

FREQUENTLY ASKED QUESTIONS ABOUT THE TRUST INDENTURE ACT OF 1939

General

What is the Trust Indenture Act and what does it govern?

The Trust Indenture Act of 1939, as amended (the “Trust Indenture Act”), governs the offering of notes, bonds, debentures, evidences of indebtedness and certificates of interest, and is intended to safeguard the rights of bondholders (referred to in these Frequently Asked Questions as “securityholders”) by requiring that an issuer retain a trustee, which will act on behalf of securityholders, as well as by requiring additional procedural safeguards.

Notwithstanding the passage of the Securities Act of 1933, as amended (the “Securities Act”), and the Securities Exchange Act of 1934, as amended (the “Exchange Act”), the Securities and Exchange Commission (the “SEC”) determined in the 1930s that the public interest and the interest of investors in publicly offered notes and other evidences of indebtedness were still being adversely affected due to, among other factors, the issuer’s failure to retain a trustee to protect and enforce the rights of, and to represent the interests of, such investors.¹ Accordingly, the Trust Indenture Act requires that an issuer of SEC-registered debt securities qualify an indenture

under the Trust Indenture Act (*i.e.*, satisfies all of the Trust Indenture Act’s requirements) before issuing such debt securities.

Which provisions of the Trust Indenture Act are mandatory?

An indenture must include provisions that satisfy the following requirements under the Trust Indenture Act:

- Section 310 (Eligibility and disqualification of trustee);
- Section 311 (Preferential collection of claims against obligor);
- Section 312 (Bondholders’ lists);
- Section 313 (Reports by indenture trustee);
- Section 314 (Reports by obligor; evidence of compliance with indenture provisions);
- Section 315 (Duties and responsibility of the trustee);
- Section 316 (Directions and waivers by bondholders; prohibition of impairment of holder’s right to payment); and
- Section 317 (Special powers of trustee; duties of paying agents).

To the extent that Sections 310 through 317 of the Trust Indenture Act are not expressly included in the indenture, such provisions will be deemed to be

¹ See Trust Indenture Act, § 302(a)(1).

incorporated by reference by operation of law.² Moreover, if a provision of the indenture limits, qualifies or conflicts with the duties imposed by the Trust Indenture Act, the requirements of the Trust Indenture Act will control.³

Are there any provisions of the Trust Indenture Act that are not mandatory?

Yes. Section 318(b) of the Trust Indenture Act states that additional provisions may but are not required to be included in an indenture to the extent that the provisions do not contravene any requirement under the Trust Indenture Act.

Moreover, the Trust Indenture Act permits an indenture to exclude certain provisions to the extent that such exclusions are expressly provided for in the indenture.⁴

How does a fiscal and paying agency agreement differ from an indenture?

A fiscal and paying agency agreement is typically used in offerings that are not SEC-registered and qualify for an exemption from the Trust Indenture Act (*see* “Exemptions from the Trust Indenture Act”). Several of the mechanical and payment provisions of an indenture are similarly provided in a fiscal and paying agency agreement. However, while a trustee has a fiduciary duty to securityholders and acts on behalf of securityholders in its dealings with the issuer, a fiscal and paying agent has no such duty and solely performs administrative functions.

² See Trust Indenture Act, § 318(c)

³ See Trust Indenture Act, § 318(a).

⁴ See, e.g., Trust Indenture Act, §§ 311(b), 312(b), 314, 315(a) and 315(b).

Moreover, unlike under an indenture, securityholders must, in the case of a fiscal and paying agency agreement, act independently and have no way to communicate with each other (*see* “What are the rights of securityholders under the Trust Indenture Act?”). For example, if there is an event of default, a securityholder under a fiscal and paying agency agreement must accelerate its own note.

In addition, while a note issued pursuant to an indenture may be a less detailed document, incorporating the majority of its provisions by reference to the indenture, a note issued pursuant to a fiscal and paying agency agreement must contain all relevant substantive provisions.

Obligations of Issuers and Eligibility and Duties of Trustees

What are the obligations of an issuer under the Trust Indenture Act?

The issuer is required to deliver certain information to the trustee, including:

- the names and addresses of securityholders (*i.e.*, bondholder lists) at stated intervals of not more than six months and at such other times as the trustee may request in writing;⁵
- copies of the issuer’s annual reports, as well as information, documents and other reports that

⁵ See Trust Indenture Act, § 312(a). However, where the trustee has also been appointed registrar and transfer agent, the list it maintains in such a capacity would be sufficient, and the issuer would not be required to provide additional bondholder lists to the trustee.

the issuer is required to file with the SEC pursuant to Section 13 or Section 15(d) of the Exchange Act;⁶

- additional information with respect to compliance by the issuer with the conditions and covenants provided for in the indenture;⁷
- an annual certification from the issuer's principal executive officer, principal financial officer or principal accounting officer as to the issuer's compliance with all conditions and covenants under the indenture;⁸ and
- evidence of recording of the indenture and compliance with any conditions precedent in the case of an indenture relating to secured debt.

Under Section 314(f) of the Trust Indenture Act, an indenture may, but is not required to, include additional provisions that require the issuer to furnish to the trustee any other evidence of compliance with the conditions and covenants provided for in the indenture.

What are the eligibility requirements for trustees under the Trust Indenture Act?

In accordance with Section 310(a)(1) of the Trust Indenture Act, every qualified indenture must contain at all times at least one qualified "institutional trustee." While more than one person may act as trustee under

⁶ See Trust Indenture Act, § 314(a)(1). The SEC is also authorized to require that the issuer send to securityholders summaries of any information, documents and reports and any other reports that the SEC rules and regulation require the issuer to file with the trustee. However, the SEC does not require issuers to do so. See Trust Indenture Act, § 314(a)(3).

⁷ See Trust Indenture Act, § 314(a)(2). Such information must also be provided to the SEC.

⁸ See Trust Indenture Act, § 314(a)(4).

an indenture, the Trust Indenture Act expressly provides that there must at all times be at least one "institutional trustee." To qualify as an institutional trustee, an entity must satisfy the following criteria:

- Must be a corporation organized and doing business under the laws of the United States or a corporation or other person permitted to act as trustee by the SEC;⁹ and
- Must have at all times a combined capital and surplus of a specified minimum amount, which must at all times be at least \$150,000.¹⁰

However, no obligor of the indenture securities, or any person directly or indirectly controlling, controlled by or under common control with such obligor, may serve as trustee under the indenture.

Are foreign entities permitted to act as trustee under the Trust Indenture Act?

Yes. A corporation or other person organized and doing business under the laws of a foreign government may act as sole trustee under an indenture qualified or to be qualified pursuant to the Trust Indenture Act, where such corporation or person is:

- authorized under such laws to exercise corporate trust powers; and
- subject to supervision or examination by authority of such foreign government or a political subdivision thereof substantially equivalent to supervision or examination

⁹ See Trust Indenture Act, § 310(a)(1).

¹⁰ See Trust Indenture Act, § 310(a)(2). However, market practice for this amount tends to be significantly higher, and the amount usually ranges from \$5 million to \$50 million.

applicable to United States institutional trustees.¹¹

A foreign entity may additionally apply for an exemptive order under Section 304(d) of the Trust Indenture Act.¹²

A foreign entity must file an application on Form T-6 with the SEC in order to attempt to qualify as an institutional trustee.¹³

The SEC Staff has additionally noted that Section 310(a) of the Trust Indenture Act permits a U.S. subsidiary of a foreign company to serve as trustee if it is organized and doing business under the laws of the United States or any state.¹⁴

What are the duties of trustees under the Trust Indenture Act prior to default?

Prior to any default, the role of the trustee is largely administrative, including the performance of such duties as are specifically set out in the indenture.¹⁵ Additionally, pursuant to Section 313(a) of the Trust Indenture Act, while the debt securities remain outstanding, the trustee must prepare and provide to

securityholders a brief annual report *only* if any one of the following events has transpired over the previous 12-month period:

- any change to the trustee’s eligibility and its qualification under Section 310 of the Trust Indenture Act;
- the creation of or any material change in a relationship that would cause an impermissible conflict of interest (after a default by the issuer on the securities);
- the character and amount of any advances made by the trustee: (i) aggregate more than 0.5% of the principal amount of the indenture securities outstanding on the date of the annual report; (ii) remain unpaid on the date of the annual report; and (iii) may be reimbursed or claimed by the trustee through a lien or charge prior to that of the securityholders on property or funds held by the trustee;
- any change to the amount, interest rate and maturity date of all other indebtedness owed to the trustee in its individual capacity, as of the date of the annual report, by the obligor under the indenture;
- any change to the property and funds physically in the trustee’s possession as indenture trustee on the date of the annual report;
- any release, or release and substitution, of property subject to the lien of the indenture that was not previously reported;

¹¹ See Trust Indenture Act, § 310(a)(1).

¹² Section 304(d) provides a “catch all” exemption from the requirements under the Trust Indenture Act “to the extent such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by [the Trust Indenture Act].” See Trust Indenture Act, § 304(d).

¹³ See Application Under Section 310(a)(1) of the Trust Indenture Act of 1939 for Determination of Eligibility of a Foreign Person to Act as Institutional Trustee (Form T-6), available at: <https://www.sec.gov/about/forms/formt-6.pdf> (accessed Nov. 2016).

¹⁴ See Securities and Exchange Commission, Trust Indenture Act of 1939 Interpretations (“TIA Interpretations”), at Question 105.01 (Apr. 24, 2015), available at: <https://www.sec.gov/divisions/corpfin/guidance/tiainterp.htm>.

¹⁵ See Trust Indenture Act, §§ 315(a)(1)-(2).

- any additional issue of indenture securities that the trustee had not previously reported; and
- any action taken by the trustee in the performance of its duties under the indenture that the trustee had not previously reported and which, in the trustee's opinion, materially affects the indenture securities or the trustee estate, except action in respect of a default, notice of which has been or is to be withheld by the trustee in accordance with Section 315 of the Trust Indenture Act.

The trustee must provide additional reports to securityholders with regard to:

- the release, or release and substitution, of property subject to the lien of the indenture, unless the fair value of such property is less than 10% of the principal amount of the indenture securities outstanding at the time of such release;¹⁶ and
- any advances that the trustee makes to the issuer for which the trustee claims or may claim a lien or charge before securityholders on property or funds held by the trustee, if the advances aggregate over 10% of the principal amount of indenture securities outstanding.¹⁷

¹⁶ See Trust Indenture Act, § 313(b)(1). This report must be transmitted within 90 days of any release.

¹⁷ See Trust Indenture Act, § 313(b)(2). The advances must be calculated since the date of the last annual report transmitted to securityholders pursuant to Section 313(a) of the Trust Indenture Act or, if no such report has been transmitted, since the date of execution of the indenture.

How must reports and notices required under the Trust Indenture Act be transmitted to securityholders?

Any report required to be provided to securityholders pursuant to Section 313(c) of the Trust Indenture Act must be transmitted by mail to:

- all registered securityholders under the indenture (as the names and addresses of such holders appear upon the registration books of the obligor);
- securityholders of bearer form securities who have, within the two years preceding the transmission, filed their names and addresses with the trustee for the purpose of receiving transmissions; and
- all securityholders whose names and addresses have been furnished to or received by the trustee pursuant to Section 312 of the Trust Indenture Act (*i.e.*, bondholders' lists).

What are the duties of trustees under the Trust Indenture Act after an issuer defaults?

Pursuant to Section 315 of the Trust Indenture Act, in the case of a default, the trustee must use the same degree of care and skills in the exercise of its rights and powers as a "prudent man would exercise or use under the circumstances in the conduct of his own affairs." The trustee must provide to securityholders notice of all defaults known to the trustee within 90 days after the occurrence of any such default. Adequate notice must be provided to all securityholders in accordance with Section 313 of the Trust Indenture Act (*see "How must reports and notices required under the Trust Indenture Act be transmitted to securityholders?"*).

However, the trustee may, unless there is an express provision to the contrary contained in the indenture, withhold notice to the securityholders if:

- the default does not relate to payment of principal, interest, sinking fund or purchase fund installment; and
- the action has been approved by the trustee's board of directors, executive committee or by a trust committee of directors and/or responsible officers who in good faith determine that the withholding of such notice is in the interests of securityholders.

Section 317 of the Trust Indenture Act provides the trustee with special powers, in the case of a default, to:

- recover judgment, in the trustee's own name and as trustee of an express trust, against the obligor for the whole amount of such principal and interest remaining unpaid; and
- file such proofs of claim and other papers or documents as may be necessary or advisable in order to have the claims of the trustee and of the securityholders allowed in any judicial proceedings.

In addition, if the trustee is, or becomes, a creditor, directly or indirectly, under the indenture securities within three months prior to a default or subsequent to any such default, then unless and until the default is cured, the trustee must, in accordance with Section 311(a) of the Trust Indenture Act, set apart and hold in a special account for the benefit of both the trustee and the securityholders:

- an amount equal to any and all reductions in the amount due and owing upon any claim as such creditor in respect of principal or interest, effected after the beginning of such three-month period and valid as against such obligor and its other creditors; and
- all property received in respect of any claim as such creditor, either as security therefor, or in satisfaction or composition thereof, or otherwise, after the beginning of such three-month period or an amount equal to the proceeds of any such property, if disposed of, subject, however, to the rights, if any, of such obligor and its other creditors in such property or such proceeds.

Must the trustee satisfy any requirements before its resignation becomes effective?

Yes. A trustee's resignation may only be deemed effective under Section 310(b) of the Trust Indenture Act upon the appointment of a successor trustee and the successor's acceptance of such an appointment.

Are there any related requirements imposed on a trustee by exchanges?

Yes. In accordance with the New York Stock Exchange (the "NYSE") Listed Company Manual, where an issuer lists bonds on the NYSE pursuant to an indenture that is not qualified under the Trust Indenture Act, the trustee of the listed bonds must be a bank or trust company: (i) having substantial capital and surplus and (ii) having the experience and facilities for the proper performance

of corporate trust functions.¹⁸ However, the following persons will not be eligible to serve as a trustee or co-trustee for any listed bonds:

- a director or officer of the issuing company;
- any organization in which an officer of the issuing company is an executive officer; and
- any organization that, directly or indirectly, controls, is under common control with or is controlled by the issuing company.

If an issuer listed bonds on the NYSE under an indenture that is not qualified under the Trust Indenture Act, and the issuer also has bonds outstanding under another indenture, while such bonds remain listed, the NYSE requires that there be a different trustee (or co-trustee) under each indenture.¹⁹

Furthermore, the NYSE requires that the trustee for any NYSE-listed bonds give the NYSE immediate notice of:

- any change or removal of deposited collateral;
- acceleration of maturity by the trustee;
- issuance or authentication of duplicate bonds;
- cancellation, retirement or other reduction in the amount of bonds outstanding; or
- any call for redemptions, including sinking fund requirements.²⁰

Lastly, for as long as the bonds remain listed on the NYSE, the issuer of such bonds must give the NYSE at

least five business days' notice of any change of a trustee or co-trustee for its listed bonds.

Disqualification of Trustees and Conflicts of Interest

When will a trustee be disqualified under the Trust Indenture Act?

Under Section 310(b) of the Trust Indenture Act, a trustee will be “disqualified” from serving as trustee under an indenture where the trustee is deemed to have a conflicting interest. A trustee will be said to have a conflict of interest if the indenture securities are in “default” and

- such trustee is serving as trustee under another indenture under which any other securities, or certificates of interest or participation in any other securities, of an obligor under the indenture securities are outstanding;
- such trustee or any of its directors or executive officers is an underwriter for an obligor under the indenture securities;
- such trustee directly or indirectly controls or is directly or indirectly controlled by or is under direct or indirect common control with an underwriter for an obligor under the indenture securities;
- such trustee or any of its directors or executive officers is a director, officer, partner, employee, appointee or representative of an obligor under the indenture securities, or of an underwriter for such an obligor who is

¹⁸ See NYSE Listed Company Manual, Section 603.01 (accessed Nov. 2016).

¹⁹ See *id.*

²⁰ See NYSE Listed Company Manual, Section 603.02 (accessed Nov. 2016).

currently engaged in the business of underwriting;

- at least 10% of the voting securities of such trustee is beneficially owned either by an obligor under the indenture securities or by any director, partner or executive officer of the obligor;
- at least 20% of the voting securities of such trustee is beneficially owned, collectively, by any two or more obligors under the indenture securities or any director, partner or executive officer of the obligor;
- at least 10% of the voting securities of a trustee is beneficially owned either by an underwriter for any such obligor or by any director, partner, or executive officer of the obligor, or is beneficially owned, collectively, by any two or more such persons;
- the trustee is the beneficial owner of, or holds as collateral security for an obligation of, an obligation which is in default; or
- unless expressly permitted under Section 311(b) of the Trust Indenture Act, the trustee is (or becomes) a creditor of the obligor.

Notwithstanding the above, a subsidiary may use the same trustee used by its parent for an offering of debt securities without giving rise to a conflict of interest under the Trust Indenture Act as long as: (i) the parent has not guaranteed any debt of its subsidiary; and

(ii) the subsidiary has not guaranteed any debt of its parent.²¹

Can the same trustee serve as trustee for both an issuer's senior and subordinated notes or for both an issuer's secured and unsecured notes?

Yes. However, should the trustee have a conflict of interest as trustee for both an issuer's senior and subordinated indentures or for both an issuer's secured and unsecured notes, the trustee will be deemed to be disqualified and must resign unless it can clear the conflict of interest (see "When will a trustee be disqualified under the Trust Indenture Act?").

How can an issuer ensure that a trustee under multiple indentures of that issuer is not disqualified because of a conflict of interest?

Generally, a trustee will be deemed to have an impermissible conflict of interest if the indenture securities are in "default" and the trustee is trustee under more than one indenture of the obligor. However, the issuer can resolve this potential conflict of interest if the securities under the indentures are wholly unsecured and rank equally (such as multiple senior debt securities indentures) and the newer indenture to be qualified specifically describes the previous indenture for the equally ranked, wholly unsecured securities.²²

Many large trustees have affiliated underwriters. Does this constitute a conflict of interest for an issuance of

²¹ See TIA Interpretations, *supra* note 14 at Question 106.01.

²² See *id.* at No. 209.01.

debt securities underwritten by the affiliated underwriter?

Yes. If the trustee for an obligor's debt securities or any of its directors or executive officers is an underwriter for such debt securities, the trustee will be deemed to have an impermissible conflict of interest if the debt securities are in default within one year after the affiliated underwriter was an underwriter of any securities of the obligor (not just debt securities) and such securities are outstanding.

If an issuer has a credit facility with the trustee of the issuer's debt securities, does that create a conflict of interest?

Yes, if the credit facility is drawn upon. Any time that the trustee is a creditor of the obligor of the debt securities, a conflict of interest exists.

How can a trustee avoid having to resign if there is a conflict of interest?

Except in the case of a default in the payment of principal or of interest on the debt securities, or in the payment of any sinking fund installment, the trustee may apply to the SEC for a stay of the duty to resign. The trustee must prove to the SEC that:

- the default may be cured or waived during a reasonable period; and
- the stay of the trustee's duty to resign will not be inconsistent with the interest of the debt holders.²³

What must occur once a trustee acquires any conflicting interest?

If the trustee has or will acquire any conflicting interest, as defined under the Trust Indenture Act, then, within 90 days after ascertaining that it has such conflicting interest, and if the conflicting interest has not been cured or duly waived or otherwise eliminated before the end of such 90-day period, the trustee must either: (i) eliminate the conflicting interest; or (ii) resign. Where the trustee is forced to resign because of a conflicting interest, the obligor must, pursuant to Section 310(b) of the Trust Indenture Act, take prompt steps to have a successor trustee appointed in the manner provided in the indenture.

Where the trustee fails to either eliminate the conflicting interest or resign, then the trustee must, within 10 days after the expiration of the 90-day period, transmit notice of such failure to the indenture securityholders in the manner and to the extent provided in Section 313(c) of the Trust Indenture Act (see "How must reports and notices required under the Trust Indenture Act be transmitted to securityholders?").

May a bona fide securityholder petition to have a trustee removed?

Yes. Unless the trustee has failed to resign because it has not yet found a suitable successor, any securityholder who has been a *bona fide* holder of indenture securities for at least six months may, on behalf of themselves and all other similarly situated securityholders, petition any court of competent jurisdiction for (i) the removal of the trustee and (ii) the appointment of a successor trustee, if the trustee fails,

²³ See TIA Interpretations, *supra* note 14 at No. 208.03.

after written request by such securityholder(s), to either cure the conflicting interest or resign.

Exemptions from the Trust Indenture Act

Are there any exemptions for certain securities under the Trust Indenture Act?

Yes. The Trust Indenture Act generally requires that all debt securities covered under the Trust Indenture Act be issued pursuant to a qualified indenture. However, several securities are exempt from the Trust Indenture Act's requirements pursuant to Section 304 of the Trust Indenture Act, including:

- any security other than a note, bond, debenture or evidence of indebtedness, whether or not secured;
- certain securities exempt from Securities Act registration, most notably bank notes issued pursuant to Section 3(a)(2) of the Securities Act;
- any note, bond, debenture or evidence of indebtedness or guaranteed by a foreign government or by a subdivision, department, municipality, agency or instrumentality of such a foreign government;
- any guarantee of any security which is exempted by Section 304(a) of the Trust Indenture Act;
- any securities that have been or will be issued other than under an indenture (however, the same issuer may not claim this exemption

within a period of 12 consecutive months for more than \$50 million aggregate principal amount of any securities);

- any security that has been issued or will be issued in accordance with the provisions of Regulation A under the Securities Act; and
- any security which has been or is to be issued under an indenture that limits the aggregate principal amount of securities at any time outstanding thereunder to no more than \$10 million (however, this exemption may not be used by an issuer for more than \$10 million aggregate principal amount of its securities over a 36-month period).

Are there any exemptions for certain transactions under the Trust Indenture Act?

Yes. Transactions exempt from the Securities Act's registration requirements pursuant to Section 4 of the Securities Act, including transactions relying on Section 4(a)(2) and Rule 506 of Regulation D, are exempt from Sections 305 and 306 of the Trust Indenture Act. However, transactions relying on Rules 504 or 505 of Regulation D may not utilize this exemption.

Moreover, pursuant to Section 1145 of the United States Bankruptcy Code (the "Code"), securities issued as part of a plan of reorganization under Chapter 11 of the Code are exempt from the Trust Indenture Act's requirements. However, the limited exemption provided under Section 1145 of the Code only applies to

securities with a maturity date no later than one year after the effective date of the reorganization plan.²⁴

Lastly, while the Trust Indenture Act does not specifically state whether a transaction relying on the offering exemption provided under Rule 802 of the Securities Act is exempt from the Trust Indenture Act's qualification requirement, the SEC has clarified that such an exchange offer would be exempt from the Trust Indenture Act's qualification requirement.²⁵

Are Regulation S and 144A offerings exempt from the Trust Indenture Act?

Yes. Because Rule 144A and Regulation S debt offerings are exempt from the registration requirements of the Securities Act, the indenture will not need to be qualified under the Trust Indenture Act. However, these debt offerings, particularly of U.S. issuers contemplating a subsequent registered exchange offering (such as an Exxon Capital or A/B exchange offer), should be issued under an indenture that is qualifiable under the Trust Indenture Act. When the registration statement is subsequently filed, the indenture must then be qualified under the Trust Indenture Act. In the ordinary course, issuers and initial purchasers choose trustees that can comply with the requirements of the Trust Indenture Act, but such trustee qualification (on Form T-1) also is required

²⁴ See 11 U.S.C. §1145(e).

²⁵ See U.S. Securities and Exchange Commission, *Final Rule: Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings*, Release No. 33-7759 (Jan. 2000) (“[S]ecurities issued in exchange offers for foreign private issuers’ securities and securities issued in business combinations involving foreign private issuers [are] exempt from the qualification requirements of the Trust Indenture Act, if U.S. security holders hold 10 percent or less of the subject class of securities.”).

when the registration statement is subsequently filed. An issuer might consider having a qualifiable indenture in place at the outset of the offering.

Although it is standard to use an indenture, if the debt will not be registered subsequently with the SEC (which usually is the case in a standalone Rule 144A offering or Regulation S offering), a fiscal and paying agency agreement may be used (*see “How does a fiscal and paying agency agreement differ from an indenture?”*).

May the SEC provide any additional exemptions from the Trust Indenture Act under its rules and regulations?

Yes. The SEC may, by rules or regulations, exempt any person, registration statement, indenture, security or transaction from any of the Trust Indenture Act's requirements to the extent such exemption is necessary or appropriate in the public interest and consistent with the aims of the Trust Indenture Act.²⁶

The SEC may additionally provide an exemption for any class of securities issued by a small business investment company under the Small Business Investment Act of 1958, to the extent consistent with the aims of the Trust Indenture Act.²⁷

Is there an exemption from the requirements under the Trust Indenture Act for Canadian issuers?

Yes. The SEC has adopted exemptive rules under the Trust Indenture Act as part of its multi-jurisdictional disclosure system.

²⁶ See Trust Indenture Act, § 304(d). See also 17 C.F.R. §260.4d-7 and 17 C.F.R. § 260.4d-8 (providing the specific procedures for applying for an exemptive order under Section 304(d) of the Trust Indenture Act).

²⁷ See Trust Indenture Act, § 304(e).

Rule 4d-9 under the Trust Indenture Act provides an exemption for Canadian trust indentures used to issue debt securities, which are registered on Securities Act Forms S-1, F-7, F-8, F-10 or F-80, from the majority of the substantive requirements of the Trust Indenture Act, provided that the trust indentures are subject to the: (i) Canada Business Corporations Act; (ii) Bank Act (Canada); (iii) Business Corporations Act (Ontario); or (iv) Company Act (British Columbia) (the “Rule 4d-9 Exemption”).²⁸ However, even where a Canadian trust company relies on the Rule 4d-9 Exemption, the following provisions must still be satisfied under the Trust Indenture Act: (a) eligibility requirements of the trustee, pursuant to Sections 310(a)(1), 310(a)(2) and 310(a)(5) under the Trust Indenture Act; and (b) no impairment without the holder’s consent of the right to receive payment of principal and interest when due and to sue to enforce such payment, pursuant to Section 316(b) under the Trust Indenture Act.

Rights of Securityholders

What are the rights of securityholders under the Trust Indenture Act?

Section 316 of the Trust Indenture Act contains several provisions that specifically safeguard securityholders’ ability to enforce their rights under the indenture. As provided below, securityholders are granted, among other things, the right to: (i) direct the trustee to enforce the terms of the indenture as part of a proceeding; (ii) authorize the waiver of past defaults; (iii) authorize

the postponement of interest payments; and (iv) sue for principal and interest.

Communications with other securityholders. Under Section 312(b) of the Trust Indenture Act, if the trustee receives a written application from three or more securityholders requesting that such securityholders desire to communicate with other securityholders with respect to their rights under the indenture or the indenture securities, the trustee must, within five business days of receiving the application, either: (i) provide the applicant securityholders access to the securityholder lists that are maintained by the trustee; or (ii) inform the applicant securityholders as to the approximate (a) number of indenture securityholders (according to the most recent information furnished to or received by the trustee) and (b) cost of mailing to such securityholders the form of proxy or other communication, if any, specified in the application received by the trustee.

However, the three or more securityholders may only receive such information if the written application is accompanied by: (i) a copy of the form of proxy or other communication which such applicants propose to submit; and (ii) reasonable proof that each such applicant has owned an indenture security for a period of at least six months preceding the date of the application to the trustee.

Compliance with proxy rules. Under Exchange Act Section 12(b), the communications described above may be subject to the proxy rules under Section 14 of the Exchange Act if:

- the securities covered by the indenture are listed on a securities exchange; or

²⁸ See 17 C.F.R. § 260.4d-9.

- the securities covered by the indenture are: (i) convertible debt securities that are traded over the counter; (ii) of an issuer with greater than \$3 million in assets; and (iii) held of record by at least 500 persons.

Directions to trustee. Under Section 316 of the Trust Indenture Act, an indenture must, unless a contrary provision is expressly provided, contain provisions that authorize securityholders of not less than a majority in principal amount of the indenture securities (or if expressly specified in the indenture, of any series of securities at the time outstanding) to:

- direct the time, method and place of conducting any proceeding for any remedy available to the trustee, or exercising any trust or power conferred upon the trustee under the indenture; and
- on behalf of all securityholders, consent to the waiver of any past default and its consequences (subject to Section 316(b) of the Trust Indenture Act (see “—Payments of principal and interest”).

Moreover, securityholders of not less than 75% in principal amount of the indenture securities (or if expressly specified in the indenture, of any series of securities at the time outstanding) may consent on behalf of all securityholders to the postponement of any interest payment for a period not exceeding three years from its due date. In determining whether the required principal amount of securityholders of indenture securities has concurred in any direction or consent, the Trust Indenture Act stipulates that any indenture securities owned by the issuer, or by any person directly

or indirectly controlling or controlled by or under direct or indirect common control with the issuer, must be disregarded from the calculation. However, for purposes of determining whether the trustee is protected from liability in relying on any such direction or consent, only the indenture securities that the trustee actually knows are owned by the issuer must be disregarded from such a calculation.

Setting record date. Section 316(c) of the Trust Indenture Act permits the issuer to set a record date for purposes of determining the identity of securityholders entitled to vote or consent to any action permitted under Section 316(a) of the Trust Indenture Act (see “—Directions to trustee”). Unless the indenture provided otherwise, the record date must be the latter of:

- 30 days prior to the first solicitation of such consent; or
- the date of the most recent list of holders furnished to the trustee pursuant to Section 312 of the Trust Indenture Act (see “What are the obligations of an issuer under the Trust Indenture Act?”).

Payments of principal and interest. In accordance with Section 316(b) of the Trust Indenture Act, the right of any securityholder under an indenture to receive payment of principal and interest, on or after their due dates, or to institute suit for the enforcement of any such payment on or after such respective dates, must not be impaired or affected without the securityholder’s consent, except that:

- the right to receive payment of principal and interest may be temporarily postponed (see “—Directions to trustee”); and

- the indenture may contain provisions limiting or denying the right of any securityholder to institute any such suit if and to the extent that the institution of the suit or entry of judgment would result in the surrender, impairment, waiver or loss of the indenture's lien on collateral.

Must supplemental indentures be qualified under the Trust Indenture Act?

Generally, no. A supplemental indenture is not required to be qualified under the Trust Indenture Act, except in the cases described below.

Modification of the terms of indenture securities. The SEC Staff has noted that a supplemental indenture may need to be qualified to the extent that the supplemental indenture makes significant changes to the terms of securities outstanding under a previously qualified indenture. In that case, the changes may be deemed to involve the offering of a new security, and, therefore, the issuer must either register the transaction under the Securities Act or rely upon an available exemption under the Securities Act for which there is no corresponding Trust Indenture Act exemption.²⁹

Where the modifications to the previously qualified indenture do not rise to the level of an offering of a new security, the supplemental indenture may be filed as an exhibit to Form 8-K (if the offering is on a Form S-3) or in an automatically effective, exhibit-only, post-effective amendment filed pursuant to Rule 462(d) under the Securities Act. For automatic shelf registration statements, the post-effective amendment must be filed

pursuant to Rule 462(e) under the Securities Act. If an offering has terminated, an amended indenture must be filed as Exhibit 4 to the issuer's next Exchange Act report.³⁰

Substitution of new obligor. A supplemental indenture that provides for the substitution of a new obligor would not need to be qualified under the Trust Indenture Act if the substitution: (i) is conducted pursuant to a provision of an already qualified (older) indenture; and (ii) is not subject to the approval or consent of securityholders.³¹ However, where approval of securityholders must be solicited, the substitution will be deemed the sale of a new security, and therefore a Securities Act registration must be filed, and the associated supplemental indenture must be qualified.³²

What is a "collective action clause" and is it permitted under the Trust Indenture Act?

A "collective action clause" is generally never permitted under the Trust Indenture Act. A collective action clause enables a group of securityholders constituting a supermajority in principal amount of the securities outstanding to take collective action to change the terms of an indenture without the consent of dissenting securityholders. However, absent an exemption, Section 316(b) of the Trust Indenture Act prohibits any collective action from impeding or affecting the rights of dissenting securityholders from receiving payment of the principal of and interest under the indenture securities without the consent from those securityholders. This protection for dissenting

²⁹ See TIA Interpretations, *supra* note 14 at Question 102.01.

³⁰ See *id.*

³¹ See *id.* at Question 101.03.

³² See *id.*

securityholders has been further expanded and reaffirmed by the recent decisions of *Marblegate Asset Management v. Education Management Corp.* (“*Marblegate*”)³³ and *MeehanCombs Global Credit Opportunities Funds, LP v. Caesars Entertainment Corp.* (“*Caesars*”)³⁴ (see “*Can the Trust Indenture Act be used to prohibit out-of-court restructurings?*”).

SEC Registration

Does the indenture need to be filed with the SEC?

Yes. In the context of a registered offering of debt securities, an indenture is deemed to be qualified under Section 305 of the Trust Indenture Act only after (i) the indenture in connection with the debt securities satisfies all requirements under the Trust Indenture Act and (ii) the Securities Act registration statement in connection with the debt securities becomes effective (see “*What is a Form T-3 and when does it need to be filed?*” for filing requirements in the context of an unregistered offering).³⁵

The following documentation must be filed with the SEC in order to qualify a registered offering of debt securities under Section 305 of the Trust Indenture Act:

- a registration statement related to the debt securities;

³³ See *Marblegate Asset Management, LLC v. Education Management Corporation*, 2014 WL 7399041 (S.D.N.Y. Dec. 30, 2014).

³⁴ See *MeehanCombs Global Credit Opportunities Funds, LP v. Caesars Entertainment Corp.*, 2015 WL 221055 (S.D.N.Y. Jan. 15, 2015).

³⁵ See Trust Indenture Act, § 309(a)(1).

- a Form T-1 (see “*What is a Form T-1 and when does it need to be filed?*”);
- a copy of the indenture related to the debt securities; and
- a sheet cross-referencing the location in the indenture where each requirement is satisfied.

The indenture must be included as part of the filing of the registration statement by the time the registration statement is declared effective.

Does the indenture need to be a U.S.-style indenture?

No. An indenture is not required to be a U.S.-style indenture in order to be qualified under the Trust Indenture Act. However, the non-U.S. style indenture must still satisfy the mandatory provisions of the Trust Indenture Act, including ensuring that an eligible institutional trustee is in place (see “*What are the eligibility requirements for trustees under the Trust Indenture Act?*”). From a practical standpoint, however, most U.S. issuers follow the market practice of using a standard U.S.-style indenture.

Are there any other filings required for qualifying an indenture?

Yes. In addition to filing a copy of the indenture, an issuer must file, as applicable:

- a Form T-1 (see “*What is a Form T-1 and when does it need to be filed?*”);
- a Form T-2 (see “*What is a Form T-2 and when does it need to be filed?*”);
- a Form T-3 (see “*What is a Form T-3 and when does it need to be filed?*”); or

- a Form T-6 (see “What is a Form T-6 and when does it need to be filed?”).

How are trustees appointed for shelf registration statements?

If an eligible issuer (such as a “well-known seasoned issuer” (a “WKSI”)) files a shelf registration statement pursuant to Rule 415 under the Securities Act in order to issue debt securities,³⁶ Section 305(b)(2) of the Trust Indenture Act permits an indenture for debt securities to be qualified at the time the issuer’s registration statement becomes effective (despite the trustee not having been appointed yet by the issuer). Instead, a trustee must be appointed by the time a first takedown from the shelf occurs.

An issuer seeking to issue, offer or sell securities on a delayed basis under Rule 415 of the Securities Act must file an application to determine the eligibility of the trustee. In the case of a Form T-1, the eligible issuer must file the Form T-1 with the SEC no later than the second business day following the initial date of public offering or sales after the applicable registration statement becomes effective.³⁷

Are there any special considerations for automatic shelf registration statements?

Yes. Pursuant to the SEC’s offering reforms adopted in December 2005, a WKSI is permitted to add securities to a shelf registration statement by means of a post-effective amendment. As the effectiveness of an automatic shelf registration is deemed to occur at the time “when registration becomes effective as to such

³⁶ See 17 C.F.R. § 230.415.
³⁷ See 17 C.F.R. § 260.5b-1.

securit[ies],” the issuer will satisfy Section 309(a)(1) of the Trust Indenture Act if an indenture is included as an exhibit to the registration statement at the time that post-effective amendment becomes effective.³⁸

If an automatic shelf registration statement is filed to register the offer and sale of debt securities (or the registrant subsequently adds debt to an automatic shelf registration statement by post-effective amendment), the requirement regarding naming the trustee and qualifying under the Trust Indenture Act depends on whether the offering is being made on a delayed basis pursuant to Rule 415(a)(1)(x) under the Securities Act.³⁹

Offerings made on a delayed basis. For offerings made on a delayed basis, Section 305(b)(2) of the Trust Indenture Act permits the trustee to be designated on a delayed basis. In such an instance, the Form T-1 would become effective 10 calendar days after it was filed (unless the SEC accelerates effectiveness).⁴⁰

Offerings not made on a delayed basis. However, if an offering is not made on a delayed basis, a Form T-1 must be filed as an exhibit to the automatic shelf registration statement (or post-effective amendment to the automatic shelf registration statement filed to register the debt securities), and qualification would, therefore, occur upon effectiveness of those filings.⁴¹

³⁸ See SEC Release No. 33-8591(Dec. 1, 2005), at 229 n.527, available at: <https://www.sec.gov/rules/final/33-8591.pdf>; see also TIA Interpretations, *supra* note 14 at No. 201.02.
³⁹ See TIA Interpretations, *supra* note 14 at Question 103.01.
⁴⁰ See *id.*
⁴¹ See *id.*

Can an indenture filed with a registration statement be “open-ended?”

Yes. An indenture filed with, and qualified upon the effectiveness of, a registration statement may be “open-ended” (*i.e.*, the indenture provides a generic, non-specific description of the securities). For automatic shelf registration statements, an open-ended indenture must be filed either: (i) as an exhibit to the registration statement; or (ii) as an exhibit to a post-effective amendment to the registration statement that registers the securities to be issued under the indenture.⁴²

SEC Filing Forms

What is a Form T-1 and when does it need to be filed?

In order to offer registered debt securities, an issuer must file, as an exhibit to the issuer’s registration statement, a Form T-1 with the SEC.⁴³ A Form T-1, which is prepared by the trustee but filed by the issuer, provides certain information about the trustee so that the SEC can determine whether a corporate entity is qualified to serve as trustee under Section 305(b)(2) of the Trust Indenture Act. If the trustee fails to meet the eligibility requirements specified under Section 310(a) of the Trust Indenture Act, the SEC Staff may issue a refusal order preventing the registration statement from becoming effective.

A Form T-1 must contain the following information:

- general information regarding the trustee;
- a description of the trustee’s affiliations with the obligor;
- a description of the voting securities of the trustee;
- a description of the trustee’s trusteeships under other indentures;
- a description of the interlocking directorates and similar relationships with the obligor or underwriters;
- a description of the voting securities of the trustee owned by the issuer or its officials;
- a description of the securities of the issuer owned or held by the trustee;
- a description of the securities of underwriters owned or held by the trustee;
- a description of the ownership or holdings by the trustee of any securities of a person owning 50% or more of the voting securities of the issuer;
- a description of the indebtedness of the issuer to the trustee;
- a description of the defaults by the issuer;
- a description of the affiliations with the underwriters; and
- a description of the order or rule pursuant to which a foreign trustee is qualified to act as sole trustee under the Trust Indenture Act.

What is a Form T-2 and when does it need to be filed?

Like a Form T-1, a Form T-2 is used by the SEC to determine the eligibility of trustees under

⁴² See *id.* at Question 201.04.

⁴³ See “Form T-1,” available at: <https://www.sec.gov/about/forms/formt-1.pdf> (accessed Nov. 2016).

Section 305(b)(2) of the Trust Indenture Act.⁴⁴ However, unlike a Form T-1, a Form T-2 is used for purposes of assessing the eligibility of individual trustees as opposed to corporate trustees (see “*What are the eligibility requirements for trustees under the Trust Indenture Act?*”). Like a Form T-1, the issuer files the Form T-2 on behalf of the trustee.

A Form T-2 contains several questions that must be answered by the Trustee. The information specified in the Form T-2 by the Trustee must be disclosed prior to processing any statements of eligibility and must be included as an exhibit to an issuer’s registration statement and Form T-3 filings (see “*What is a Form T-3 and when does it need to be filed?*”).⁴⁵

What is a Form T-3 and when does it need to be filed?

The qualification of debt securities to be issued as part of an unregistered offering under Section 304 of the Trust Indenture Act is accomplished by (1) issuing such securities under an indenture and (2) filing a *Form T-3 for Applications for Qualification of Indentures Under the Trust Indenture Act of 1939* (“Form T-3”) with the SEC, which is subject to review by the SEC staff. For example, an exchange offer (involving the issuance of debt securities) exempt from registration pursuant to Sections 3(a)(9) or 3(a)(10) of the Securities Act would require the qualification of the related indenture under the Trust Indenture Act and, thus, the filing of a Form T-3. The solicitation of an exchange offer, however, may not commence until the Form T-3 is filed

⁴⁴ See “Statement of Eligibility Under the Trust Indenture Act of 1939 of an Individual Designated to Act as Trustee” (Form T-2), available at: <https://www.sec.gov/about/forms/formt-2.pdf> (accessed Nov. 2016).

⁴⁵ See *id.*

with the SEC, and no sales may be made until the Form T-3 is declared effective by the SEC staff.⁴⁶

A Form T-3 must contain the following information:

- *General Information.* The applicant of the Form T-3 (“applicant”) must provide general information, including (i) the applicant’s form of organization; and (ii) the jurisdiction in which the applicant is organized.
- *Applicable Securities Exemption.* The applicant must briefly describe the facts being relied upon as the basis for the claim that registration of the indenture securities under the Securities Act is not required.
- *Affiliations.* The applicant must furnish a list or diagram of all affiliates of the applicant and indicate the respective percentages of voting securities or other bases of control. The list or diagram must clearly show the relationship of each affiliate to the applicant and to the other affiliates named.
- *Directors and Executive Officers.* The applicant must list the names and complete mailing addresses of all directors and executive officers of the applicant, as defined by Sections 303(5) and 303(6) of the Trust Indenture Act, respectively, and all persons chosen to become directors or executive officers.
- *Principal Owners of Voting Securities.* The applicant must furnish the following information as to each person owning 10% or more of the voting securities of the applicant:

⁴⁶ See Trust Indenture Act, § 306(c).

(i) name and complete mailing address; (ii) title of class owned; (iii) amount of voting securities owned; and (iv) percentage of voting securities owned.

- *Underwriters.* The applicant must provide the name and complete mailing address of each person who within three years prior to the date of filing the application acted as an underwriter of any securities of the obligor that were outstanding on the date of filing the application. Moreover, the applicant should provide the name and complete mailing address of each proposed principal underwriter of the securities proposed to be offered.
- *Capitalization.* The applicant must furnish the following information as to each authorized class of securities of the applicant: (i) title of class; (ii) amount authorized; and (iii) amount outstanding. This section also requires that the applicant briefly outline the voting rights of each class of voting securities provided for each authorized class of securities of the applicant.
- *Analysis and Indenture Provisions.* The applicant must provide an analysis of its indenture provisions, as specified under Section 305(a)(2) of the Trust Indenture Act. The SEC requires for this section a level of detail that will reasonably inform investors from an investment standpoint and not from the standpoint of obtaining a full and complete legal description for each of the specified

provisions. Section 305(a)(2) of the Trust Indenture Act requires an analysis of the applicant's indenture provisions with respect to:

- the definition of what must constitute a default under such indenture, and the withholding of notice to the securityholders of any such default;
 - the authentication and delivery of the indenture securities and the application of the proceeds thereof;
 - the release, or the release and substitution, of any property subject to the lien of the indenture;
 - the satisfaction and discharge of the indenture; and
 - the evidence required to be furnished by the obligor under the indenture securities to the trustee as to compliance with the conditions and covenants provided for in such indenture.
- *Other Obligors.* The applicant must provide the name and complete mailing address of any person, besides the applicant, who is an obligor under the indenture securities.
 - *Exhibits.* The applicant must also file several exhibits as part of the application for qualification, which contain, among other things, a copy of the applicant's charter and existing bylaws (or instruments), and a copy of the indenture to be qualified.

What is a Form T-6 and when does it need to be filed?

A Form T-6 is generally similar to Forms T-1 and T-2, except that it must be filed with the SEC to specifically determine whether a foreign person is eligible to act as a sole trustee (see “Are foreign entities permitted to act as trustee under the Trust Indenture Act?”).⁴⁷

Liability for Issuers and Trustees Under the Trust Indenture Act

What is the potential liability for issuers for violations of the Trust Indenture Act?

Under Section 323(a) of the Trust Indenture Act, the issuer is liable to securityholders for making any false or misleading statement with respect to any material fact or omission of any material fact. Moreover, Section 323(b) of the Trust Indenture Act provides that the rights and remedies specified under the Trust Indenture Act must be in addition to any and all other rights and remedies that may exist under the Securities Act and Exchange Act, or otherwise at law or in equity.

However, under Section 323(b) of the Trust Indenture Act, any person permitted to bring a suit for damages under the Trust Indenture Act may only recover, through satisfaction of judgment in one or more actions, a total amount in excess of his or her actual damages resulting from the suit brought.

What is the potential liability for trustees for violations of the Trust Indenture Act?

A trustee that breaches its obligations under a qualified indenture may be liable to securityholders under:

- U.S. state law, for breaches of fiduciary duty or breach of contract claims; and
- U.S. federal law, for private rights of action under the Trust Indenture Act.

The trustee is liable to securityholders under Section 323(a) of the Trust Indenture Act for making any false or misleading statement with respect to any material fact, or omission of any material fact, in connection with the indenture. Moreover, Section 323(b) of the Trust Indenture Act provides that the rights and remedies specified under the Trust Indenture Act must be in addition to any and all other rights and remedies that may exist under the Securities Act and Exchange Act, or otherwise at law or in equity.

However, under Section 323(b) of the Trust Indenture Act, any person permitted to bring a suit for damages under the Trust Indenture Act may only recover, through satisfaction of judgment in one or more actions against the trustee, a total amount in excess of his or her actual damages resulting from the suit brought.

Does the Trust Indenture Act provide any exceptions for trustee liability?

Yes. The trustee is shielded from liability (for negligence) under the Trust Indenture Act for:

- any error of judgment made in good faith by a responsible officer or officers of such trustee (unless it is proven that such trustee was

⁴⁷ See Form T-6, *supra* note 13.

negligent in ascertaining any pertinent facts);⁴⁸ and

- any action taken or omitted to be taken by it in good faith in accordance with the direction of the securityholders of not less than a majority in principal amount of the indenture securities at the time outstanding relating to the time, method and place of conducting any proceeding for any remedy available to the trustee.⁴⁹

What is an exculpatory clause, and is it permitted under the Trust Indenture Act?

Prior to the implementation of the Trust Indenture Act, trustees commonly included an exculpatory clause in an indenture to immunize the trustee from liability for any negligent action or for failure to act on behalf of securityholders. However, the Trust Indenture Act was passed, in part, to prohibit the trustee from eluding any and all such liability through the use of an exculpatory clause.⁵⁰ Under Section 315(d) of the Trust Indenture Act, an indenture cannot be qualified if it contains “any provisions relieving the indenture trustee from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct,” with certain limited exceptions.

⁴⁸ See Trust Indenture Act, § 315(d)(2).

⁴⁹ See Trust Indenture Act, § 315(d)(3).

⁵⁰ See Trust Indenture Act, § 302(a)(2)(B) (describing how the Trust Indenture Act is necessary because trust indentures have in the past “generally relieve[d] the trustee from liability even for its own negligent action or failure to act”).

How is jurisdiction determined for matters involving trustee liability under the Trust Indenture Act?

Under Section 322(b) of the Trust Indenture Act, the jurisdiction and venue of any suits and actions brought in connection with any offenses and violations by the trustee under the Trust Indenture Act must be in accordance with Section 22(a) of the Securities Act.⁵¹

Who is responsible for paying the fees (e.g., court costs and attorneys’ fees) associated with matters involving the indenture?

The Trust Indenture Act requires that an indenture contain a provision that stipulates undertaking for costs. Pursuant to Section 315 of the Trust Indenture Act, all parties to an indenture must agree that the court may require, in its discretion, in any suit for the enforcement of any right or remedy under the indenture, or in any suit against the trustee for any action taken or omitted by the trustee, the filing of an undertaking to pay costs of the action.

The court may also use its discretion to assess reasonable costs, including reasonable attorneys’ fees, against any party involved in the action, taking into consideration: (i) the merits of the claim; and (ii) the good faith of the claims or defenses made by the party to the suit.

However, these provisions do not apply to:

- any suit instituted by the trustee;
- any suit instituted by any securityholder (or group of securityholders) holding in the aggregate greater than 10% in principal

⁵¹ See also 15 U.S.C. § 77v (stipulating the jurisdiction of offenses and suits under the Securities Act).

amount of the outstanding indenture securities; or

- any suit instituted by a securityholder for the enforcement of the payment of the principal of or interest on any indenture security, on or after the respective due dates expressed in such indenture security.

What types of indemnification provisions will trustees typically require to be included in an indenture?

A trustee will typically require the inclusion of indemnity provisions in the indenture that specify the following:

- the issuer, as well as any guarantors, will indemnify the trustee and its officers, directors, employees, agents and any predecessor trustee and its officers, directors, employees and agents for, and hold the trustee harmless against, any and all losses, damages, claims, liabilities or expenses (*e.g.*, attorneys' fees) incurred by the trustee in connection with the acceptance of the administration of the indenture and the performance of the trustee's duties under the indenture;
- failure by the trustee to notify the issuer promptly of any claim for which the trustee may seek indemnification will not relieve the issuer of its obligations under the indenture;
- the issuer will defend any claim made against the trustee in connection with the administration of the indenture; and
- the trustee may have its own counsel in connection with any claim made against it, and

the issuer must pay the fees and expenses of such counsel (except that the issuer will not be responsible for reimbursing any expense or indemnify against any loss, liability or expense incurred by the trustee through the trustee's own willful misconduct, negligence or bad faith).

Can the Trust Indenture Act apply to indentures governed by non-U.S. law?

Yes. To the extent the Trust Indenture Act applies because the securities being offered must be registered under the Securities Act, the indenture would need to be qualified pursuant to Section 305 of the Trust Indenture Act. Irrespective of whether the indenture's governing law clause stipulates a non-U.S. law, the mandatory provisions of the Trust Indenture Act (*i.e.*, Sections 310 through 317) would still apply and control (*see "Which provisions of the Trust Indenture Act are mandatory?"*).

Recent Developments and Litigation Involving the Trust Indenture Act

What types of claims were brought against trustees in the wake of the financial crisis?

Prior to the financial crisis in 2008, the Trust Indenture Act garnered minimal attention among regulators, and relatively few cases had been adjudicated involving Trust Indenture Act claims. However, lawsuits brought against trustees in connection with the financial crisis for their roles as trustees for more than \$2 trillion in residential mortgage securities reflect a new focus on

the trustee's obligations under the Trust Indenture Act. In particular, securityholders of residential mortgage-backed securities ("RMBS") have brought several lawsuits against the trustees that oversaw the applicable RMBS trusts for, among other things, breaching their trustee obligations under the Trust Indenture Act. In many cases, single plaintiffs have brought multiple suits against several different trustees. The National Credit Union Administration Board (the "NCUA") has also brought suits on behalf of failed credit unions against trustees overseeing RMBS trusts due, in part, to the trustees' failure to satisfy their obligations under the Trust Indenture Act.

The suits brought against trustees have largely focused on the trustee's alleged inability to protect the contractual and legal rights of RMBS securityholders or credit unions, as applicable. Specifically, claimants have asserted, among other things, that the relevant trustee violated Section 315 of the Trust Indenture Act by failing to exercise due care in reviewing the RMBS trusts' mortgage files for missing, incomplete and defective documentation. Moreover, claimants have argued that trustees should have utilized the rights granted to them under the applicable indentures to ensure that all defective loans were remediated and the trusts reimbursed for losses. These cases generally exemplify how the role and duties of the trustee will be more thoroughly scrutinized by stakeholders in the future.

Can the Trust Indenture Act be used to prohibit out-of-court restructurings?

Yes. Dissenting securityholders have rarely utilized Section 316(b) of the Trust Indenture Act to prevent out-of-court restructurings because these restructurings largely leave the core provisions of the indenture and securityholders' right to payment intact. However, *Marblegate* and *Caesars*, through their broad interpretations of Section 316(b) of the Trust Indenture Act, provide dissenting securityholders with a mechanism to challenge the decisions of majority securityholders in the context of a restructuring.⁵²

Marblegate. *Marblegate* involved the decision by Education Management Corp. ("EMC") to restructure \$1.5 billion of its debt, including over \$1 billion in secured debt (the "Secured Debt") and over \$200 million in unsecured notes (the "Unsecured Notes"). The Unsecured Notes were issued by EMC's subsidiary, Education Management LLC (together with EMC, the "Defendants"), but guaranteed by EMC (the "Parent Guarantee"), and qualified under the Trust Indenture Act. The Parent Guarantee could only be released by the majority vote of holders of the Unsecured Notes or by a corresponding release of the Parent Guarantee by the secured lenders (pursuant to the applicable indenture).

⁵² On April 25, 2016, 28 leading U.S. law firms published a white paper for the purpose of presenting "a set of general principles that can guide opinion givers until such time as the interpretive questions raised by [*Marblegate and Caesars*] are resolved through future judicial opinions and/or legislative action." See Baker Botts, *et al.*, "Opinion White Paper" (Apr. 25, 2016), available at: https://www.cov.com//media/files/corporate/publications/2016/04/white_paper_judicial_opinions_on_the_trust_indenture_act_of_1939.pdf.

In October 2014, the Defendants commenced an exchange offer as part of the restructuring of EMC. A dissenting group of holders (the “Plaintiffs”) declined to participate in the exchange offer and sought to enjoin the Defendants from transferring the assets out of EMC. The plaintiffs claimed that the restructuring violated Section 316(b) of the Trust Indenture Act because the removal of the Parent Guarantee impermissibly impaired the Plaintiffs’ right to receive payment on the Unsecured Notes.

While the court in *Marblegate* declined to issue an injunction, it did acknowledge that the Plaintiffs could succeed on the merits of their case, noting that the out-of-court restructuring at issue was “precisely the type of debt reorganization that the Trust Indenture Act [was] designed to preclude.”⁵³

Caesars. In *Caesars*, holders of \$1.5 billion worth of unsecured notes with maturities of 2016 and 2017 (the “2016 and 2017 Notes”) issued by Caesars Entertainment Operating Company, Inc. (“CEOC”) in 2006 (and guaranteed by CEOC’s parent, Caesars Entertainment Corporation (“CEC,” and together with CEOC, “Caesars”)), alleged that an out-of-court restructuring conducted by Caesars violated Section 316(b) of the Trust Indenture Act. The 2016 and 2017 Notes were issued pursuant to indentures that included unconditional guarantees by CEC and provisions prohibiting CEOC from divesting its assets.

In August 2014, CEOC and CEC purchased a substantial amount of the 2016 and 2017 Notes in a private transaction (the “August 2014 Transaction”). In exchange for the notes, CEOC and CEC promised to,

⁵³ *Id.* at 17.

among other things, consent to the removal and acknowledgment of the termination of CEC’s parental guarantee of the 2016 and 2017 Notes.

Holders of the 2016 and 2017 Notes that were not invited to participate in the August 2014 Transaction brought suit claiming that the transaction violated Section 316(b) of the Trust Indenture Act because the release of CEC’s parental guarantee effected a “non-consensual change to plaintiffs’ payment rights and affected plaintiffs’ practical ability to recover payment.”⁵⁴ The court in *Caesar* found plausible the plaintiffs’ claim that the August 2014 Transaction stripped the plaintiffs of the valuable CEC parental guarantee, “leaving them with an empty right to assert payment default from an insolvent issuer . . . [that was] sufficient to state a claim under section 316(b) [of the Trust Indenture Act].”⁵⁵

Would a payment acceleration provision under an indenture bar bondholders from seeking specific performance of a make-whole redemption provision if the default resulted from voluntary actions by the issuer?

In a recent case, the U.S. District Court for the District of New York (the “District Court”) determined that an indenture’s permissive, non-exclusive acceleration clause, together with an issuer’s voluntary breach of the indenture, does not bar bondholders from seeking specific performance of a make-whole redemption provision under the indenture.⁵⁶

⁵⁴ See *Caesars*, *supra* note 34 at 4.

⁵⁵ *Id.* at 5.

⁵⁶ See *Wilmington Savings Fund Society, FSB v. Cash America International, Inc.*, 15-CV-5027 (JMF) (Sept. 19, 2016).

The bonds included a make-whole redemption provision allowing for the redemption of the bonds and the payment of a make-whole redemption premium to bondholders in certain circumstances. The indenture trustee brought suit against the issuer on behalf of bondholders, asserting that the issuer had voluntarily breached the indenture when it spun off one of its major subsidiaries, and sought to collect on behalf of the bondholders the make-whole redemption premium, as the remedy for the breach of the indenture. Under the indenture, the spin-off of a subsidiary constituted an “event of default.” However, absent a bankruptcy, the indenture did not require payment acceleration.

The District Court held that because the indenture had both a redemption clause and an “explicitly permissive” and non-exclusive acceleration clause, the bondholders were not prevented from enforcing the make-whole redemption provision through specific performance.⁵⁷

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⁵⁷ See *id.* at 13-15 (citing *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039 (2d Cir. 1982)).