

Cross-Border Private Placement Market

10 October 2014

Speakers

- The 2014 Edition of the Legal 500 UK states that Morrison & Foerster is “the best in the private placement market for issuers.”



Brian A. Bates

- Mr. Bates heads Morrison & Foerster’s leading private placement practice.
- In addition to having worked in private placement finance for 27 years, Mr. Bates continues to act as the sole "issuer-side" member of the Transactions Process Management Committee of the American College of Investment Counsel (ACIC) where he is a Fellow.



Scott D. Ashton

- Based in London, Mr. Ashton is very active in the cross-border private placement market and is also a member of the Loan Market Association working group on private placements.
- Mr. Ashton is included in Financial News' 2014 list of 40 under 40 Rising Stars in Legal Services.

The Global Private Placement Market



- After a record-breaking year in 2012, volume in 2013 also set a new record at \$58.4 billion. Of that total, \$27.9 billion was invested in US issuers, \$9.6 billion in UK issuers with the rest of the top ten rounded out by investments in companies in Australia, Canada, Germany, The Netherlands, Ireland, Italy, Switzerland and France plus 14 other jurisdictions.
- 2014 looks to be another strong year with volume exceeding \$40 billion through September.
- The traditional investor base of US insurance institutions is increasing allocations to private placements and new investors from other jurisdictions are also entering the market.

Market Participants

- Investors
- Placement Agents
- Issuers
- Counsel – issuer counsel and pre-designated investor counsel
- Other market participants

Other Funding Sources

- Bank loans
- Domestic and offshore public bonds
- Convertible bonds
- Hybrid bonds
- Other private markets – i.e., Schuldschein
- Mortgage finance
- Securitization

Financing Continuum

Private Offering

Public Offering



- Private placement (“insurance” or “debt” private placement)

- 144A offering
- Tranche from a EMTN or GMTN
- Standalone 144A
- 144A “program”

- SEC Registration OR
- 3(a)(2) Offering (for banks) OR
- Other Public Bonds

Less Liquid
Less time-consuming

More Liquid
More time-consuming

Funding Diversification

- Long term capital structure
- Reliable source of funding
- Maturity profile of debt / tranching
- Ability for delayed drawdown
- Fixed rate versus floating rate
- No minimum size (in contrast to other markets, i.e. Eurobond €300M minimum)
- Other currencies beside USD available
- Relationship lending versus public bonds

Advantages of long-term funding

- Locked-in financing and pricing
- Less administrative time and effort than almost constant bank refinancing
- Planning
- Ability to match long, lived assets to debt liabilities

Disadvantages of long-term funding

- Potential make-whole for early prepayment
- Ability to achieve amendments

Pricing

- Impact of Treasury yields
- Spread
- No up-front lender fees
- Transaction costs – lower than some alternatives

Currency

- Desire for US Dollars
- Cross-currency swaps
- Swapped notes
- Ability of certain investors to lend directly in other currencies

Rating

- Unlike public markets, no rating requirement
- NAIC (NAIC designations and reserve requirements)
- Private letter ratings
- Pre-designation option

Private Placement Process

- Standardized documentation
 - Model X Forms
 - Most transactions are documented pre-marketing
 - U.S. governing law (usually NY); English law has become an option
 - Term sheets vary in detail
- Individual investor decisions – no “agent bank” equivalent
 - Due diligence – confidentiality preserved given limited number of potential investors
 - Bilateral negotiations pre-circle via placement agent(s)
 - Monitoring of the investment post-closing

Benefits of Specialized Issuer Counsel

- Market expectation/desire
- Issuer can better control drafting of principal documentation
- Provides Issuer with objective, current market and legal expectations
- Effectively represents the Issuer's interests during pre-documentation
- Smoother, more efficient transaction process

Role of Pre-Designated Investor Counsel

- Experienced special counsel for investors usually pre-designated by issuer with advice from placement agents and issuer special counsel
- Pre-marketing phase
 - Reviews term sheet and issuer's bank facility
 - Advocates for "the market" on documentation and structural issues
 - Identifies potential investor resistance points (structure, documentation or commercial) for the issuer and the placement agent to evaluate before going to the market
- Marketing phase
 - Responds to inquiries from prospective investors regarding the term sheet, the proposed Note Purchase Agreement, the issuer's bank facility and other aspects of the transaction
 - Identifies important issues that arose in the pre-marketing documentation phase
- Post-circle phase
 - Negotiate final changes in documentation (if any)

Significant Covenants in Most Transactions

- Model X Forms
 - Financial information and reasonable access to management and auditors
 - “Housekeeping” covenants
 - Maintenance of *pari passu* ranking of Notes and any guarantees
 - Change in nature of business
 - Arms’ length affiliate transactions
 - Mergers, consolidations, amalgamations
 - “OFAC” provisions
- Other Restrictive Covenants
 - Financial covenants usually based upon covenant package in existing bank facility (if any)
 - Asset dispositions
 - Emergence of “Most Favored Lender” provisions
- Limitation on “priority debt” (structural subordination)
 - Subsidiary external borrowings
 - Secured debt

“Model Forms”

- Almost total market acceptance of the so-called Model Forms X-1 and X-2
 - Streamlines documentation process (template)
 - Investors focus on departures from relevant Model Form and substantive issues that are outside the form (primarily covenant package)
- Cross-border adaptation of Model Forms
 - Model X Form adopted in September 2004
 - Surprisingly few changes from domestic version, with particular emphasis on tax-related issues and certain “hot button topics” such as compliance with new U.S. anti-terrorism regulations
 - Easily adaptable to multi-currency transactions and investor swap arrangements re non-USD tranches
 - Model Forms X-1 and X-2 adopted in 2006
- New drafts of Model Forms are now used yet to be finalized
 - Mostly updates to “OFAC” provisions and delayed funding
 - LMA project currently under way to develop additional forms

Transaction Chronology

- Potential issuer, working with the placement agents, produces an Offering Memorandum (“Memorandum”)
 - Memorandum contains Term Sheet and most often a draft of a Note Purchase Agreement
- Note Purchase Agreement drafted by issuer counsel but with the review and reaction of pre-designated investors’ counsel
- Deal is marketed to investors, often through a “roadshow”
- Issuer and investors agree a final Note Purchase Agreement
- Issuer sells Notes to investors

Secondary Transfers

- Transferability
- Restrictions on transfers to competitors
- Buy and hold investors
- Current size of secondary market

Other Topics

- Secured Versus Unsecured Deals
- US GAAP or IFRS Reporting
- Question and Answer Period

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