the benefits of some or all of the terms of a contract without actually being a party thereto. If you want there to be a Third Party Beneficiary, the contract should say so, in which case you have an "express third party beneficiary" (and if you are the Third Party Beneficiary, that's the type you want to be). If you don't want any Third Party Beneficiaries, the contract should also say that.

**Tick Mark:** refers to the letters (e.g., "A," "B," "C") accountants write next to accounting books and records data that appear in the Offering Memorandum as part of the Comfort Letter. Each Tick Mark represents a negotiated procedure designed to demonstrate a "reasonable investigation" with respect to Numbers that are not covered by the text of a Comfort Letter. Each Tick Mark explains how the given number was verified by the accounting firm as part of the comfort process. For instance, the auditor might say that it "compared the number in the disclosure to the audited financials and found them to be in agreement."

**Ticking and Tying:** the procedure of providing Tick Marks in a Comfort Letter.

**Ticking Fee:** a fee associated with a long-term commitment to provide a Bridge Loan or Credit Facility, which starts accruing the day the Fee Letter is signed (or a specified number of days thereafter) and terminates when the underlying transaction is either consummated or terminated. The Ticking Fee is set forth in the Fee Letter.

**TLA:** shorthand for Tranche A Term Loans.

**TLB:** shorthand for Tranche B Term Loans.

**Toggle Facility:** a Credit Facility that contains a PIK Toggle.

**Tombstone:** a gift (often made of lucite) handed out to senior deal participants after the Closing to commiserate and thank them for all of the hard work of their more junior colleagues on the deal. It makes a nice decoration for your office. Will not biodegrade. Sometimes called a Deal Toy.

***Tombstone Ad:*** a written advertisement for publicity purposes placed by Underwriters after Closing of a Security offering. The Tombstone Ad provides the basic details about the issue and, in order of importance, the Underwriters involved in the deal. This advertisement gets its name from its black border and heavy black print.

***Topco:*** shorthand for “top company,” this refers to the ultimate parent in a Credit Group or other group of companies.

***Total Cap:*** see Cap.

***Trade Letter of Credit:*** a Letter of Credit issued for the purpose of providing the principal payment mechanism for the purchase of goods through the presentation of documents to the Issuing Bank.

***Tranche:*** this term, which means “slice” in French, refers to an individual class or series of Bonds within an offering (which may have different ratings) or to individual Credit Facilities within the same Credit Agreement (e.g., a single First Lien Credit Agreement may have a Tranche A Term Loan, a Tranche B Term Loan, a Delayed Draw Term Facility and a Revolving Facility, each of which is a separate loan Tranche).

***Tranche A Term Loans:*** Term Loans that are structured to appeal to the commercial bank loan market, for instance, by featuring meaningful Amortization. Prior to the entrance of Institutional Investors into the loan market in the early 1990s (at which point Tranche B Term Loans became more popular), most Syndicated Term Loans were sold to commercial banks as Tranche A Term Loans.

***Tranche B Term Loans:*** Term Loans that are structured to appeal to Institutional Investors (e.g., “hedge funds”) who are more focused on keeping their funds invested at attractive Yields than on Amortization. Tranche B Term Loans typically Amortize at a rate of 1 percent per year (or, in the case of Second Lien Facilities, have no Amortization), mature six to 12 months after the maturity of any Tranche A Term Loans and have a higher Interest Rate than the Tranche A Term Loans of the same Borrower.

***Transfer Agent:*** an agent of the Issuer who keeps records of issued Securities and is responsible for issuing and cancelling certificates for transferred Securities. The Transfer Agent typically plays the role of registrar, maintaining a register of the holders of each Security.

***Treasury Bills:*** Securities offered by the US Treasury.

***Tree:*** a perennial plant with a woody main stem. In the acquisition finance context, Trees are references to different bidders or financing sources. If a company puts itself up for sale (in an auction), there will be multiple bidders (generally Sponsors, but sometimes Strategic Buyers) looking at the Target, and each bidder will in turn be examining possible financing from a variety of banks. So if Sponsor A and Sponsor B were

looking at the Target, and each had two possible financing sources (drafting Commitment Papers), there would be four financing Trees. Ideally, at least three of those Trees would be using Latham & Watkins.

**Triple Hook:** refers to receiving a CCC rating from the Ratings Agencies.

**True Sale:** a transaction in which actual legal title to an asset is transferred, as opposed to the asset being loaned or pledged as Collateral in a financing transaction. The issue of whether a transaction is a True Sale or a financing has Bankruptcy implications, because if a transferor goes Bankrupt, unless the asset in question is deemed to have been sold in a True Sale transaction, the Bankruptcy court can determine that the asset is still owned by the transferor and can therefore be included as part of the Bankruptcy assets that are distributed to creditors.

**Trust Indenture:** same as Indenture.

**Trustee:** performs as the Bond equivalent of a Credit Agreement Administrative Agent. The Trustee has certain assigned duties and rights under the Indenture that become particularly important following Defaults or Events of Default. Unlike an Administrative Agent, a Trustee will rarely own any of the underlying securities and will not take any action unless it is provided with specific direction and indemnification from the bondholders.

**Turn:** (i) banker slang for a unit of measurement equal to the LTM EBITDA of a Borrower, often used with reference to leverage (e.g., a banker may ask you to increase a debt Basket by “three Turns” of EBITDA. If the Borrower’s LTM EBITDA was \$100.0 million, that Basket should be increased by \$300.0 million). (ii) The process of making changes to and redistributing a document following a round of comments—usually requested in a half-time timeframe, as in “do you think we will see the next Turn by tomorrow morning our time?”

**UCC:** the Uniform Commercial Code. The UCC is one of a number of uniform acts that have been promulgated in conjunction with efforts to harmonize the law of sales and other commercial transactions in all 50 states within the United States, although each state’s version of the UCC may be slightly different from another’s. The UCC deals primarily with transactions involving personal property. See Larry Safran.

**UCC Diligence Certificate:** another name for Perfection Certificate.

**UCC-1:** the precise form of the filing required to Perfect by filing.

**UCC-3:** also known as a “UCC-3 termination statement,” this is the form of filing made to terminate or release (and in some states, amend) Security Interests.

**Umbrella Partnership Real Estate Investment Trust:** a REIT that holds all or substantially all of its assets through an “operating partnership” or

“OP.” The value of one limited partnership unit in an OP, or “OP unit,” is generally intended to equal the value of one share of REIT stock, and a distribution made with respect to an OP unit will generally equal the dividend paid with respect to a share of REIT stock. Owners generally are able to contribute their real estate to an operating partnership on a tax deferred basis in exchange for OP units. Holders of OP Units will typically have a right to cause the operating partnership to redeem the OP units for cash (based on the trading price of a share of REIT stock) after a period of time, subject to the REIT’s right to issue shares in exchange for such units (generally on the basis of one share for one OP unit). Thus, the UPREIT structure provides REITs with a non-cash “currency” to acquire real estate assets in a manner that is attractive to property owners. Although the redemption or exchange of OP units for REIT stock will be a taxable transaction for a holder, contributing property to an operating partnership is attractive because it allows a property owner to diversify its investment on a tax-deferred basis while providing an opportunity for liquidity in the future.

***Undersecured Claim:*** a Secured Claim the amount of which is more than the value of the creditor’s interest in the Collateral securing the claim. Under Bankruptcy Code Section 506(a), a claim that is secured by Collateral is bifurcated into two claims: a Secured Claim in the amount of the value of the interest in the Collateral and an Unsecured Claim in the amount of the shortfall or deficiency.

***Underwriters:*** the investment banks that buy Securities in the initial purchase from the Issuer and then immediately resell them to the public in a public offering. More technically, and in brief, Section 2(a) (11) of the Securities Act defines an Underwriter as any person who has purchased a Security from an Issuer or a controlling person of an Issuer with a view to distributing the Security.

***Underwriting Agreement:*** the contract pursuant to which Underwriters agree to purchase Securities from an Issuer. In Rule 144A Financings and Regulation S offerings, the comparable contract typically is referred to as a Purchase Agreement.

***Underwriting Discount:*** the money the Underwriters make from a Securities offering. Underwriters make their money by selling the new Securities at a markup from what they paid. For example, the Underwriters might buy each share in an IPO from the Issuer for \$16.50 and sell it into the market at the offering price of \$20. Here, the Underwriting Discount (or Spread) is \$3.50 per share.

***Underwriting Fee:*** the fee paid to the Arranger for arranging and underwriting the Credit Facilities. Calculated as a percentage of the Credit Facilities that are being provided. Also known as an Arranger Fee.

**Undrawn Commitment:** in a Revolving Facility or Delayed Draw Term Facility, the loans the Lenders have agreed to make available to the Borrower, but that the Borrower either has not yet requested, or in the case of a Revolving Facility, may have requested but has paid back (and therefore has the option to reborrow in the future). Interest is not payable on undrawn committed amounts, but a Commitment Fee will be due in some amount lower than the Interest that would be payable if the loans were drawn. The Commitment Fee compensates the Lenders for keeping the funds available for the Borrower.

**Unencumbered:** free from encumbrance. Assets that are not subject to a Lien are Unencumbered assets.

**Unrestricted Subsidiaries:** subsidiaries to which most of the Indenture or Credit Agreement Covenants do not apply. For this reason, the Covenants place a firewall between the Restricted Subsidiaries and the Unrestricted Subsidiaries, and transactions between an Issuer/Borrower and its Unrestricted Subsidiaries will be treated similarly to transactions with unrelated parties. See Restricted Subsidiaries.

**Unsecured Claim:** a right of payment (or, in Bankruptcy, a claim) held by a creditor that is not secured by a Lien on any of the debtor's assets, or for which no Collateral is held by the creditor.

**Unsecured Creditor:** Creditors who hold Unsecured Claims.

**Upfront Fee:** an alternative way of structuring the economics of an Original Issue Discount that in certain instances is preferable from a tax and Bankruptcy perspective.

**UPREIT:** acronym for Umbrella Partnership Real Estate Investment Trust.

**Upstream:** from a subsidiary to a direct or indirect parent company; for example, a Guarantee granted by a subsidiary to support the debt of the parent is an Upstream Guarantee. See also Cross-stream and Downstream.

**Use of Proceeds:** the specification in the Term Sheet (or Prospectus or Offering Memorandum) of what the proceeds of the financing will be used for, and a Rep and Covenant by a Borrower in a Credit Agreement (or an Issuer in an Underwriting Agreement) that this is in fact where proceeds will go.

**Variable Rate Debt Obligation:** a long-term Security, often a municipal Bond, that has interest that re-sets on very short terms, usually seven, 28 or 35 days. At the end of that period, the Interest Rate is reset through a Dutch Auction. The holder can at the end of any Interest Period put the Bond back to the Issuer (*i.e.*, cause the Issuer to buy the Bond). The Bond is then quickly remarketed (another buyer is found). If no other buyer is found, a bank which has provided a backup facility for just that event puts up the money to buy the Bond, and remarketing efforts continue. See also Auction Rate Securities.

**Voluntary Prepayments:** prepayments of a Term Loan made at the Borrower's option that are not required pursuant to the Amortization Schedule. Compare Mandatory Prepayments.

**Waiting Period:** the period in a registered Securities Offering after the Registration Statement has been filed with the SEC when offers are permitted but sales are prohibited (e.g., marketing period). This is the period when the SEC reviews the Registration Statement. The Issuer must continue to be very careful about what it says during the Waiting Period.

**Waivable Mandatory Prepayment:** in some Credit Agreements, Mandatory Prepayments can be waived by the First Lien Lenders. The rejected amounts may be offered to the Lenders under the Second Lien Facility and, if rejected again, the Borrower is typically permitted to keep the funds. In some cases, prepayments that have been waived by both the First Lien and Second Lien Lenders are required to be rerun through the prepayment Waterfall without any right for Lenders to waive. In other cases, the Borrower can just keep the proceeds without offering them to any other Lenders.

**Waiver:** a waiver of a past Default under a Credit Agreement or Indenture. In contrast to an Amendment that actually amends the text of a Credit Agreement or Indenture going forward, a Waiver generally applies to a one-time Default and may last only for a limited period of time. Also, Waivers tend to be given after a Default has occurred whereas Amendments are granted prior to the occurrence of a Default (ideally). Amendments are generally better—plan ahead if you can.

**Warrants:** derivative Securities setting forth a time period within which the holders may buy Securities from the Issuer at a given price (the "strike" or "exercise" price). Sometimes a feature of Mezzanine Financing that provides a higher return to Mezzanine investors.

**Waterfall:** sometimes called a "payment waterfall," generally refers to the order of application of funds or proceeds. Think of the funds in question as water running down a flight of stairs with a bucket placed on each step—the water (money) flows to the top step first and fills that bucket before the overflow continues on to the second step, and fills that bucket before proceeding to the third step, etc. So, if your deal is that you get paid before someone else, your proverbial bucket will be placed higher in the Waterfall. The guy most likely to be left with an empty bucket (or in practice, an unpaid obligation) is of course whoever is at the bottom of the Waterfall. Similar to choosing a seat on the water rides at Six Flags, the goal of negotiating your position in a Waterfall is not to come out dry.

**Weighted Average Life:** this is shorthand for "weighted average life to maturity" which is calculated based on the average of the time remaining for the remaining principal payments on a debt obligation. In the case of most High Yield Bonds, this is easy since they do not have

any Amortization requirements—it is simply the time remaining until the Maturity Date of the Bonds. Also just known as the Average Life.

**Well Known Seasoned Issuer:** WKSIs are large-scale, seasoned Issuers that benefit from special treatment in public Securities offerings. In particular, WKSIs are able to make offers to sell Securities before a Registration Statement has been filed and without regard to previously applicable Gun Jumping restrictions. In addition, WKSIs are entitled to Automatic Shelf Registration on demand without SEC review. WKSIs were introduced as part of Securities Offering Reform. See Latham & Watkins publication, Christmas in July—the SEC Improves the Securities Offering Process (August 2005), available at [www.lw.com](http://www.lw.com).

**WGL:** acronym for Working Group List. The list assembled early in every deal showing all parties and their respective roles. In 15 years, the junior-most people on the list will be Masters of the Universe.

**White Knight:** in a hostile takeover situation, a friendly bidder who makes a rival bid for the Target in an effort to prevent a hostile bidder from acquiring the Target.

**Whitelist:** a list, put together by the Borrower or the Sponsor, of Lenders to whom a certain loan may be assigned. A Whitelist can be more restrictive than a Blacklist, because it is inclusive rather than exclusive—meaning only Lenders included on the Whitelist can receive Assignments.

**Whitewash:** the name given to the statutory process which private companies in many European jurisdictions could go through in order to be able to give lawful Financial Assistance. Involved lots of pieces of paper. No longer applicable in many European jurisdictions given recent changes to the Financial Assistance provisions in those countries.

**Withholding Tax:** a tax that is generally required to be collected and paid by a payor making a payment to a recipient. In some cases, the recipient is considered the primary obligor of the tax, and the recipient can also be held liable for the tax if the payor fails to pay the withholding tax. The payor usually deducts an amount from a payment, and remits such deduction to the taxing authority. In some cases, withholding taxes may be payable if there is a deemed payment instead of an actual payment. Withholding taxes are often reduced or eliminated under a double taxation treaty.

**WKSI:** acronym for Well Known Seasoned Issuer.

**Working Capital:** a measure of a company's short-term Liquidity, calculated by subtracting current liabilities from current assets.

**Working Capital Facility:** a Revolver used by the Borrower to fund working capital needs.

**Wrapped Bond:** a Bond that is insured by Monoline Bond Insurance.

**www.lw.com:** in the leveraged finance context, the best leveraged finance web site on earth.

**XBRL:** “eXtensible Business Reporting Language” or “interactive data”—an open technology standard adopted by the SEC that facilitates the electronic tagging of data in Financial Statements so that it can be extracted easily and processed using an XBRL-compatible viewer. The SEC now requires all filers preparing Financial Statements in accordance with US GAAP to submit their Financial Statements with certain of their periodic reports and registration statements in the XBRL interactive data format.

**Xerox Language:** language in an acquisition agreement that protects the interests of the Lenders committed to financing the deal, particularly with respect to liability if the deal fails because the expected financing is unavailable. Xerox Language typically includes an agreement by the Target and the seller that (i) the sole and exclusive remedy with respect to the commitment parties is the payment of a specified reverse break-up fee; (ii) any action or proceeding involving any commitment party arising out of or relating to the acquisition, the committed facilities or the performance of any services thereunder is subject to the exclusive jurisdiction/venue of a federal or state court sitting in the County of New York; (iii) the Target will not bring or support anyone else in bringing any claim, action or proceeding in any other court; (iv) the Target waives any right to trial by jury in respect of any such claim, suit, action or proceeding and (v) the commitment parties are express third-party beneficiaries of the provisions in the acquisition agreement reflecting the foregoing.

**Yank-a-Bank:** a Credit Agreement provision that allows the Borrower to throw a Lender out of a Credit Facility if it won't agree to an Amendment. Certain Credit Agreement Amendments (including Amendments affecting pricing of the loans) cannot be achieved without approval of all Lenders, or all affected Lenders. Yank-a-Bank provisions enable the Borrower to squeeze out dissenting Lenders in a 100 percent vote situation so long as a majority of the Lenders has approved the Amendment. The “yanked” Lender is replaced with a new Lender who does approve the Amendment and is willing to purchase the outstanding loans and commitments of the yanked Lender, usually at Par.

**Yield:** the total rate of return to a Lender or Bond investor (which may include both Interest payments and accrual of Original Issue Discount or market discount). The Yield on a Bond may be higher or lower than the Coupon.

**YieldCo:** a public vehicle created for the purpose of holding and acquiring assets with a predictable cash flow stream in order to fund a regular and increasing dividend to public investors. YieldCos are typically created by publicly traded energy companies or private investment funds to hold conventional and renewable power projects that are not eligible for MLP treatment under the US tax code, but that have long-term contracts with creditworthy counterparties that produce a reliable cash flow stream. Some YieldCos use a tax-advantaged "Up-C" structure that borrows heavily from the structure used in UPREITs and some have incentive distribution rights, or "IDRs," which is a concept borrowed from the wonderful world of MLPs.

**YTD:** acronym for year-to-date.

**Zero Coupon Bond:** a Bond that is issued with substantial OID and calls for no Interest payments at all—just a single principal payment at maturity. See also Discount Notes.

**Zone of Insolvency:** no, this is not a bad TV sitcom. When a previously solvent Borrower gets close to insolvency, the courts have held that the board of directors' fiduciary duties morph to include the Borrower's creditors. Prior to entering the Zone of Insolvency, Borrowers do not owe their creditors any fiduciary duties.



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