King & Spalding

Private Credit & Special Situations

WHAT IS IT?

ESG and Sustainability-Linked Provisions in US Credit Agreements

Summary

Given the absence of standardization in ESG reporting, ratings measurement and diligence, and the expectation that the use of ESG-related and sustainability-linked loan contractual provisions will evolve, it is difficult to declare terms market in this kind of financing at this stage. And yet, the number of loans made refute any doubt that there has been a tremendous rise in ESG and sustainability linked loans made within the last five years.[1] These financings are no longer rare and with this growth, we are beginning to see some patterns crystallize in credit documentation with respect to ESG-related or sustainability-linked loan contractual provisions.

In this update, we highlight and review some frequently-seen provisions in ESG and sustainability-linked loan agreements, including (1) approaches through which ESG provisions make their way into and are structured within credit agreements, (2) a look into how key performance indicators (KPIs) and sustainability performance targets (SPTs) may be set up in the credit agreement, (3) the covenant dealing with proceeds of ESG and sustainability linked loans, (4) reporting and information covenants, (5) touchpoints between ESG and sustainability provisions and default-related provisions in credit agreements and (6) the additional parties or players introduced in connection with ESG and sustainability-linked loan agreements. Lastly, we discuss the presence of ESG and sustainability provisions in other connected or ancillary documentation within the credit agreement orbit with a focus on their appearance in limited liability company agreements. While Europe has taken an important lead in the sustainable and ESG financing area, our focus in this note is on US-style credit documentation.

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[1] According to the UN Principles for Responsible Investment, sustainable lending activity grew from US$6 billion in January 2016 to US$322 billion in September 2021 with sustainable lending representing more than one-tenth of the global corporate syndicated loan market and of which 90 per cent were sustainability-liked loans as of September 2021. See Sehoon Kim et al., "Sustainability-Linked Loans: A Strong ESG Commitment or a Vehicle for Greenwashing?", dated July 20, 2022, available at https://www.unpri.org/pri-blog/sustainability-linked-loans-a-strong-esg-commitment-or-a-vehicle-for-greenwashing/10243.article.

1. Structuring of ESG-Related and Sustainability-Linked Loan Provisions in Credit Agreements

One approach to the structuring of ESG loans in credit agreement sees KPIs, ESG or sustainability performance targets SPTs and pricing adjustment provisions incorporated into the credit documentation at the time of closing. SPTs or KPIs, such as environmental improvements, are selected, in the first instance, in consultation with the borrower, the credit facility agent and an ESG coordinator,[2] and pricing adjustments for the borrower are agreed in line. Pricing adjustments couple interest rates of the loans and facility fees to the borrower's performance of the SPTs. A reduction or increase in interest rate or facility fees is applied depending on the borrower performance in meeting preestablished SPTs, allowing the borrower to benefit from a lower interest rate or facility fees if such preestablished SPTs are met. If there are not met, there is no change in pricing or facility fees. If the borrower underperforms, there is usually a premium in the same amount as would be applied in the discount.[3]

In a second approach frequently seen, sustainability and ESG terms are added to the credit documentation as an amendment following the closing date. Through this mechanism, a provision is included in the credit agreement at closing that allows for ESG-related or sustainability-linked loan terms (including pricing provisions) to be added to the credit agreement in the future (i.e., after the closing) in the form of an amendment by the borrower in consultation with an ESG coordinator determining the appropriate KPIs. Some agreements stipulate the timeline by when the credit facility may be amended to include ESG or sustainability-related provisions, with many deadlines set prior to the first anniversary of closing. The following are additional highlights noted in the amendment approach:

a. Required Lenders can object to the ESG amendment by delivering a written notice to the agent, and an alternative ESG Amendment may be proposed and effectuated.

b. Any pricing adjustment requires reporting and validation of the measurement of the KPIs in a manner aligned with the [Sustainability-Linked Loan Principles](https://www.lsta.org/content/sustainability-linked-loan-principles-sllp/)[4] and is to be agreed between the borrower and ESG coordinator all acting reasonably.

c. Any modification that reduces or increases the fees and any applicable interest rates to a manner that is not contemplated by the applicable ESG amendment provision requires the consent of all Lenders; any other modification to the ESG pricing provisions is subject only to the Required Lenders' consent. Some iterations of the latter formulation permit borrower's consent as well.

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[2] The concept of an ESG coordinator is further discussed below.

[3] See, for example, $600,000,000 Revolving Credit Agreement, dated as of October 15, 2020 among Millicom International Cellular S.A., as Borrower, the Lenders therein, The Bank of Nova Scotia as Administrative Agent, DNB Bank ASA, Sweden Branch as ESG Coordinator and the other parties thereto, filed March 10, 2021 on Form 20-F, Exhibit 4.2, available at https://www.sec.gov/Archives/edgar/data/912958/000162828021004466/micsarcf-revolvingcreditaga.htm.

[4] Asia Pacific Loan Market Association, Loan Market Association, Loan Syndications & Trading Association, Sustainability-Linked Loan Principles, dated March 31, 2022, available at https://www.lsta.org/content/sustainability-linked-loan-principles-sllp/.

d. The interest rate is never to be less than zero as a result of sustainability additions to the credit documentation.

e. The ESG amendment will not impose any requirement on the ESG Coordinator to assess, monitor, report and/or validate the KPIs.[5]

2. Key Performing Indicators and Sustainability Performance Targets

In an ESG or sustainability-linked loan agreement, borrowers select KPIs of an environmental, social or governance nature, and then set SPTs tied to such KPIs. KPIs ought to be relevant and material to the borrower's business, achievable and consistently measurable.[6] Some examples of common KPIs we see in credit agreements include:

- Environmental: reductions in greenhouse gas emissions; water consumption and savings made by the borrower; and increases in the amount of renewable energy generated or used by the borrower.[7]
- Social: improvements in specific goals relating to improvements in gender and racial diversity of the borrower's personnel; reduction in risks related to data privacy security; and, in the case of a real estate borrower, increases in the number of affordable housing units developed by the borrower.[8]
- Governance: improvement in the borrower's approach to managing risks and opportunities around ethical conduct of its business; and improvements in expertise of individuals sitting on the borrower's governance committees, e.g., audit committee, compensation committee, compliance committee.[9]

SPTs ought to be ambitious, represent a material improvement in the respective KPIs; be beyond a "Business as Usual" approach in the borrower's business; be in comparison to a benchmark or external reference; be consistent with the borrower's overall sustainability or ESG strategy; and be measured on a predefined timeline.[10] SPTs are typically set against numbers, and in one credit agreement, if the borrower underperforms against its SPTs of 28% Gender Diverse Employee Percentage Threshold, its pricing margin will increase by 2.5 basis points and its revolving commitment fee will increase by 5 basis points. If it does not hit its SPT threshold, the pricing remains the same. If the borrower achieves or exceeds its SPTs of greater than or equal to 30% of the Gender Diverse Employee Percentage Target, it will be rewarded with an interest rate reduction of 2.5 basis points and a revolving commitment fee decrease of 5 basis points.

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[5] See, for example, Amended and Restated Credit Agreement, dated as of September 30, 2021 among Stericycle, Inc. and Certain Subsidiaries as Borrowers, Bank of America, N.A. as Administrative Agent and the other parties thereto, Section 2.18, filed October 4, 2021 on Form 8-K, Exhibit 10.1, available at https://www.sec.gov/Archives/edgar/data/861878/000119312521291128/d233563dex101.htm.
[6] The Sustainability-Linked Loan Principles.
[7] Id.
[8] Id.
[9] Id.
[10] Id.

ILLUSTRATIONS:

- "Gender Diverse Employee Percentage Margin Adjustment Amount" means, with respect to any period between Sustainability Pricing Adjustment Dates, (a) positive 0.025% per annum, if the Gender Diverse Employee Percentage for such period as set forth in the KPI Metrics Report is less than the Gender Diverse Employee Percentage Threshold for such period, (b) 0.00% per annum, if the Gender Diverse Employee Percentage for such period as set forth in the KPI Metrics Report is more than or equal to the Gender Diverse Employee Percentage Threshold for such period but less than (or in the case of Calendar Years 2025 and 2026 equal to) the Gender Diverse Employee Percentage Target for such period, and (c) negative 0.025% per annum, if the Gender Diverse Employee Percentage for such period as set forth in the KPI Metrics Report is more than or (in the case of Calendar Years 2022, 2023 and 2024) equal to the Gender Diverse Employee Percentage Target for such period.[11]
- "Gender Diverse Employee Percentage Revolving Commitment Fee Adjustment Amount" means, with respect to any period between Sustainability Pricing Adjustment Dates, (a) positive 0.005% per annum, if the Gender Diverse Employee Percentage for such period as set forth in the KPI Metrics Report is less than the Gender Diverse Employee Percentage Threshold for such period, (b) 0.00% per annum, if the Gender Diverse Employee Percentage for such period as set forth in the KPI Metrics Report is more than or equal to the Gender Diverse Employee Percentage Threshold for such period but less than (or in the case of Calendar Years 2025 and 2026 equal to) the Gender Diverse Employee Percentage Target for such period, and (c) negative 0.005% annum, if the Gender Diverse Employee Percentage for such period as set forth in the KPI Metrics Report is more than or (in the case of Calendar Years 2022, 2023 and 2024) equal to the Gender Diverse Employee Percentage Target for such period.[12]

In general, pricing adjustments tend to range from 1 to 25 basis points, with the ESG and sustainability-linked loan market in the United States on the lower end of the range and the sustainability-linked loan market in Europe on the upper end. Pricing adjustments tend not to be cumulative over the life of the loan and are normally reset annually. There is no "stacking" of achievements (or premiums) on the interest rate or facility fees.

3. Proceeds of the Loans

Proceeds from ESG-related and sustainability-linked loans are not earmarked for specific ESG or sustainability purposes. Instead, proceeds are used for customary general corporate purposes and/or working capital. Some ESG-related and sustainability-linked credit agreements may have use of proceeds go towards green projects plus the general corporate purpose and/or working capital.

[11] Credit Agreement, dated as of March 24, 2022 among Trimble Inc., the Borrowing Subsidiaries party thereto, Lenders Party thereto and Bank of America, N.A., as Administrative Agent, Section 1.01, filed March 30, 2022 on Form 8-K, Exhibit 10.1, available at https://www.sec.gov/Archives/edgar/data/864749/000086474922000064/a101trimblecreditagreement.htm.
[12] Id.

ESG and Sustainability-Linked Provisions in US Credit Agreements (cont'd)

A sustainability revolving credit agreement with an electricity supplier as borrower permits a "Sustainability Use of Proceeds", which is described as a "Green Investment Use of Proceeds and/or a Social Investment Use of Proceeds" and as a subset of the general corporate purposes use.

ILLUSTRATIONS:

- 8.9. Use of Proceeds. The proceeds of the Loans made to the Borrower hereunder may be used for general corporate purposes, including for Green Investment Use of Proceeds and Social Investment Use of Proceeds.[13]
- "Green Investment Use of Proceeds" means the allocated use of the proceeds of a Loan by the Borrower or any of its Affiliates to finance (or to refinance a financing the proceeds of which were used during the eighteen months prior to the making of such Loan to finance), in whole or in part, investments in, and working capital, capital expenditures and other general corporate purposes relating to, existing (at the time of such use) and future solar, wind, hydro, storage battery, renewable natural gas, and other renewable energy as well as pollution prevention and control, biodiversity conservation, or sustainable building projects, installations, improvements and businesses and purposes reasonably related or ancillary thereto.[14]
- "Social Investment Use of Proceeds" means the allocated use of the proceeds of a Loan by the Borrower or any of its Affiliates to finance (or to refinance a financing the proceeds of which were used during the eighteen months prior to the making of such Loan to finance), in whole or in part, investments in, and working capital, capital expenditures and other general corporate purposes relating to, existing (at the time of such use) and future projects, installations, improvements and businesses and purposes reasonably related or ancillary to (i) supporting small and medium sized businesses and/or diverse owned businesses, (ii) COVID 19 and emergency related community response, (iii) measures to increase diversity among new hires and the retention and promotion of women and minority employees and (iv) solidarity with vulnerable, underrepresented, underserved and/or marginalized populations including without limitation, foregoing arrearages or donations/grants made to community support organizations or to support educational programs serving underrepresented minority populations (including, but not limited to, historically black colleges and universities).[15]

On the other hand, the use of proceeds in green loan facilities, whereby loans are made with the intent of financing a green project, is tailored specifically towards funding such green projects. The Green Loan Principles'[16] tenets, such as the guideline that all green projects ought to provide clear environmental benefits, usually guide use of proceeds in these facilities. For example, a green loan may have the following use of proceeds clause.

[13] $900,000,000 Sustainability Revolving Credit Agreement, dated as of June 9, 2021 among Dominion Energy, Inc., as Borrower, Several Lenders, Sumitomo Mitsui Banking Corporation as Administrative Agent and Sustainability Coordinator and the other parties thereto, Section 8.9, filed June 10, 2021 on Form 8-K, Exhibit 10.2, available at https://www.sec.gov/Archives/edgar/data/715957/000119312521187869/d179382dex102.htm.
[14] Id., Section 1.1.
[15] Id.
[16] Asia Pacific Loan Market Association, Loan Market Association, Loan Syndications & Trading Association, Sustainability-Linked Loan Principles, February 2021, available at https://www.lsta.org/content/green-loan-principles/.

ILLUSTRATION

- 4.9. Purpose of Loans. The proceeds of the Loans shall be used by the Borrower to finance and/or refinance (including via consummation of the Refinancing) certain projects that meet the Green Loan Principles consisting of capital investments related to wildfire mitigation, and to pay fees and expenses in connection with this Agreement and the Refinancing. The use of proceeds of the Loans shall be in compliance with all applicable decisions of the California Public Utilities Commission. No part of the proceeds of any Loans, and no other extensions of credit hereunder, will be used for "buying" or "carrying" any "margin stock" within the respective meanings of each of the quoted terms under Regulation U as now and from time to time hereafter in effect. First Amendment, dated as of May 9, 2022, to the Term Loan Credit Agreement, dated as of May 10, 2021, by and among Southern California Edison Company, the Lenders thereto and Royal Bank of Canada as Administrative Agent, Section 4.9, filed May 9, 2022 on Form 8-K, Exhibit 10.1, available at https://www.sec.gov/Archives/edgar/data/92103/000009210322000008/sce-20220509xex10d1.htm.[17]

4. Reporting

Borrowers report on meeting KPI metrics and SPTs by delivering an annual certificate in the form of an "ESG Certificate" (also known as a "Pricing Certificate" or "Sustainability Pricing Certificate"), duly signed by a responsible officer and providing information on how the borrower performed against the KPI metrics or SPTs in furtherance of the pricing discount, pricing premium or no change in pricing. We see performance of SPTs and metrics measured retroactively from the date of closing, and the lookback is typically one-full year from such time. Attached to the certificate is a KPI metrics report that would set forth the calculations for the KPI metrics. The borrower's annual ESG or sustainability report may also take the form of the KPI metrics report. A best practice means the KPI metrics report is audited by a "KPI Metrics Auditor", a designated third-party, independent consultant with experience with ESG and sustainability research and assurance services. The concept of a KPI Metrics Auditor is further discussed below.

Independent of an ESG Certificate, lenders also request that borrowers report on their ESG or sustainability activities, which reporting may take the form of responses to the Loan Syndications & Trading Association's (LSTA's) "ESG Diligence Questionnaire",[18] is delivered concurrently with other information reports, such as financial statements, and, as such, is an affirmative covenant under the credit agreement.

[17] First Amendment, dated as of May 9, 2022, to the Term Loan Credit Agreement, dated as of May 10, 2021, by and among Southern California Edison Company, the Lenders thereto and Royal Bank of Canada as Administrative Agent, Section 4.9, filed May 9, 2022 on Form 8-K, Exhibit 10.1, available at https://www.sec.gov/Archives/edgar/data/92103/000009210322000008/sce-20220509xex10d1.htm..

[18] The LSTA ESG Diligence Questionnaire, published as of June 4, 2021, is a result of the work of the LSTA's ESG Working Group, which is comprised of LSTA executive staff and participants such as lender and sponsor institutions, corporate borrowers and counsel to each of the aforementioned parties.

ILLUSTRATIONS

- (s) ESG Reporting. Upon reasonable request of Administrative Agent, together with the Annual Financial Statements delivered pursuant to Section 5.1(c), an ESG Certificate.[19]
- "ESG Certificate" means a certificate substantially in the form of the Loan Syndications and Trading Association's ("LSTA") "ESG Diligence Questionnaire – Borrower, effective June 4, 2021", and any successor thereto as may be designated as the form "ESG Certificate" by the Administrative Agent.[20]

We have also seen ESG-related credit agreement reporting covenants, whereby borrowers agree to deliver newly-generated or updated internal policies and procedures of a borrower group to reflect ESG and sustainability considerations similar to a sanctions and/or bribery covenant. This request by lenders is a show of commitment to their continued focus on ESG in loan documentation given the increased attention on ESG and sustainability in the loan financing industry. Below is an example of such language.

ILLUSTRATION:

- (f) concurrently with the annual financial statements delivered pursuant to clause (e) of this Section 4, copies of (i) the anti-bribery and anti-corruption policies of Holdings and its Subsidiaries (collectively, the "Anti-Corruption Policies") and (ii) the environmental, social and/or governance policies (the "Specified Governance Policies") of Holdings and its Subsidiaries (to the extent such items are not already contained in such annual financial statements); provided that, if such Anti-Corruption Policies and Specified Governance Policies are not in effect as of the Amendment Effective Date, Holdings and its Subsidiaries will use commercially reasonable efforts to design and implement such policies on or before the date that the first annual financial statements are required to be delivered pursuant to clause (e) of this Section 4 and shall, and shall cause their Subsidiaries, to maintain such policies thereafter.[21]

5. Default and Events of Default

In most cases, the failure to meet SPTs or KPI targets or deliver an ESG Certificate will not constitute a default or event of default – though, as previously discussed, it could result in inability to obtain the pricing discount and even result in a pricing premium. Moreover, inaccuracies in KPI metrics reports, KPI metrics themselves or the ESG Certificate typically do not constitute a default or event of default under credit agreements.

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[19] Financing Agreement, dated as of June 30, 2022, among Blueprint Medicines Corporation, as Borrower, Certain Subsidiaries of Borrower, Various Lenders from Time to Time Party thereto and Tao Talents, LLC, as Administrative Agent, Section 5.1(s), filed August 2, 2022 on Form 10-Q, Exhibit 10.3, available at https://www.sec.gov/Archives/edgar/data/1597264/000155837022011648/bpmc-20220630xex10d3.htm.

[20] Id., Section 1.1.

[21] Credit agreement sample language based on an amalgamation of non-publicly announced deals.

ILLUSTRATIONS

- Notwithstanding anything in this Agreement to the contrary, the failure to deliver an ESG Certificate under this Section shall not constitute an Event of Default or an Unmatured Event of Default.[22]
- 1.09(c). It is hereby understood and agreed that if no such Pricing Certificate is delivered by the Borrower with regard to a particular Reference Year, the Sustainability Rate Adjustment will be 0.000% commencing on the last day such Pricing Certificate could have been delivered pursuant to the terms of Section 1.09(g) below and continuing until the Borrower delivers a Pricing Certificate to the Administrative Agent for the applicable Reference Year.[23]
- 1.09(g). As soon as available and in any event within 180 days following the end of each fiscal year of the Borrower (commencing with the fiscal year ending December 31, 2021), the Borrower shall deliver to the Administrative Agent and the Lenders, in form and detail satisfactory to the Administrative Agent and the Required Lenders, a Pricing Certificate for the most recently-ended Reference Year; provided, that, for any Reference Year the Borrower may elect not to deliver a Pricing Certificate, and such election shall not constitute a Default or Event of Default (but such failure to so deliver a Pricing Certificate by the end of such 180-day period shall result in the Sustainability Rate Adjustment being applied as set forth in Section 1.09(c) above).[24]
- 2.23(d). …It is understood and agreed that any Pricing Certificate Inaccuracy (and any consequences thereof) shall not constitute a Default or Event of Default, so long as the Borrower complies with the terms of this Section 2.23(d).[25]

6. Parties in ESG and Sustainability-Linked Loan Agreements

In addition to the customary signatories, such as the administrative agent, lenders and borrower parties, ESG and sustainability-linked loan agreements introduce some new parties to credit agreements. For example, an "ESG Coordinator", which we also see referred to as a "Sustainability Agent"," Sustainability Coordinator" or "Sustainability Structuring Agent", is an institution engaged to perform duties of helping the borrower determine the ESG pricing provisions in connection with an ESG amendment and helping the borrower prepare informational materials focused on ESG to be used in connection with such amendment. The ESG Coordinator may be a lender or administrative agent under the credit facility, but in its capacity as ESG Coordinator, it plays a distinct role in helping to ensure selection of meaningful KPIs and remains involved post-signing in connection with ESG-related administrative and operational matters such as compliance with delivery of the Pricing Certificate and other information materials in connection with aspects of the credit documentation that are focused on ESG.

[22] Second Amendment to the Receivables Financing Agreement dated as of September 24, 2021, by and among Enlink Midstream Funding, LLC, Enlink Midstream Operating, LP, PNC Bank, National Association and PNC Capital Markets LLC, Section 14.20 (third sentence), filed September 27, 2021 on Form 8-K, Exhibit 10.1, available at https://www.sec.gov/Archives/edgar/data/1592000/000110465921119585/tm2128455d1_ex10-1.htm.

[23] Amended and Restated Credit Agreement, dated as of July 26, 2022, among Stag Industrial Operating Partnership, L.P., Stag Industrial, Inc., Well Fargo Bank National Association, Bank of America, N.A. and the other parties thereto, Section 1.09(c), filed July 29, 2022 on Form 8-K, Exhibit 10.1, available at https://www.sec.gov/Archives/edgar/data/1479094/000110465922084206/tm2222119d1_ex10-1.htm.

[24] Id., Section 1.09(g).

[25] Credit Agreement, dated as of May 20, 2022, among Huntsman International LLC, the Lenders, Citibank, N.A. as Administrative Agent and the other parties thereto, Section 2.23(d) (second sentence), filed May 23, 2022 on Form 8-K, Exhibit 10.1, available at https://www.sec.gov/Archives/edgar/data/1089748/000110465922063550/tm2216038d1_ex10-1.htm.

ILLUSTRATIONS

- Sustainability Structuring Agent. The Sustainability Structuring Agent will (i) assist the Borrower in determining the ESG Pricing Provisions in connection with the ESG Amendment and (ii) assist the Borrower in preparing informational materials focused on ESG targets to be used in connection with the ESG Amendment, in each case, based upon the information provided by the Borrower with respect to the applicable KPIs or ESG Ratings targets selected in accordance with Section 9.01; provided that the Sustainability Structuring Agent (x) shall have no duty to ascertain, inquire into or otherwise independently verify any such information and (y) shall have no responsibility for (and shall not be liable for) the completeness or accuracy of any such information.[26]

Worth noting is that the above provision carves out any fiduciary duties owed by the Sustainability Structuring Agent to the lenders to verify the completeness or accuracy of KPI or ESG target information provided by the borrower, and so it remains incumbent upon the lenders to do so independently.

It is a best practice for borrowers to engage a "KPI Metrics Auditor" or "Sustainability Assurance Provider" to serve as external reviewer, auditor, evaluator and consultant in audits of the KPI metrics and as verifier of the KPI metrics report. Independent, external post-signing verification of borrowers' performance levels against SPTs for KPIs, at least annually, became mandatory pursuant to the Sustainability-Linked Loan Principles as part of its May 2021 updates. Some KPI Metrics Auditors or Sustainability Assurance Providers we see are members of the "big four" auditing firms, Apex Companies, Cventure and ERM.

Some credit agreements also have as a condition precedent, a "second party" opinion[27] from an ESG or sustainability ratings provider as to the alignment of the loans with the Sustainability-Linked Loan Principles or the sustainability ratings assigned the borrower party. Ratings service providers we have seen referenced and used are GRESB (with respect to transactions that touch the real estate sector), MSCI, Sustainalytics, and Vigeo Eiris.

Finally, at least one credit agreement has introduced the role of Vice President of Sustainability in the definition of "Responsible Officer" of the borrower for purposes of authorized delivery of the ESG Certificate.[28]

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[26] Fourth Amended and Restated Revolving Credit and Term Loan Agreement, dated as of July 20, 2022, by and among Healthcare Realty Holdings, L.P., Healthcare Trust of America, Inc., the Financial Institutions party thereto and Wells Fargo Bank, National Association as Administrative Agent, Section 8.12, filed July 26, 2022 on Form 8-K, Exhibit 10.1, available at https://www.sec.gov/Archives/edgar/data/1495491/000119312522202185/d384978dex101.htm.

[27] See, for example, First Amended and Restated Credit Agreement, dated as of May 19, 2021, between Seaspan Holdco III LTD., Seaspan Corporation, Citibank, N.A., as Administrative Agent, Société Générale, Hong Kong Branch as Lead Sustainability Coordinator and the other Lenders thereto, Section 4.01(e)(vii), filed May 27, 2021 on Form 6-K, Exhibit 4.1, available at https://www.sec.gov/Archives/edgar/data/1794846/000119312521175428/d157605dex41.htm.

[28] Third Amendment to the Revolving Credit Agreement, dated as of April 23, 2019, as amended and restated as of September 29, 2021 among Ford Motor Company, the Several Lenders from Time to Time Parties Thereto, JP Morgan Chase Bank, N.A. as Administrative Agent and Co-Sustainability Structuring Agent and Crédit Agricole Corporate and Investment Bank as Lead Sustainability Structuring Agent, Section 1.1, filed September 29, 2021 on Form 8-K, Exhibit 10.2, available at https://www.sec.gov/Archives/edgar/data/37996/000003799621000079/exhibit102toseptember29202.htm.

7. Other Documents

ESG provisions also appear in documents within the wider orbit of credit documentation and related ancillaries-- though it is not clear that they are incorporated at the request of lenders. As an illustration, stet amended and restated limited liability company agreement for one Delaware holdings company requires delivery of a summary of any material ESG issues to its unitholders and investors on an annual basis.

ILLUSTRATIONS

- Delivery of Information. The Company shall use reasonable efforts to provide to each Unitholder and Investor on an annual basis a brief summary of any material environmental, social and governance ("ESG") issues during such annual period of which the Company has knowledge, and how the Company and the Company Subsidiaries have addressed, or intend to address, such ESG issues. The Company may limit, withhold or defer disclosure of a particular ESG issue if it determines in good faith that such disclosure would not be permitted under Applicable Law or contract, or would not be in the best interests of the Company and the Company Subsidiaries.[29]

Another Delaware amended and restated limited liability company agreement states in its "Management of Company Business" section that the limited liability company "shall have regard to ESG issues and use commercially reasonable efforts to endeavor to maintain and/or introduce appropriate ESG strategies to the operation of the Company and its Subsidiaries". It is directed by its member to provide any information regarding ESG efforts and activities promptly at the member's request.[30]

Concluding Remarks

ESG-related and sustainability-linked loans continue to increase in the loan market, and they are likely not going away anytime soon. We know that lenders, sponsors and borrowers are interested in the sustainability loan product given the keen attention to sustainable financing and ESG generally. However, developments in the ESG and sustainable financing space continue to be monitored, and deal drafting in this area remain largely high (and growing) bespoke among parties. Still, given the number of financing transactions we are beginning to see some trends in contractual language, terms and provisions coalesce in documents, which may likely set up the market roadmap for how ESG and sustainability concepts are structured and reflected in credit documentation not only in the short-run, but in the long-term.

[29] ALSK Holdings, LLC Amended and Restated Limited Liability Company Agreement dated as of July 21, 2021, Section 12.01(c), filed July 22, 2021 on Form 8-K, Exhibit 10.1, available at https://www.sec.gov/Archives/edgar/data/879585/000110465921094942/tm2122780d1_ex10-1.htm.

[30] Plymouth MIR JV LLC Limited Liability Company Agreement, dated as of October 23, 2020, Section 3.9, filed December 18, 2020 on Form 8-K, Exhibit 99.2, available at https://www.sec.gov/Archives/edgar/data/1515816/000117152020000475/ex99-2.htm.