



## SECONDARY MARKET TRADING UPDATE

### How to Navigate the Distressed “BISO”

Beginning on September 9, 2011, bank loan trades entered into on the basis of the Loan Syndication and Trading Association (the “LSTA”) Distressed Trade Confirmations are subject to Buy-in / Sell-out Provisions (“BISO Provisions”) similar to those already used in the LSTA Par/Near Par Trade Confirmation. As described below, the BISO Provisions may provide a “Performing Party” with a mechanism to expedite settlement if its trading partner is a “Non-Performing Party.” The BISO Provisions are set forth in Sections 16 through 19 of the LSTA Standard Terms for Distressed Trade Confirmations, published by the LSTA on September 9, 2011.

#### I. PERFORMING PARTY VS. NON-PERFORMING PARTY

A party to a distressed trade is a “Performing Party” if it delivers to the other party (i) its signature to the trade confirmation (the “Original Confirmation”), (ii) its signature to the “Settlement Documents”<sup>1</sup> (where the Performing Party is not drafting such documents), or drafts of the Settlement Documents (where the Performing Party is drafting such documents)<sup>2</sup>, and (iii) if the Performing Party is the Seller, the fully executed upstream documents within fifty business days<sup>3</sup> of the trade date in the Original Confirmation (the “Original Trade Date”) (the completion of items (i), (ii) and (iii) (where applicable) are a party’s “Settlement Delivery Obligations”). In addition, where the Seller is the Performing Party it must hold the relevant loans referenced in the Original Confirmation (the “Debt”) at the time of delivering a BISO Notice. A party that fails to perform its Settlement Delivery Obligations is deemed the “Non-Performing Party.”

#### II. DELIVERY OF BISO NOTICE

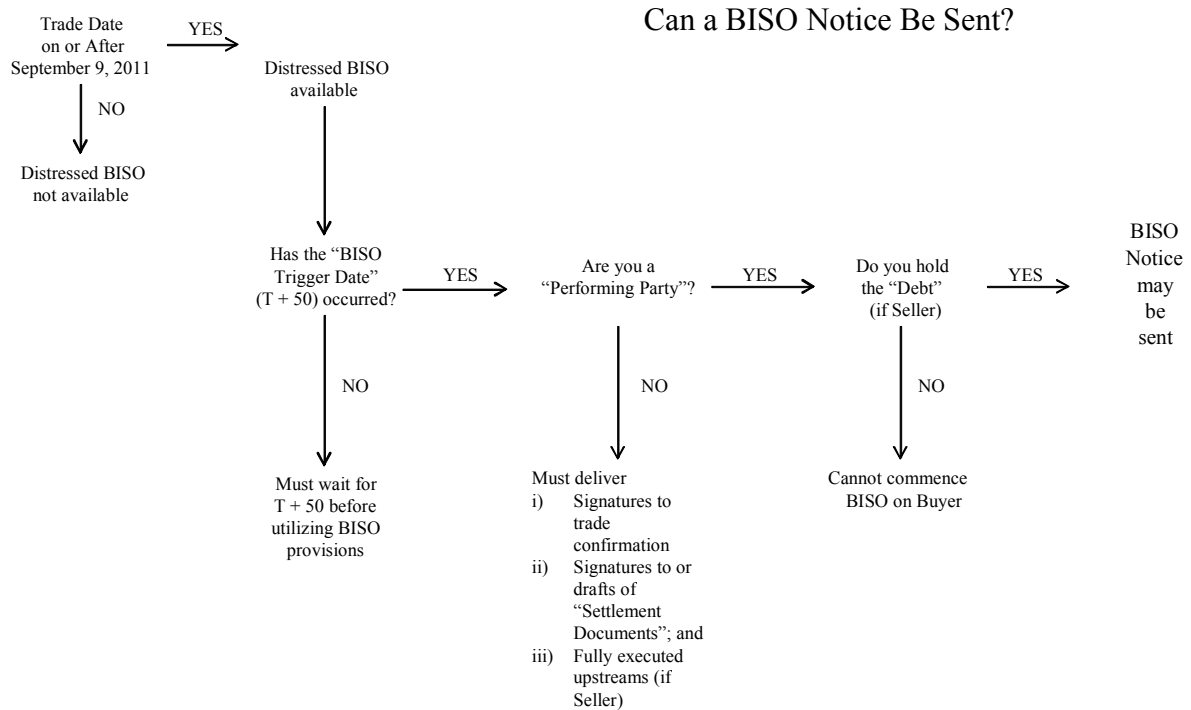
The Performing Party may deliver a BISO Notice to the Non-Performing Party that sets forth its intent to terminate the Original Confirmation and enter into a “Cover Transaction” to buy or sell, as the case may be, the Debt from a

<sup>1</sup> “Settlement Documents” means the assignment agreement, the purchase and sale agreement, the purchase price letter and any other instruments required to effectuate a transfer of the Debt from Seller to Buyer.

<sup>2</sup> If a counterparty returns signatures on the Settlement Documents, the drafting party has ten days to provide its signatures to such documents to the non-drafting party, otherwise it will be deemed a Non-Performing Party.

<sup>3</sup> In certain instances the fifty business day period may be extended: (i) if drafts are exchanged between forty and fifty business days after the Original Trade Date, a grace period exists of an additional ten days from the date the drafts are exchanged or (ii) if the parties elect for Buyer to draft and Buyer is provided with upstreams after T+40, Buyer is given an additional ten days to draft and Seller is given ten days to review drafts, resulting in a period of up to T+70.

different counterparty. If a Cover Transaction is effected, the Non-Performing Party may be liable for the price differential between the “Cover Price” and the price set forth in the Original Confirmation (the “Cover Damages”).<sup>4</sup>



### III. NON-PERFORMING PARTY’S ABILITY TO CURE

After receiving a BISO Notice, the Non-Performing Party may “Cure,” and thereby avoid responsibility for Cover Damages, by performing its Settlement Delivery Obligations within the “Cure Period” of twenty business days following receipt of the BISO Notice. If the Non-Performing Party is the Seller under the Original Confirmation and does not currently own the Debt, as an alternative to the Cure option it may deliver to the Buyer fully executed “Upstream Trade Confirmation(s)” (with the purchase price redacted) for at least the total amount of the Debt and with a trade date not later than five business days after the Original Trade Date. In that case, the Seller must also provide written certification to the Buyer that (i) the Upstream Trade Confirmation has not and will not be delivered to cure a different BISO Notice and (ii) the Seller will perform its Settlement Delivery Obligations under the Upstream Trade Confirmation. If the Seller under the Upstream Trade Confirmation is also a Non-Performing Party, then the Non-Performing Party under the Original Trade Confirmation must then deliver a BISO Notice and commence a Cover Transaction for its own open upstream trades. If the Non-Performing Party successfully meets the requirements of this alternative cure method it will be deemed to have performed its “Upstream BISO Obligations.”

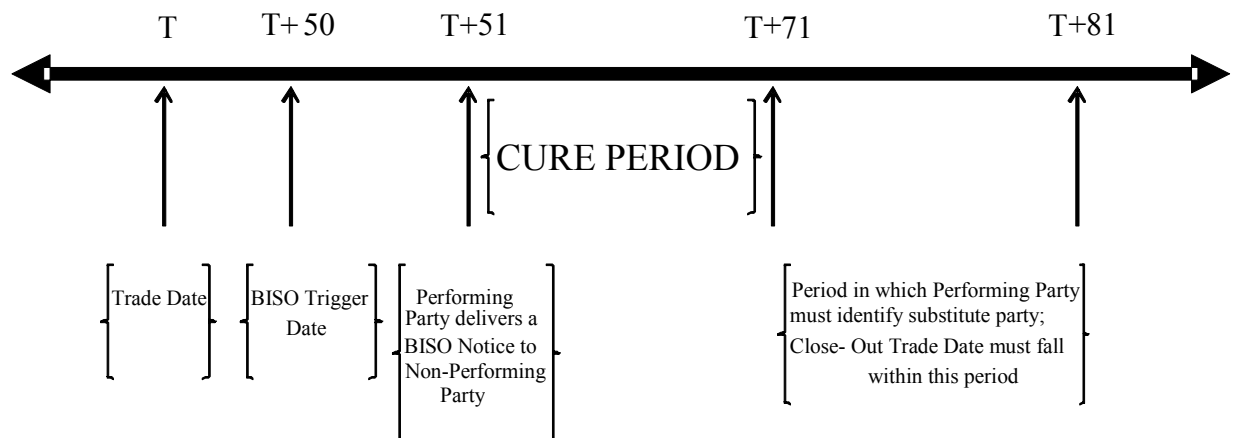
<sup>4</sup> The provisions on calculation of the Cover Damages are set forth in Section 17 of the Standard Terms (“Buy-in Damages”) if the Cover Transaction is a buy or Section 18 of the Standard Terms (“Sell-out Damages”) if the Cover Transaction is a sale and are discussed further in Section VI below. Note that the Performing Party is responsible for the price differential should the price move in its favor.

#### IV. FAILURE TO PERFORM A COVER TRANSACTION

If the Non-Performing Party receives a BISO Notice and does not Cure by performing its Settlement Delivery Obligations (or its Upstream BISO Obligations when the Non-Performing Party is the Seller) within the Cure Period, the Performing Party will have a “Cover Period” of ten business days from the expiration of the Cure Period to enter into a Cover Transaction. If the Performing Party fails to enter into a Cover Transaction during the Cover Period then (i) the Performing Party must notify the Non-Performing Party of such failure, (ii) the obligations under the Original Confirmation remain in full force and effect, (iii) the Performing Party has no further ability to enter into a Cover Transaction, and (iv) the Performing Party is barred from sending any future BISO Notices to the Non-Performing Party in connection with the Original Confirmation (unless the Non-Performing Party provides consent).

#### V. SUCCESSFUL PERFORMANCE OF A COVER TRANSACTION

If the Performing Party enters into a Cover Transaction during the Cover Period,<sup>5</sup> (i) the obligations of the parties under the Original Confirmation are terminated<sup>6</sup> and (ii) the Performing Party must send a notice to the Non-Performing Party that sets forth the Cover Price within one business day of the trade date of the Cover Transaction. The Non-Performing Party has the right to dispute the reasonableness of the Cover Price. Notice of a dispute must be sent to the Performing Party within two business days of receipt of notice that the Cover Transaction has occurred. Cover Price disputes are submitted to binding arbitration governed by the “Rules Governing Arbitration Between Loan Traders With Regard to Cover Price for Trades that Do Not Settle by BISO Trigger Date.”<sup>7</sup>



#### VI. COVER TRANSACTION DAMAGES

The intent of the damages calculation for a Cover Transaction is that the Performing Party neither receives the upside of the Cover Transaction nor is penalized for entering into the Cover Transaction.

If the Performing Party is the Buyer and the Cover Price is less than the purchase price under the Original Confirmation (the “Original Purchase Price”) the Buyer is not entitled to keep the benefit received by purchasing the Debt at a lower price in the Cover Transaction. Instead, it must pay the difference to the Seller under the Original

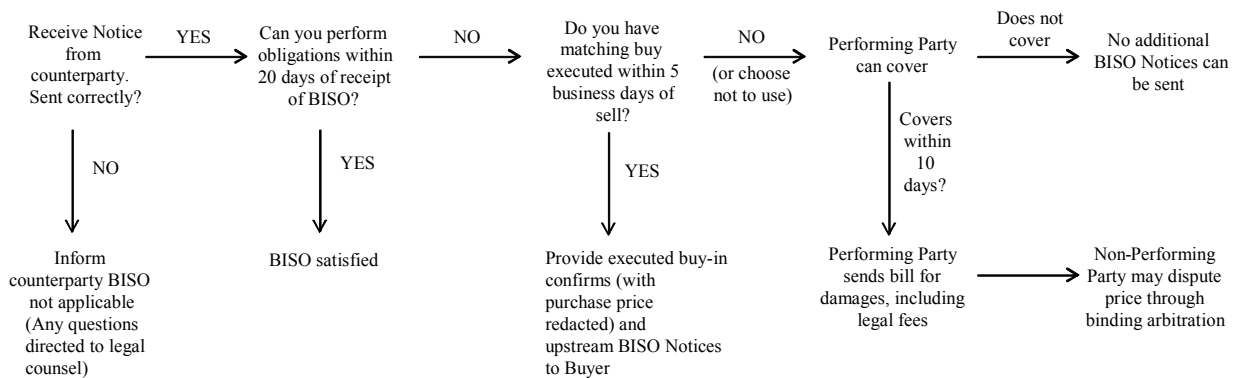
<sup>5</sup> Cover Transactions are not subject to the Non-Performing Party’s approval of the Cover Price.

<sup>6</sup> Except for the rights and obligations of each party under the BISO provisions of the Standard Terms.

<sup>7</sup> As published by the LSTA and in existence as of the Original Trade Date.

Confirmation. However, if the Cover Price is greater than the Original Purchase Price, then the Seller under the Original Confirmation is responsible for remitting the difference to the Buyer.

In addition to the Non-Performing Party’s obligation to make the Performing Party whole (or in the case where the Performing Party receives extra benefit from the Cover Price, the Performing Party’s obligation to pay the benefit to the Non-Performing Party), amounts payable in connection with a Cover Transaction may be adjusted based on the delayed compensation the Performing Party would have received had there been no Cover Transaction (i.e., the Non-Performing Party must pay to the Performing Party any delayed compensation that the Performing Party has a right to receive under the Original Confirmation but will not receive under the Cover Transaction). In addition, the Non-Performing Party must pay the Performing Party any legal fees and expenses (up to \$5,000) incurred in connection with the transaction contemplated in the Original Confirmation. Lastly, any payments made in connection with the Cover Transaction are offset by any payments that would have been made under the Original Confirmation pursuant to Section 5, “Interest Payments and Fees.” This would include, among others, PIK payments and/or non-recurring fees.



**VII. WHEN ARE BISO PROVISIONS APPLICABLE?**

The BISO Provisions are applicable if either (i) “Assignment Only” or “Assignment” is selected in the form of purchase section in the Original Confirmation or (ii) no election under the form of purchase section in the Original Confirmation is made and an assignment of the Debt is permitted under the credit agreement. It is important to note that the exercise of the BISO Provisions are not subject to the Non-Performing Party’s defense that it acted in good faith or engaged in commercially reasonable conduct. In addition, impossibility of settlement due to (i) a failure to obtain necessary third-party consents, (ii) a “credit freeze,” or (iii) an order of the relevant bankruptcy court does not constitute a failure of either Seller or Buyer to perform its Settlement Delivery Obligations.

While delays in settlement caused by a “credit freeze” or an order of the relevant bankruptcy court do not constitute a failure to perform one’s Settlement Delivery Obligations, such occurrences do not increase the relevant deadlines for performing such obligations. Therefore a trade participant that desires to utilize the BISO Provisions must proceed with performing its Settlement Delivery Obligations in a timely manner even if such impediments to settlement exist.

**VIII. WHEN ARE BISO PROVISIONS NOT APPLICABLE?**

The BISO Provisions are not applicable if (i) “Participation” is selected in the form of purchase section of the Original Confirmation, (ii) prior to the BISO Cure Period one party reasonably determines or the parties mutually agree that the transaction must be settled via participation, (iii) the transaction must settle via “Proceeds” due to a restructuring, or (iv) either Buyer or Seller is acting as a “Riskless Principal.”

## IX. CONCLUSION

The LSTA has provided the loan trading market with a powerful tool to effectuate more efficient settlement of distressed bank loan trades.

Although the distressed BISO provisions will not eliminate settlement delays, there is little doubt that they will contribute to a more efficient settlement process and be frequently utilized. As a result, it is important for all market participants to familiarize themselves with the distressed BISO provisions to understand how to avail themselves of their benefits and protections.

If you have any questions or would like more information regarding the matters discussed in this memorandum, please call your usual contact at Sidley Austin LLP, or either attorney below.

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In addition to our experience in assisting clients in trading assets currently in the secondary market, our group keeps an eye towards the future. In this extremely turbulent world economy we work to keep a step ahead in advising clients on new potential trading opportunities and strategies on a global basis.

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