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Distressed BISO Rules

What are the “BISO” provisions?

“Buy-In Sell-Out” rules adopted by the LSTA¹ in 2009 for par/near-par transactions, and recently adopted, in modified form, for distressed transactions. The BISO rules authorize a party, under limited circumstances, to terminate an agreed trade that has not closed in a timely manner².

What is the purpose of the new Distressed BISO rules?

To increase liquidity in the secondary market for distressed loans by setting clear deadlines by which market participants can be required to close their trades.

How do the Distressed BISO Rules work?

In general, any party that has, as of T+50, performed its obligations to further the closing of an agreed sale of distressed loans can serve a counterparty that has not yet performed its parallel obligations with a “BISO Notice” threatening termination of the trade if failure to perform isn’t cured within an additional 20 business days.³ If the counterparty fails to cure, the party that served the notice has 10 business days to enter a binding commitment for a cover sale (where the defaulting counterparty is the buyer) or cover buy (where the party in default is the seller).⁴

¹ Loan Syndications and Trading Association.

² See LSTA Standard Terms and Conditions for Distressed Trade Confirmations (“Distressed STC”), §§16-18; see also LSTA Standard Terms and Conditions for Par/Near-Par Trade Confirmations (“Par STC”), §§16-18.

³ See Distressed STC, §16(a)-(b).

⁴ See Distressed STC, §16(a)(5).

What happens to the original trade when the cover trade is timely entered into?

The original trade is terminated.⁵ Where Buyer terminates, original Seller remains long the loans it had originally agreed to sell; where Seller terminates, original Buyer ends up without having purchased the loans.

Who bears responsibility for the difference between the purchase price originally agreed by Buyer and Seller, and the purchase price on the cover trade?

The Distressed BISO Rules do not change the economics of the terminated trade between original Buyer and original Seller. Cover trade proceeds in excess of the original purchase price are reimbursable by original Seller, and any amount by which the original purchase price exceeds the amount of cover trade proceeds is reimbursable by original Buyer, regardless of which party terminated the original trade (each such reimbursement amount is referred to in these FAQs as a “BISO Settlement Payment”).⁶

Is Delayed Compensation⁷ payable on trades terminated under the Distressed BISO Rules?

Yes. For purposes of calculating the amount of a BISO Settlement Payment, the original purchase price is calculated in the same manner as it would have been if the original trade had actually closed on the earlier of the date that the cover trade actually closes, or the 20th business day after the cover trade’s trade date.⁸ This helps assure that, as the case may be, the terminating party still gets the benefit of, or bears responsibility for, all closing date adjustments, including without limitation delayed compensation and credits for permanent commitment reductions, from the trade date of the original trade through the closing date of the cover trade.

Are any other amounts payable in respect of a trade terminated under the Distressed BISO Rules?

The defaulting party is also responsible for up to \$5000 of any attorneys’ fees and expenses incurred by the terminating party in connection with the terminated trade.⁹

⁵ See Distressed STC, §16(a)(5)(A).

⁶ See Distressed STC, §§17-18.

⁷ See our answers to Frequently-Asked Questions regarding Delayed Compensation, *available at* <http://www.kieselaw.com/claims-trading-faq/delayed-compensation-2>.

⁸ See Distressed STC, §§17(b)(iii), 18(b)(iii).

⁹ See Distressed STC, §§17(b)(iv), 18(b)(iv).

A terminating party enters into a cover trade at a price that the counterparty believes is unfair. Does the counterparty have any recourse for this?

Where a counterparty timely objects to the reasonableness of a buy-in or sell-out price of a cover trade, mandatory binding arbitration is available before a panel constituted by the LSTA¹⁰.

What if the counterparty believes the termination was inappropriate in the first place?

Mandatory arbitration under the Distressed BISO Rules applies only to disputes over the reasonableness of the buy-in or sell-out price of the cover trade. All other disputes remain subject to any rights and remedies the parties may have under applicable documentation and law.

How does a party to a distressed loan trade avoid getting “BISO’d”?

In the case of the party designated as the “drafting party” by original Seller and original Buyer, by timely delivering draft confirmations and closing documents to the counterparty for review and approval, and indicating that you are ready, willing and able to close and/or actually executing and delivering these documents, in a timely manner per the LSTA Distressed Confirmation Standard Terms and Conditions. In the case of the “non-drafting party”, by timely reviewing such documents and, as appropriate, either objecting in writing to them, or indicating that you are ready, willing and able to close on and/or actually executing and delivering such documents. With respect to any so-called “upstream” agreements whose rights and obligations are contemplated to be passed along by Seller to Buyer in connection with the trade, timely delivering the upstreams (in the case of Seller) or timely reviewing them (in the case of Buyer).¹¹

What if the closing delays aren’t Buyer’s or Seller’s fault?

The Distressed BISO Rules generally require the parties to a trade to do what they can to close by a particular date, but do not obligate the parties to close where this is beyond their control. Where, for example, both original Seller and original Buyer have timely performed their respective obligations to generate, deliver, review and approve the relevant upstreams, confirmation letter and closing documents for a distressed trade, but the trade does not close by T+50 due to the inability of the parties to obtain any necessary borrower or agent consents, neither party may resort to the Distressed BISO Rules to terminate the trade.¹²

¹⁰ See Distressed STC, §16(a)(5).

¹¹ See Distressed STC, §16(a)-(b).

¹² See Distressed STC, §16(c)(4).

What if original Seller can't perform its delivery obligations because it's waiting on *its* upstream sellers?

The Distressed BISO Rules provide parties (typically, dealers) facing this common problem with an exemption from the BISO Rules (defined by the Rules as an "Upstream Shield"), subject to the satisfaction of two basic conditions. First, they need to provide their counterparty with redacted confirmations evidencing the upstream trade or trades. Second, they themselves are required to "BISO" their relevant upstream sellers, in an attempt to break the logjam.¹³

Do all upstream trades afford the BISO'd seller an Upstream Shield?

No. To qualify as an Upstream Shield, a pending upstream trade needs to have been committed to by Seller not later than five business days after seller committed to the resale on which it is currently being "BISO'd".¹⁴ As discussed in our September 2011 Newsletter, this is likely to make it more difficult for a party to short distressed loans.

Is termination under the BISO Rules a "use it or lose it" remedy?

Yes and no. There is no time limit for a party that has performed its obligations under a distressed LSTA confirmation letter to exercise its remedies under the Distressed BISO Rules once the trade is more than 50 business days old. But once a BISO Notice has been delivered, if the performing party fails to effectuate a Cover Transaction within 10 business days following the expiration of the defaulting counterparty's Cure Period, the BISO Notice expires and the performing party loses the ability to use the Distressed BISO Rules again for the duration of the trade.¹⁵

Are there any distressed loan trades to which the BISO Rules do not apply?

The Distressed BISO Rules only apply to secondary loan sales that can close by assignment. Sales of participation interests in distressed loans, and outright assignments of loans that have been reduced to proceeds and can no longer be transferred of record, are expressly exempted from the application of the Rules.¹⁶

¹³ See Distressed STC, §16(c)(9).

¹⁴ See Distressed STC, §16(c)(9)(B)(i)(c).

¹⁵ See Distressed STC, §16(a)(6).

¹⁶ See Distressed STC, §16(c)(2).