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CLOs and the Changing Landscape after COVID-19

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Introduction

The year 2020 proved to be an "interesting time" for the Collateralized Loan Obligation ("CLO") markets. New CLO issuances had already tapered by the second half of 2019, which coincidentally occurred as around the globe news reports circulated of a novel coronavirus, which came to be commonly referred to as "COVID-19", spreading in Asia. Although many expected a rebound in CLO new issuance in 2020, none could predict that the first light at the end of the tunnel was actually the oncoming COVID-19 train. The first few weeks of 2020 had only modest CLO issuance activity compared to recent prior years, but then COVID-19 brought everything to a standstill as several countries, including most of Europe and the United States, ordered lockdowns to combat the spread of the seemingly indefatigable virus.

As economies slowed to the point where growth was negative, resulting in mass layoffs and high unemployment, regulators and governments considered actions to bolster the economy. For CLOs, although interest rates dropped, pricing spreads widened due to the anticipated risk of a global economic slowdown induced by the pandemic. New CLO issuances stopped, and some CLO warehouses closed. During this time, rating agencies also downgraded ratings on many loans, particularly those whose obligors appeared to be in the most at-risk industries (such as, for example, the travel and leisure industries). This resulted in CLO par haircuts, which affected overcollateralization ("O/C") tests, and some CLO transactions saw their junior O/C tests fail, resulting in diversions of interest proceeds to pay down senior debt.

In response to COVID-19 and the disruption of the financial markets, there were many government initiatives to support the economy. One such program, the Term Asset-Backed Securities Loan Facility ("TALF") was established in the United States to support the flow of credit to consumers and businesses. The TALF program aimed to provide financing to investors willing to invest in securitizations backed by a wide range of assets, including CLOs. However, for a variety of reasons, including the fact that only static CLOs were eligible for the TALF program, CLOs never became an asset class that was a significant part of the TALF program.

By the end of 2020 and early in 2021, as economic optimism returned alongside reports of successful vaccine trials, the CLO market began to re-emerge, including as the result of a wave of re-financings. However, much occurred to affect the CLO markets from the end of 2019 to the early part of 2021, and the CLOs that emerged when market activity resumed had several features that, as we discuss in this article, distinguished them from their predecessors.

Volcker Rule Amendments

Section 13 of the Bank Holding Company Act of 1956, also referred to in the United States as the "Volcker Rule", generally prohibits any banking entity from engaging in proprietary trading or from acquiring or retaining an ownership interest in, sponsoring, or having certain relationships with a "covered fund". A "covered fund" under the Volcker Rule generally includes any issuer, such as a hedge fund, private equity fund or CLO, that would be an investment company as defined under the Investment Company Act but for section 3(c)(1) or section 3(c)(7) of the Investment Company Act. However, the covered fund definition is subject to certain exclusions, including the loan securitization exclusion, which is particularly important for CLO issuers.

The Volcker Rule did not exempt securitizations generally and its exemption for loan-only securitizations was effective for CLOs having collateral comprising only loans (i.e., no bond buckets or other debt securities). Such "covered fund" issuers are limited in their ability to hold short-term debt, certain other debt instruments and equity securities if they wish to utilize the loan securitization exemption from the covered fund definition. To the extent that any of the securities issued by the CLO issuer could be considered an "ownership interest", banking entities are barred, with certain limited exceptions, from purchasing them.

In 2020, the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission (collectively, the "Agencies"), approved new amendments (the "Final Rules") to the regulations implementing the Volcker Rule. The Final Rules came into effect on October 1, 2020. The Final Rules made many important changes to the application of the Volcker Rule to CLOs and banking entities that invest in CLOs.

Pertinent amendments in the Final Rules include:

(i) an amendment permitting up to 5% of the aggregate value of the portfolio of a "loan securitization" to consist of debt securities that do not constitute loans, subject to certain conditions;

(ii) changes to the definition of "ownership interest", including an exclusion for certain "senior loans" or "senior debt interests" by operation of a safe harbor;

(iii) clarification as to the meaning of "cash equivalents" for purposes of the "loan securitization" exclusion from the definition of "covered fund"; and

(iv) an expanded carve-out from such definition relating to the right to remove an investment manager for "cause".

The Final Rules modified the definition of "ownership interest" to allow for certain additional rights of creditors under

a debt instrument (that are not triggered exclusively by an event of default under, or acceleration of, the debt instrument) to participate in the removal of a CLO's investment manager "for cause" and the replacement of the manager following its resignation or removal, that will not give rise to a banking entity having an ownership interest in a covered fund. In addition to such rights arising under events of default or acceleration, the Final Rules describe the scope of such "for cause" removals or replacements of a CLO investment manager to include:

(1) the bankruptcy, insolvency, conservatorship or receivership of the investment manager;
(2) breaches of material provisions of a covered fund's transaction agreements applicable to the investment manager;
(3) breaches of material representations and warranties by the investment manager;
(4) the occurrence of an act that constitutes fraud or criminal activity in the performance of the investment manager's obligations under the covered fund's transaction agreements;
(5) the indictment of the investment manager for a criminal offense or any officer, member, partner or other principal of the investment manager for a criminal offense materially related to his or her investment management activities;
(6) a change in control with respect to the investment manager;
(7) the loss, separation or incapacitation of an individual critical to the operation of the investment manager or primarily responsible for the management of the covered fund's assets; or
(8) other similar events that constitute "cause" for removal of the investment manager, provided that such events are not solely related to the performance of the covered fund or the investment manager's exercise of investment discretion under the covered fund's transaction documents.

The Final Rules further amend the definition of "ownership interest" to create a safe harbor for "ordinary debt instruments" that were never intended to confer an ownership interest in the borrower to the holders of such debt instruments. Under the Final Rules, senior loans or other senior debt interests would not be treated as "ownership interests" in a covered fund if:

(a) the holders of any such interest do not participate in the profits of the covered fund but receive only interest payments that are not dependent on the performance of the covered fund and a fixed principal payment on or prior to a stated maturity date. The repayment of the fixed principal payment on or prior to a stated maturity date must be required by contract (and such terms may include prepayment premiums to compensate holders of the interest for forgone income from an early prepayment);
(b) the amount of interest payable to the holders of any such interest is not contingent (e.g., subject to write-down or other adjustment arising from losses incurred by the covered fund); and
(c) the holders of any such interest are not entitled to receive the underlying assets of the covered fund or any residual assets remaining after the repayment in full of all other interests (excluding creditor rights to exercise remedies upon an event of default or an event giving rise to acceleration).

The Agencies did not clarify whether or not "senior loans or other senior debt interests" include all investment grade loans, so it is not clear that the safe harbor in the Final Rules covers interests other than "AAA" rated notes. Although the safe harbor may not apply to CLO obligations rated below "AAA", it does not automatically follow that such obligations are ownership interests in covered funds. They simply do not have the benefit of the safe harbor, and therefore require a more detailed analysis as to whether or not they constitute ownership interests in a covered fund.

Documentation Changes to Facilitate Recoveries on Restructurings

In 2019, there were a number of workouts and restructurings of companies in which non-CLO creditors of the company negotiated and restructured the company in a manner in which the CLO creditors were unable to participate in newly issued loans or securities of the company. As such, the CLO's recovery on their original investment were lower than the non-CLO creditors who were able to participate in the newly issued debt or equity of the company. CLOs have a number of restrictions in their transactional documents that prohibit them from acquiring certain debt or equity securities in a workout situation. CLOs that rely on the loan securitization exemption prior to the Final Rules discussed above being enacted are not permitted to purchase securities or they run afoul of the loan securitization exclusion. They are only permitted to receive securities "*in lieu* of debt previously contracted" for purposes of the Volcker Rule. CLOs must meet certain requirements prior to purchasing any loans, including that they are satisfying certain collateral quality tests. CLOs only have a limited ability to purchase loans after their reinvestment periods. In addition, any loan that a CLO acquires must at the time of purchase meet certain guidelines and restrictions that are often not satisfied by loans issued in workout and restructuring situations.

In response to these workout situations, CLO indentures now include provisions to allow CLOs to purchase workout-related assets that would have otherwise not been permitted to be acquired by the CLO. These assets are commonly referred to as "loss mitigation loans" or "workout loans". Workout assets may only be purchased with the intention to improve recovery prospects for the currently held distressed loan. The main issues surrounding the purchase of these assets are how such assets may be added to the CLO, the carrying value assigned to these assets for purposes of the coverage tests and the usage of interest and principal proceeds received from the assets. Generally speaking, interest proceeds may be used to purchase the workout asset so long as, after taking into account the purchase of the workout asset, there are sufficient interest proceeds to pay accrued but unpaid interest on the notes on the next payment date and proceeds received on the asset must be designated as principal proceeds until an amount equal to the O/C carrying value of the original asset has been received. Principal proceeds may be used so long as after taking into account the purchase of the workout asset, the reinvestment target par balance is met and/or par value coverage tests are met, and the proceeds received on the asset must be designated as principal proceeds until an amount equal to the principal proceeds used to purchase such asset plus the O/C carrying value of the original asset are received. In addition, equity contributions and supplemental reserves may be used to purchase workout assets.

These additional indenture provisions should enable CLOs to realize more value in respect of loans issued by obligors that become the subject of workouts or restructurings. Some managers have also amended legacy CLOs to include such provisions, but amending the transaction documents to permit the purchase of loss mitigation loans or workout loans may in some cases require consents of the holders of the notes and, as such, have been difficult to amend. Therefore, under these circumstances, managers have only been able to add some but not all of the workout loan-related provisions.

Moody's Proposes Methodology Changes

In September 2020, Moody's Investors Service ("Moody's") proposed changes to its methodology for rating CLOs.[1] Prior

to the proposal, when assessing the Moody's Default Probability Rating, Moody's treated an obligor whose rating Moody's placed on review or to which Moody's assigned a negative outlook as: (a) if assigned a negative outlook, adjusted down one notch; (b) if on review for possible downgrade, adjusted down by two notches; and (c) if on review for possible upgrade, adjusted up by one notch. Following adoption of the proposal, Moody's criteria treats the rating as adjusted up or down by one notch when Moody's has placed it on review for possible upgrade or downgrade, respectively, and no longer incorporates adjustments based on an obligor's rating outlook status. In the proposal, Moody's stated that these proposed adjustments were based on an analysis of Moody's history with rating reviews and outlook status, observing that ratings placed on review historically drifted by one notch on average (up or down, based on whether it was a review for upgrade or downgrade) at the conclusion of the review, and that the ratings drift resulting from outlook status was significantly smaller. Because adjustments based on review or outlook status affected the calculation of the weighted average rating factor test applicable to CLO transactions rated by Moody's, these changes were viewed positively by managers and issuers.

LIBOR Update

Following a July 2017 speech by Andrew Bailey, the Chief Executive of the Financial Conduct Authority ("FCA") at that time, in which he announced the FCA's intention to cease sustaining the London Interbank Offered Rate ("LIBOR") for all currencies and tenors after 2021 by not requiring panel banks to submit information for the calculation of LIBOR after the end of 2021,[2] much has been written (including in this space in 2020[3]) about the expected transition away from LIBOR for both legacy contracts and new originations.

This article does not purport to review the background of why or how the transition from LIBOR will occur. Rather, the intent is to provide an update regarding recent events connected with the transition from LIBOR as it relates to CLO transactions.

Several milestones relevant to the LIBOR transition (and CLOs in particular) occurred prior to 2020:

- The risk-free rates working group of the Bank of England recommended the Sterling Overnight Index Average ("SONIA") as its preferred replacement for LIBOR (sterling).[4]
- In the United States, the Alternative Reference Rates Committee ("ARRC") of the Federal Reserve Board and the Federal Reserve Bank of New York ("New York Fed") recommended the Secured Overnight Financing Rate ("SOFR") as the appropriate replacement index for U.S. dollar LIBOR in derivative contracts and other financial contracts.[5]
- In April 2018, the New York Fed began publishing overnight SOFR rates, and in March 2020, the New York Fed began publishing 30-, 90- and 180-day SOFR averages, as well as a SOFR Index.[6]
- In 2019, the ARRC released recommended contract fallback language for replacement benchmark rates to replace U.S. dollar LIBOR in floating rate notes, securitizations, syndicated loans (updated in June 2020 and supplemented in March 2021) and bilateral business loans (updated in August 2020 and supplemented in March 2021).

During mid-2020, the ARRC published the recommended best practices for completing the transition from LIBOR, proposing that hardwired fallbacks be incorporated into syndicated business loans by September 30, 2020 and into bilateral business loans by October 31, 2020, and targeting June 30, 2021 as the date for cessation of new use of LIBOR in contracts.[7] For CLOs, the ARRC proposed as a best practice that hardwired fallbacks be incorporated by June 30, 2020, and that LIBOR cease to be used for new issuances after September 30, 2021. These goals appeared realistic for CLOs, given that versions similar to the ARRC's recommendations for "hardwired" securitization fallback language began to appear in CLO indentures relatively soon after the ARRC's recommendations became available in 2019, but the bilateral loan and syndicated loan markets were not quick to adopt the recommended "hardwired" fallback approach. Even during 2020, it was common to hear about borrowers and lenders continuing to utilize fallback language that required the parties (or the lender, or certain requisite lenders) to consent to amendments to adopt a new base rate. However, in the fourth quarter of 2020, it became more common to hear, at least anecdotally, about credit agreements including hardwired fallback language.

In February 2021, the Working Group on Sterling Risk-Free Rates published an update to their roadmap for transition by the end of 2021, which made it clear that, across product lines, active conversion, where viable, should be completed by the end of the third quarter in 2021, with robust fallback being adopted in those cases where active conversion is not viable. The Sterling markets have been swifter to act in terms of the mission to make the switch from LIBOR but, given the timelines set out in the roadmap, some acceleration is anticipated at the time of this writing. While a more liquid market for SONIA as a risk-free rate may exist, at least in swaps and futures, in the Sterling markets, the majority of SONIA liquidity still commonly resides in the shorter end of the curve.

In a surprising but welcome development, on November 30, 2020, LIBOR's administrator, ICE Benchmark Administration ("IBA"), announced a proposal to seek consultation for public feedback to discontinue the publication of one-week and two-month U.S. dollar LIBOR following publication on December 31, 2021, but, with cooperation from the panel banks, to continue to publish U.S. dollar LIBOR for the remaining settings until June 30, 2023.[8] At the same time, regulators released statements in support of IBA's actions highlighting that, although the June 30, 2023 extension would help with the transition for legacy contracts, the extension was consistent with the ARRC's proposed best practices in that banks should cease entering into new contracts using U.S. dollar LIBOR as a reference rate as soon as possible. On March 5, 2021 IBA and the FCA confirmed that IBA will cease publication of one-week and two-month U.S. dollar LIBOR on December 31, 2021, and the remaining U.S. dollar LIBOR settings on June 30, 2023. The FCA also announced that it would consult on possibly requiring IBA to continue publishing certain sterling and yen LIBOR settings on a "synthetic" basis after December 31, 2021, and would consider the case for doing the same for certain U.S. dollar LIBOR settings after June 30, 2023, noting that in any case such "synthetic rates" would no longer be representative of the underlying market and economic reality the settings were intended to measure.[9] The "no longer representative" announcement was important for purposes of fallback language recommendations, as this was anticipated to trigger a "Benchmark Transition Event" in contracts that included the ARRC's recommended fallback language; in fact, the ARRC issued a statement on March 8, 2021 confirming that, in its opinion, the March 5, 2021 announcements by IBA and the FCA did constitute a "Benchmark Transition Event" for purposes of their recommended contract fallback language.[10]

Legislation to address difficult legacy contracts (those being contracts that reference LIBOR but do not include adequate fallback language) remains important despite the extension of the publication of certain U.S. dollar LIBOR tenors until June 30, 2023. On March 24, 2021, the New York State Legislature passed a bill addressing the legal uncertainty and potential adverse impacts associated with the transition away from LIBOR. If signed into

law, the bill would provide a statutory replacement benchmark rate for agreements that use LIBOR but contain no fallback provisions or contain fallback provisions that result in replacement rates that are based on LIBOR in some way. The bill would also prohibit parties to such agreements from refusing to perform contractual obligations or declaring a breach of contract as a result of the discontinuance of LIBOR or use of a "recommended benchmark replacement", as well as establish that the selection or use of the recommended benchmark replacement constitutes a commercially reasonable replacement for, and a commercially substantial equivalent to, LIBOR. The bill also provides a safe harbor from litigation for the use of the recommended benchmark replacement. The bill will not override contracts that either fall back expressly to a non-LIBOR based rate or give a determining person the right to exercise discretion or judgment regarding fallback language. The New York State legislation only addresses contracts governed by New York law. It is possible that similar Federal legislation will be proposed. In the United Kingdom ("UK"), the Financial Services Bill 2020 ("FSB 2020") is, at the time of writing, passing through the House of Lords. Under the FSB 2020, the FCA will be granted enhanced powers to deal with the orderly wind-down of LIBOR, including the ability to compel the publication of a synthetic LIBOR to be used for a narrow pool of tough legacy contracts.

Brexit

The UK withdrew from, and ceased to be a Member State of, the European Union ("EU") on January 31, 2020 ("Brexit"). As a result, the UK is no longer part of the EU Single Market and the EU Customs Union, and EU laws do not apply in the UK. Certain EU regulations were retained under the domestic laws of the United Kingdom as "retained EU law", by operation of the European Union (Withdrawal) Act 2018 (the "EUWA"). From January 1, 2021, relevant UK-established or UK-regulated persons are subject to the restrictions and obligations of the EU Securitisation Regulation as retained under the domestic laws of the UK as "retained EU law", by operation of the EUWA. As a result, CLOs that sell securities to certain EU and UK investors must comply with the EU Securitisation Regulation and the UK Securitisation Regulation

Conclusion

In any review of a year dominated by the real-world effects of COVID-19, consideration of the effects on CLOs seems trivial. However, in the way that CLOs were both resilient and adaptable in the most difficult economic conditions, they were a barometer of economic performance, and the rebound in CLO performance in the latter part of 2020 from the depths of the second quarter was impressive. Future challenges, like the transition from LIBOR to replacement base rates, remain to be addressed, but the CLO market ended 2020 with greater promise than was present at the start of the year, and that is significant for a year dominated by a global pandemic.

Endnotes

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