SLAUGHTER AND MAY/

ACT TREASURY EXCELLENCE AS STANDARD

A BORROWER'S GUIDE TO SUSTAINABILITY-LINKED LOAN TERMS

Produced by Slaughter and May

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INTRODUCTION

INTRODUCTION

1. The rise of sustainability-linked loans (SLLs)

In November 2022, we published a new edition of our **ACT Borrower's Guide to the LMA's Investment Grade Agreements** (the **ACT Borrower's Guide**). This was the first edition of the ACT Borrower's Guide to include a chapter on SLLs, in which we observed that these products are still evolving in many respects and that this is a fast-moving area. This has proved to be the case.

SLLs are the most popular sustainable loan product by some measure. The volume of SLLs now far surpasses the volume of use of proceeds loans. The popularity of SLLs lies in their breadth of application – they have much wider reach than the use of proceeds products. Green and social loans are only available to borrowers requiring funding for specific green/social projects. SLLs carry no restriction on the use of the proceeds and are therefore available to all borrowers seeking to amplify their sustainability strategy by embedding it in their financing terms. The question of whether a facility should be structured as an SLL is now raised in the initial stages of the majority of loan transactions.

The rise in SLL volumes has brought with it increasing focus on whether the structure and terms on which SLLs are being written are sufficiently robust to withstand accusations of "greenwashing". While loans remain an unregulated product, concerns about whether best practices are being upheld has attracted regulatory attention. In the words of the Financial Conduct Authority (**FCA**) in its recent **letter to ESG/Sustainable Finance leads**, the SLL market must "scale with integrity".

This desire to build trust in the product and promote best practice has had a significant impact on how both lenders and borrowers approach SLLs. The FCA's messaging underlines the importance of new entrants to the market having a sufficiently developed sustainability strategy and lenders' responsibility to scrutinise that strategy to an appropriate degree. Borrowers, in turn, are more cognisant of the adverse consequences of adopting an SLL structure too early, in particular, when balanced against the limited economic incentives currently on offer – the paucity of which is also highlighted by the FCA in the above-mentioned letter.

2. Key developments in 2023

The Loan Market Association (**LMA**) continues to take an active role in supporting the SLL market during this development phase. In February 2023, the LMA, alongside the Loan Syndications and Trading Association (**LSTA**) and the Asia Pacific LMA (**APLMA**), published the results of a comprehensive review of their principles for sustainable lending products, including the Sustainability-Linked Loan Principles (the **SLLP**) and related guidance material (the **SLLP Guidance**). The FCA's letter notes that adherence to the SLLP as recently updated may help to address some of the concerns it has observed about the credentials of certain loans labelled as SLLs and the development of the SLL market more generally.

Increasing scrutiny of SLL structures and their alignment with the SLLP has also had an effect on how SLL structures are addressed in facility documentation. SLL terms have tightened and become more sophisticated over the last 12 months, but there is quite wide variation in both form and content.

With a view to improving efficiency and promoting greater quality and consistency with regard to the documentation of SLLs, the LMA started work on some template drafting for SLLs, specifically designed to align with the recently updated SLLP and SLLP Guidance. Following quite extensive discussions with the LMA's ESG Working Group (which revealed a range of views on certain aspects), the LMA's draft provisions for sustainability-linked loans were finally published in May 2023 (the **LMA Draft Provisions**).

3. The LMA Draft Provisions from the Borrower's perspective

The publication of the LMA Draft Provisions is helpful in that a common starting point and options should help market participants, in particular borrowers, to develop a better understanding of the parameters of the product and lenders' expectations in light of the updated SLLP and SLLP Guidance. In addition, template drafting should help standardise the terminology and structure of SLL provisions, which over time, will facilitate a swifter review of relevant terms.

While we do not expect (and it is not intended) that the LMA Draft Provisions would be adopted wholesale in any transaction, treasurers should be aware that the LMA Draft Provisions represent a change in approach to SLL terms (and in fact this is already apparent). They are more granular and detailed than the terms applicable to many existing SLLs. Accordingly, it is important that businesses considering the adoption of an SLL structure, as well as those with SLLs coming up for refinancing, anticipate lenders' requirements with regard to SLL terms by familiarising themselves with the contents of the LMA Draft Provisions (in addition to the latest versions of the SLLP and SLLP Guidance).

The LMA has indicated that it will keep the LMA Draft Provisions under review, to be refined further as market practice develops. It is important that the views of borrowers are taken into account in those discussions and we are keen to make sure these are passed on to the LMA.

Treasurers are, therefore, strongly encouraged to share feedback and/or views on the LMA Draft Provisions and/or the nature and operation of SLL terms in practice, either directly with the LMA or via the ACT and Slaughter and May contacts listed at the end of this Guide.

The LMA Draft Provisions (like all LMA documentation) are available on the LMA website to LMA members only. In this instance, the LMA has kindly agreed to make the document available to ACT members on request, for the purpose of building understanding and eliciting feedback. ACT members wishing to access the LMA Draft Provisions should contact Gemma Lawrence-Pardew (Director, Legal) or Hannah Vanstone (Senior Associate Director, Legal) (Gemma.Lawrence-Pardew@lma.eu.com/Hannah.Vanstone@lma.eu.com).

In the context of a potential SLL transaction, treasurers should also be able to request sight of the LMA Draft Provisions from their banks or legal advisers.

4. This Guide

Building on the introduction to SLLs in the ACT Borrower's Guide, this guide aims to equip treasurers with a more detailed understanding of key SLL documentation terms, how they are evolving and some of the discussion points to anticipate. It is drafted by reference to the LMA Draft Provisions (which are being used as a reference point in current deals). It is structured as follows:

- **Part 1 (Essential Background)** – a brief reminder of the sustainable lending products on offer and an overview of how SLLs are governed and documented.
- **Part 2 (The Sustainability-Linked Loan Principles)** – outlines the key features of the SLLP and SLLP Guidance, which govern the parameters of the SLL product.
- **Part 3 (The LMA Draft Provisions)** – a clause-by-clause commentary on the LMA Draft Provisions, to assist treasurers reviewing SLL terms based on those provisions.
- **Part 4 (Role of the Sustainability Coordinator)** – discusses the use and role of a Sustainability Coordinator in syndicated SLLs, including related aspects of the LMA Draft Provisions.

The Appendix contains links to the SLLP, the SLLP Guidance and some other key reference material treasurers may find useful.

Capitalised terms used and not defined in this guide have the meanings given in the LMA Draft Provisions. Clause/paragraph references are to the clauses/paragraphs referenced in the LMA Draft Provisions, except as otherwise indicated.

The Association of Corporate Treasurers
Slaughter and May

August 2023

IMPORTANT NOTE

This guide has been produced for the Association of Corporate Treasurers (ACT) by Slaughter and May to assist corporate treasurers with reviewing loan documentation based on LMA terms.

It is written in general terms and its application to specific situations will depend on the particular circumstances involved. While it seeks to highlight certain issues that may be raised by borrowers, it does not purport to address every issue that borrowers could or should raise. It does not necessarily describe the most borrower-friendly approach that may be taken. The observations in this guide relating to market practice may not be appropriate or relevant to all types of transaction. What is achievable in any particular case will depend on a variety of factors, including the identities of the borrower and the lenders, and market conditions.

Readers should therefore take their own professional advice.
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The LMA has consented to the quotation of, and referral to, its documentation for the purpose of this guide, but assumes no responsibility for any use to which its documents, or any extract from them, may be put. The views and options expressed in this guide are the views of Slaughter and May and the ACT and do not necessarily represent those of the LMA. No responsibility is accepted by the LMA for any cost, loss or liability, however caused, occasioned to any person by reliance on it.

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PART 1

ESSENTIAL BACKGROUND

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1. Sustainable finance – product categorisation

Sustainability-related considerations have shot to the top of the agenda for both corporates and financial institutions alike over the past decade. The growing importance of sustainability is being driven by multiple factors, including increasing pressure from stakeholders (and society at large) together with a rapidly expanding universe of legal and regulatory requirements requiring more and more organisations to manage, disclose and report on sustainability-related risks and targets.

The increasing focus on sustainability has fuelled the development of a range of sustainable loan and bond products as organisations seek to demonstrate their commitment to the cause.

Sustainable finance products fall broadly into the following two categories.

"Use of proceeds" products

Loans and bonds where the proceeds are applied exclusively towards green and/or social projects. Such products are referred to as "green", "social" or "sustainability" loans/bonds, depending on whether the projects in question are green, social or a combination of both.

"Sustainability-linked" products

Loans and bonds where the pricing of the product (i.e. the margin or coupon) is linked to the borrower's/issuer's sustainability performance over the term, measured using one or more predefined Key Performance Indicators (**KPIs**) as assessed against pre-determined Sustainability Performance Targets (**SPTs**).

2. Sustainable loan products - governance

Sustainable loan products are not formally regulated (although as noted in the introduction, regulators are keeping an eye on the development of the market). Instead, they are governed by voluntary recommended guidelines in the form of "principles", produced jointly by the LMA, the APLMA and the LSTA. These principles are modelled on the equivalents produced for the bond market by the International Capital Market Association (**ICMA**), with adjustments to reflect the characteristics of the loan products.

The principles set out high level parameters that in practice govern whether a purported sustainable finance product is correctly labelled as such. While these principles are industry-led voluntary recommended guidelines, they are all quite closely followed in practice. They are designed to promote consistency and integrity in the markets to which they relate (and thereby avoid claims of "greenwashing").

The sustainable lending principles comprise:

- **Green Loan Principles (GLP)**: first published in 2018, the GLP provide a framework for green loans, where the proceeds of the loan are used exclusively for green projects, and clarify the criteria to be met if a loan is to be categorised as "green". The GLP cover topics such as the use of proceeds and process for evaluation and selection of green projects, together with guidance on monitoring and reporting on the project and on how the proceeds of the loan are managed and applied.
- **Social Loan Principles (SLP)**: first published in 2021, the SLP provide a framework for social loans, where the proceeds of the loan are used exclusively for social projects, and clarify the criteria to be met if a loan is to be categorised as "social". Similar to the GLP, the SLP cover topics such as the use of proceeds and process for evaluation and selection of social projects, together with guidance on monitoring and reporting on the project and on how the proceeds of the loan are managed and applied.
- **Sustainability-Linked Loan Principles (SLLP)**: first published in 2019, the SLLP provide a framework for SLLs, setting out the fundamental characteristics of the SLL product. The SLLP cover topics such as setting KPIs and SPTs, as well as reporting on and verifying the borrower's performance against those SPTs.

Each set of principles is accompanied by a supplementary guidance document in Q&A format which seeks to provide market participants with additional clarity on the application of the relevant principles.

All of the sustainable lending principles and related guidance notes were reviewed earlier this year; the most recent versions were published in February 2023. The further development of the principles and related guidance have an important bearing on the structure, terms and therefore access to these products and as such, are essential reading for those considering using such products.

All of the principles mentioned above, and related guidance, are available on the LMA's **Sustainable Lending microsite**.

3. The SLLP and the SLLP Guidance

The SLLP and related SLLP Guidance are thus the primary reference point for determining whether a loan can be labelled as an SLL, and by extension, whether the borrower's sustainability strategy is articulated and measured to standards that enable it to embark on an SLL.

As noted above, the SLLP set standards and best practice for the structuring of an SLL. The SLLP are, however, relatively brief, providing a broad definition of an SLL, supplemented by five "core components" or defining characteristics. The accompanying SLLP Guidance aims to provide market participants with more clarity on the application of the SLLP and promote a harmonised approach. The SLLP Guidance was updated alongside the SLLP in February 2023, resulting in significant expansion.

Lenders take different views of certain aspects of the SLLP and their status. This is partly because of the high level at which the SLLP are expressed. In addition, individual lenders are working within different, and in most cases incomplete, regulatory frameworks, so must have an eye on what the future might hold in regulatory terms. Lenders are also working to shape their own policies and requirements in relation to sustainable lending based on the risk appetite of their own stakeholders.

The views of individual lenders as to what is required for an SLL to be appropriately classified as such therefore inevitably vary in practice. “House views” and policies will influence what lenders are prepared to offer and accept. As a result, situations do arise where some lenders might view a loan as capable of SLL classification in circumstances where other lenders may not.

The key features of the SLLP and how they are typically approached are outlined in Part 2 (*The Sustainability-Linked Loan Principles*).

4. Approach to SLL documentation to date

The documentation of green and social loans is relatively straightforward, the key point being the addition of a restriction on the use of the proceeds of the facility other than for the relevant purpose. The bulk of the work lies in the structural aspects that sit behind the facility documentation, namely the identification and monitoring of the relevant green and/or social projects.

While the main challenge of putting in place an SLL lies similarly in the structural aspects - the identification of appropriate KPIs and SPTs, including how they are benchmarked, calculated and measured - the documentation of SLLs involves a more complex set of contractual provisions than apply to the use of proceeds products.

Lenders and their legal advisers have developed their own sets of clauses for sustainable loan products in a form that can be added to LMA-style agreements, so existing SLLs are mostly based on an amalgam of the views of the lenders involved. In addition, the terms of an SLL are coloured by the specific circumstances of the borrower in question, including the reporting and disclosure requirements to which the borrower is subject (which also continue to evolve).

Discrepancies in lenders’ views on both structural issues and the interpretation of the SLLP has meant that SLL terms can be burdensome to settle. Incorporating SLL terms into a facility involves more time, information and costs than an ordinary refinancing. This has prompted strong demand for the development of a template or standardised drafting for SLLs among market participants.

5. Template drafting for SLLs

The SLLP are designed to have global application. They are a joint product of the LMA and its sister syndicated loan trade associations in the US and APAC. Loan documentation conventions, however, tend to vary along jurisdictional lines. Accordingly, the preparation of template drafting for SLLs has been progressed by each trade association separately, to align with their respective facility documentation templates.

- The LMA produces documentation for the EMEA syndicated loan market and the LMA Draft Provisions are designed for insertion into the LMA recommended forms of facility agreement, which are predominantly governed by English law. The LMA Draft Provisions are available to LMA members from the **LMA's website**.
- The LSTA has produced model credit agreement provisions for SLLs in the New York law loan market (the **LSTA Drafting Guidance**), which take a different approach to certain issues. These provisions, published in February 2023, are available to LSTA members from the **LSTA website**.
- The APLMA has not yet produced any full form model provisions, only a term sheet which includes an SLL terms appendix and which is available to APLMA members from the **APLMA website**.

All of the template drafting that has been produced to date is designed to align with the SLLP and the SLLP Guidance. The drafting aims to articulate how the SLLP and the SLLP Guidance should be interpreted in practice. The differences between the templates produced by each trade association illustrate that the "requirements" of the SLLP can be interpreted in a number of ways.

This guide is focussed on the LMA Draft Provisions only, which are discussed in Part 3 (The Lma Draft Provisions). Borrowers with New York or other foreign law governed loans should be aware that local conventions may influence the detail of the terms on which SLLs are available in those markets.

As noted in the introduction, this template drafting is normally available only to members of the relevant trade association. However, in the context of a potential SLL transaction, borrowers should be able to request sight of the relevant documentation from their banks or legal advisers. In addition, ACT members can access the LMA Draft Provisions by contacting the LMA (using the details noted in both the Introduction and the Appendix to this Guide).

PART 2

THE SUSTAINABILITY-LINKED LOAN PRINCIPLES

PART 2
THE SUSTAINABILITY-LINKED LOAN PRINCIPLES

1. SLL definition and core components

The definition of an SLL in the SLLP reads as follows:

> *"…any type of loan instruments and/or contingent facilities (such as bonding lines, guarantee lines or letters of credit) for which the economic characteristics can vary depending on whether the borrower achieves ambitious, material and quantifiable predetermined sustainability performance objectives..."*

The SLLP Guidance highlights that any bilateral or syndicated loan can comprise an SLL, whether a term loan, a revolving credit facility, Schuldschein or any other type of loan. It also underlines that the product is a transition tool, designed to support borrowers in improving their sustainability performance (wherever they might be on that journey).

As a result, there are no minimum requirements in terms of a borrower's ESG performance or exclusions in terms of business activities or practices – SLLs are intended to be accessible to all borrowers, regardless of sector, geography or level of sustainability, provided they deliver alignment with each of the core components of the SLLP. The SLLP Guidance, however, alludes to the fact that borrowers in controversial sectors or industries (or who are exposed to issues that are controversial from an ESG standpoint) should expect heightened transparency requirements from lenders so they can evaluate the SLL package in light of such controversies.

The SLLP go on to set out five core components that a loan needs to feature in order to be classified as sustainability-linked. These are, in summary:

- **Selection of KPIs** – KPIs must be relevant, core and material to the borrower's overall business, measurable and able to be benchmarked.
- **Calibration of SPTs** – SPTs must be ambitious, representing a material improvement in the respective KPIs and beyond both a "business as usual" trajectory and regulatory required targets.
- **Loan characteristics** – an economic outcome e.g. the margin must be linked to whether or not the SPTs are met.
- **Reporting** – borrowers are required to report to lenders at least annually to enable them to, among other things, monitor performance against the SPTs and determine whether they remain ambitious.
- **Verification** – independent and external verification of the borrower's performance level against each SPT for each KPI by a qualified external reviewer is required.

The core components of the SLLP, in essence, provide a checklist of the headline issues borrowers will need to consider before engaging with lenders on the possibility of SLL terms, and the parameters of those terms. Agreement on the substance of these core components is the key to an SLL. Each core component is discussed in more detail below.

2. Core component 1 - Selection of KPIs

2.1 Process for selecting KPIs

Where a borrower already has a broader sustainability framework or objectives in place (which will often have been disclosed by way of public announcement or in the borrower's annual report or separate sustainability report), this generally serves as a starting point in the selection of KPIs (and associated SPTs) for the purposes of the borrower's SLL. In such cases, the identification and assessment of the KPIs will typically proceed as a collaborative effort between the borrower and its relationship banks.

Where KPIs cannot be neatly drawn from an existing sustainability strategy or framework (or alternative financing arrangements such as an existing bond issuance) for the purposes of the SLL, the lender

group may take a more prominent role in the selection process. This may involve one or more of the lenders on a syndicated SLL acting as the "Sustainability Coordinator". In relation to the role of a Sustainability Coordinator, see further section 3 (*Core component 2 - Calibration of SPTs*) below and Part 4 (*Role of the Sustainability Coordinator).*

Some borrowers also engage ESG consultants or other third parties to assist with selecting appropriate KPIs. The SLLP Guidance notes that a "*growing number of organisations are performing these materiality assessments in accordance with ESG reporting frameworks and standards*".

2.2 Nature of KPIs

Environmental/climate-related KPIs remain dominant in practice, with KPIs related to reductions in Scope 1, 2 and/or 3 greenhouse gas or CO_2 emissions the most common. The range of environmental-related KPIs is, however, rapidly expanding, in part due to the increasing diversity of borrowers accessing the SLL product and in part as new environmental issues gain more prominence. Examples of environmental KPIs becoming more common include those related to water consumption, waste and nature.

Lenders are increasingly looking for the inclusion of multiple KPIs in SLLs, putting the impetus on borrowers to look beyond the "E" in ESG for their KPIs. While some SLLs do include only one KPI, two or three KPIs have become more common.

Social/governance KPIs, such as the percentage of women in leadership positions in the organisation, are now commonly seen. KPIs focussing on 'S' and 'G' still, however, trail environmental KPIs, perhaps in part due to difficulties in measuring and benchmarking such KPIs. Where they are included, they tend to be fairly bespoke.

Where multiple KPIs are included, the implications of meeting (or failing to meet) SPTs in relation to only some of the applicable KPIs will need to be considered. This is discussed further at Clause 15.3 (*Sustainability Margin Adjustment*) in Part 3.

Until the most recent update, the SLLP Guidance had explicitly contemplated the use of third party ESG ratings as a KPI. References to ESG ratings in the context of SLLs have, however, now been removed.

This deletion does not stop market participants from using ESG ratings as an ESG metric where appropriate, but perhaps reflects concern among lenders with regard to their ability to assess and compare such ratings, which, for now, remain unregulated. In practice, ESG ratings are not frequently used as KPIs in SLLs in any event.

There are ongoing discussions, at both UK and EU level, with regards to bringing ESG rating providers within the regulatory perimeter. Whether, and how, this might impact the use of ESG ratings as metrics in SLLs is likely to become clearer in the coming months.

2.3 Criteria for credible KPIs

The credibility of the chosen KPIs, whatever they are, is at the heart of an SLL. Assessing whether the proposed KPIs meet the requirements for an SLL requires an understanding of both the intentions expressed in the SLLP, as well as current guidance for particular industries and the KPIs that have been adopted by comparable businesses.

The SLLP require that KPIs are "*relevant, core and material to the borrower's overall business, and of high strategic significance to the borrower's current and/or future operations*". KPIs must also be measurable or quantifiable on a consistent methodological basis, and able to be benchmarked, as far as possible, using an external reference point.

The benchmark requirement includes against industry peers as well as industry standards, where feasible. A footnote states that the calculation methodology for any KPI should follow international standards and science-based methodologies where available.

The SLLP Guidance on what "materiality" means in the context of selecting KPIs emphasises that materiality can be assessed from both:

- a strategic standpoint, i.e. by looking at the ESG challenges that are most material for the borrower and sector, and/or
- a sustainability standpoint, i.e. by looking at the ESG issues that have the greatest impact on society/the environment.

It is made clear that best practice is to benchmark proposed KPIs by conducting a materiality assessment. Various examples are given of external guidelines and tools borrowers may use to undertake a materiality assessment in respect of KPIs for itself and its industry. These include the **Global Reporting Initiative**, **SASB**, **TCFD, ICMA's Illustrative KPI Registry**, **the International Integrated Reporting Council's Framework**, **AccountAbility's Materiality Framework** and the **various reports produced by the EU Sustainable Finance Platform**.

The SLLP Guidance underlines that KPIs must be clearly defined. The LMA Draft Provisions articulate this further, by requiring that, in relation to each KPI, the agreement specifies the calculation methodology, the ESG standards against which they are measured and the baseline against which the borrower's progress will be reviewed (see further Part 3 (*The LMA Draft Provisions)*). The **FCA letter to Sustainability Leads** referenced in the introduction highlights that the robustness of KPIs (and SPTs) is one of its principal concerns about the development of the SLL market, noting "*there may be a case for strengthened expectations on SPTs and KPIs, with clearer alignment to borrowers' published transition plans, and disclosure of these by borrowers*".

Borrowers can anticipate that lenders will request and wish to discuss whether they have or are in the process of preparing a transition plan (this topic is coming up frequently in current deals). Such plans are not yet formally recommended or mandatory in the UK or the EU, although this is anticipated to be the case over time. Some larger corporates have already developed and published very developed plans; others have not yet started. In the UK, the **Transition Plan Taskforce** is expected to publish its final framework for credible transition plans in the Autumn, which will be followed by the implementation of firm disclosure requirements relating to transition plans for listed and larger companies.

3. Core component 2 - Calibration of SPTs

3.1 Annual targets which are ambitious on an ongoing basis

The SLLP require that SPTs for each KPI must be set in good faith and remain ambitious throughout the life of the loan. They also emphasise that the SPTs should be consistent with the borrower's overall sustainability/ESG strategy, assuming it is sufficiently ambitious. In addition, the SLLP Guidance stresses that SPTs should not be set at lower levels, or on a slower trajectory, to those already adopted internally and/or announced publicly by the borrower.

The requirement for SPTs to remain ambitious throughout the life of the loan was added as part of the 2023 update to the SLLP. Another notable addition is the clarification that ambitiousness means that SPTs should be set beyond targets required by regulation, as well as beyond a business-as-usual trajectory as previously required.

The SLLP as recently updated also now recommend that an annual SPT be set per KPI for each year of the loan term. This reflects the approach to SPTs that has become typical in SLLs (in contrast to sustainability-linked bonds, where SPTs are set much less frequently, often only once during the tenor of the bond). This can be difficult for borrowers who have longer term (but not annual) targets. The SLLP do acknowledge that exceptions may apply where there is a strong rationale (which is also apparent in SLLs extended to certain borrowers in practice).

The SLLP Guidance expands on the meaning of these requirements, providing that as long as SPTs are set in good faith and remain relevant and ambitious, they can be drawn from borrower's publicly announced targets – but subject to safeguards in documentation to allow for the SPTs to be updated so they are never less ambitious than those publicly announced (i.e. the SLL must keep pace with adjustments to the borrower's strategy and targets).

The general expectation is that the borrower is able to provide historic data looking back at least three years, against which future SPTs can be set. However, the SLLP Guidance notes specifically that the absence of historical data "*should not create a barrier to potential borrowers accessing SLLs*", where parties are able to create suitably robust SPTs by reference to other measures. In practice, the availability of reliable historical data can be a reason why some borrowers are reluctant to access this market.

The recasting in the 2023 update of the SLLP of SPTs as something dynamic that should be regularly reviewed reflects lender concerns that are currently quite apparent in practice. A sustainability amendment clause or "rendez-vous" clause features in most SLLs which, in essence, describes a set of circumstances in which the ESG provisions of the SLL can be re-opened during the tenor of the loan. These clauses are described in the SLLP Guidance as follows:

"Provisions may be included in documentation to define the precise conditions under which the borrower may be allowed or required to update KPI/SPT definitions and/or calibration so as to maintain alignment with its business and sustainability commitments over the life of the loan, for example, significant M&A activities, extraordinary/extreme events, and/or drastic change in the regulatory environment. Such provisions typically fall under a "rendez-vous clause" and seek to address, via an amendment to the documentation, any KPI/SPT change required by virtue of a revision, adjustment, or update in methodology or scope, where parties would act in good faith to solve the situation in a set period of time."

In practice, there is limited consistency in terms of the scope of the rendez-vous clause, but lenders' proposals (and indeed the LMA Draft Provisions) with regard to the triggers for the operation of such a clause are often wider than the examples described in the SLLP Guidance. The triggers often include where there are changes to the borrower's business, but may also extend beyond that, for example, to the KPIs/SPTs ceasing to be aligned with the SLLP (which in the context of SPTs, could be because they are no longer considered "ambitious"). The approach to sustainability amendments taken in the LMA Draft Provisions is discussed under Clause 42.6 (*Sustainability amendments*) in Part 3.

3.2 Benchmarked – with attention to local context

The SLLP Guidance with regard to the calibration of SPTs (i.e. the bases on which they should be set) states that SPTs can be "*(i) external and set by reference to science; (ii) external and set against a borrower's ESG performance in relation to its peers; (iii) internal and bespoke to the borrower's business, referencing past performance where possible; or (iv) a combination of any of these*".

This is broadly reflective of evolving practice, although not all SPTs will reference more than one of benchmarks (i) to (iii). Science-based targets, in particular, are becoming more common in relation to environmental KPIs.

This part of the Guidance also confirms that selection of both KPIs and SPTs (and their materiality/ambitiousness) must be contextual i.e. by reference to the borrower's sector(s) of operation, giving account to local context. Where feasible, SPTs should be set in line with or (where possible) beyond official country/regional/international targets.

A distinction between developed and less developed economies is specifically noted – as well as that differences in social factors such as demographics and gender equality in the regions where the borrower operates can mean that what is regarded as an ambitious target in one region, may not be accepted as ambitious in another.

These acknowledgements are potentially helpful to borrowers in markets where the SLL product is still at an early stage of development. However, their application can be challenging for businesses with a global presence, where targets might be set quite differently, according to the market or geography to which they relate. In that regard, the requirement of the SLLP that the KPIs are relevant, core and material to the borrower's *overall* business must be borne in mind. To give an example, KPIs relating to improving workforce diversity are examples of KPIs where geographic context can have a material bearing on the targets set.

3.3 How is the ambitiousness of SPTs assessed in practice?

As with KPIs, where the borrower has a broader sustainability strategy or framework, and especially where the chosen KPIs are drawn from that strategy or framework, the targets set as part of that broader strategy or framework are likely to serve as a starting point in the calibration of the SPTs, which may proceed in conjunction with the lenders.

The SLLP Guidance also highlights that the calibration of SPTs is a process that involves benchmarking and periodic review, and that lenders and borrowers may require some assistance in that process.

The SLLP recommend that borrowers seek input from an external party via, for example, a second party opinion or KPI/SPT assessment, as to the relevance, robustness and reliability of selected KPIs and the rationale and level of ambition of the proposed SPTs. In cases where no external input is sought, it is recommended that the borrower demonstrates or develops the internal expertise to verify its methodologies.

In practice, where a borrower draws its KPIs and SPTs from its broader sustainability strategy, a second party opinion is not typically sought. This is in contrast to the bond market position, where pre-signing second party opinions are typically required (which might be viewed as appropriate, given the relative inflexibility of bond terms once set, in comparison to loans, as well as the fact that lenders generally have a more in-depth understanding of the borrower and its operations compared to bond investors).

The *recommendation* in the SLLP that an external review is conducted pre-signing should be contrasted with the *requirement* for post-signing verification (as to which, see section 6 (*Core component 5 - Verification*) below).

The section in the SLLP on the calibration of SPTs also notes that some borrowers may elect to structure their SLLs with the assistance of a Sustainability Coordinator, in particular to assist with providing market colour regarding the KPIs and SPTs to the borrower, to facilitate dialogue between the borrower and lender group in regard to substantiating the SPTs and to answer ESG-related questions the prospective lender group may have. There is, however, no suggestion that the appointment of a Sustainability Coordinator is mandatory, and lenders are reminded in the SLLP Guidance of the need to review SPTs for themselves even if a Sustainability Coordinator is appointed.

The description in the SLLP is largely an accurate representation of the general role of the Sustainability Coordinator in practice. The Sustainability Coordinator's function (and the Finance Parties' individual responsibility for assessing sustainability information) is discussed in more detail in Part 4 (*Role of the Sustainability Coordinator*).

3.4 Sleeping SLLs

"Sleeping SLLs" are loans which include the SLL margin adjustment mechanism and reporting provisions but do not specify the KPIs and/or SPTs that bring those provisions into operation, which are left to be agreed at a later date.

Against a backdrop of concerns about standards in the sustainable finance market and greenwashing, this structure, when first proposed in the market, was somewhat controversial among lenders. For some borrowers, however, especially those almost, but not quite, ready to set KPIs/SPTs at the point of refinancing, it has offered a practical solution, and a number have been able to make use of it to date.

The controversy stems from the tension between the "sleeping SLL" structure and the requirement in the SLLP that SPTs be "*set before or concurrently with origination of the loan*".

Sleeping SLLs were discussed at some length in the context of the 2023 SLLP update. The latest iteration of the SLLP Guidance acknowledges the use of this structure, but notes that it is appropriate only in "exceptional" circumstances and places conditions/parameters around its use. These include:

- that the loan is not an SLL and should not be communicated as such (until the SPTs are agreed and set, and all other components of the SLLP are met);
- that the switch from "sleeping SLL" to SLL should take place no later than 12 months post-origination;

- that the parties should ensure the SPTs undergo the same scrutiny and attention as they would have had they been proposed at the outset of the transaction; and
- a recommendation that all-lender affirmative consent be required to the setting of any SPTs (although it is acknowledged that there may be cases where this is not practicable due to the size of the syndicate in which case parties may agree a lower consent threshold).

Provided the above conditions can be satisfied, borrowers may be able to make use of the "sleeping SLL" structure. It should, however, be anticipated that lenders may require a strong use case for such a structure.

The "sleeping SLL" structure is to be distinguished from an SLL where the KPIs and initial SPTs are fully formed (so the loan can be labelled as an SLL), but where SPTs for later years are yet to be set. Some borrowers are able to agree initial SPTs with their lenders, but find it difficult to agree targets for later years. The solution is to include a mechanism in the Agreement such that the SPTs for later years can be settled after the date of the Agreement – see further comments on the definition of "SPT" in Part 3 (*The LMA Draft Provisions*).

4. Core component 3 - Loan characteristics

The "Loan characteristics" that form part of the core components of an SLL are limited to an economic outcome being linked to whether the SPTs are met. This is typically achieved by the use of a margin ratchet pursuant to which the margin will be reduced where the borrower meets an SPT and increased when the SPT is not met. The ratchet may also include a neutral bracket in which no margin adjustment applies "where a strong rationale is provided". The operation of the margin adjustment mechanism in SLLs is discussed under Clause 15.3 (*Sustainability Margin Adjustment*) in Part 3.

The cumulative ratchet amount is quite standardised in practice and has remained unaffected by the recent rise in interest rates and loan pricing more generally. In the investment grade SLL market, a cumulative adjustment of somewhere between 2.5bps and 5bps is typical. In the leveraged SLL market, cumulative adjustments are generally higher (reflecting the overall higher margins) and there is a wider range. An adjustment of between 7.5bps and 15bps might be viewed as broadly typical.

Borrowers have, for some time, complained that the economic incentives on offer are not commensurate with the work involved in implementing an SLL. The SLL structure is not a prerequisite for the existence of an ESG strategy or ESG goals, which businesses will be implementing and pursuing independently. The adjustments and reporting requirements involved in embedding such goals into a borrower's loan facilities (in particular for larger, investment grade borrowers) are often carefully weighed up against the perceived benefits of an SLL structure.

It is interesting to note that the **FCA's recent review of the SLL market** describes the margin adjustments on offer as "de minimis", providing weak incentives for issuance. Recipients of the FCA's letter are urged to bear these (alongside other) comments in mind when developing their strategy for SLLs going forward.

The SLLP go no further in describing other terms that are characteristic of SLLs. This perhaps reflects the divergent range of views in practice on whether particular clauses (for example, "declassification" provisions that specify the circumstances in which the loan will lose its sustainability-linked label) are "standard" or to be applied only in appropriate cases.

A key role of the LMA Draft Provisions is to focus attention on other core documentation terms that are, or might be considered, characteristic of an SLL.

5. Core component 4 - Reporting

The SLLP state that borrowers should, at least once per year, provide the lenders with up-to-date information sufficient to allow them to monitor performance against the SPTs.

This requirement is satisfied in most cases by the borrower delivering to the lenders/Agent a Sustainability Compliance Certificate, setting out its performance against the SPTs for the relevant year, at the same time as it delivers its annual report to them. If the borrower produces a sustainability report, the facility agreement will usually also impose an obligation on the borrower to deliver a copy to the lenders on an ongoing basis.

The LMA Draft Provisions reflect this annual reporting structure; but are framed to focus attention on the content and quality of the information provided. In that respect, they are likely to require close attention from borrowers. These reporting requirements are discussed in Part 3, in particular at Clause 26.11(*Sustainability Compliance Certificate, Sustainability Report and Verification Report*).

6. Core component 5 - Verification

In contrast to pre-signing external review which is recommended (see section 3 (*Core component 2 - Calibration of SPTs*) above), the SLLP frame the provision of regular post-signing external verification reporting as a necessary and mandatory element of an SLL.

Verification, in the context of most SLLs, involves the borrower obtaining an independent and external assessment from environmental or other consultants, auditors or ESG rating agencies of the borrower's performance level against each SPT for each KPI, at least once per year.

Such verification report "must be shared with lenders in a timely manner" and made public where appropriate.

The SLLP Guidance adds colour with regards to the contents of a verification report, noting that it should describe:

- the level and type of verification, for example whether a limited or reasonable assurance, or other engagement, has been conducted and the standards applied;
- a description of the procedures conducted by the practitioner and any inherent limitations;
- a description of the subject matter of verification and the criteria, such as sustainability standards, used to assess conformance; and
- confirmation of the practitioners' independence and conformance with quality management systems.

This illustrates that the verification report can take a range of forms, so the parties will need to agree on the form of verification and the third party who is to carry out such verification. Where the KPIs and SPTs match those in the borrower's broader sustainability strategy, it may be that the borrower can leverage an existing verification/audit process. If so, the borrower should ensure that the providing party's terms of engagement align with the level of assurance required under the loan terms.

Whilst a full audit/reasonable assurance statement may provide a greater level of comfort to lenders, these forms of verification may not be suitable for all KPIs (especially those which are not climate-related) and may also be more time-intensive and costly. In practice, borrowers are tending to opt for a limited assurance statement to satisfy the external verification requirement of the SLLP.

As a result of the range of possible reports, there has been some debate as to the correct terminology in this context, specifically whether the correct term is in fact "assurance" rather than "verification". In the event, the term "verification" has been retained in the SLLP (and the LMA Draft Provisions), seemingly due to the range of language used by external reviewers of different types – for example, auditors tend to refer only to assurance, whereas others may provide verification services.

The LMA has produced a guidance document on **external reviews in the context of green, social and SLLs**. This provides voluntary guidance relating to professional and ethical standards for external reviewers, as well as to the organisation, content and disclosure for their reports. At the time of writing, this document is under review.

The information undertakings in the LMA Draft Provisions reflect the requirement for post-signing verification – see Clause 26.11 (*Sustainability Compliance Certificate, Sustainability Report and Verification Report*) in Part 3.

PART 3

THE LMA DRAFT PROVISIONS

PART 3
The LMA Draft Provisions

1. The LMA Draft Provisions - background and approach

The LMA Draft Provisions are a set of template SLL provisions covering the types of provisions commonly required/proposed by lenders when turning an LMA-based facility agreement into an SLL. They seek to assist those with less experience of SLLs, as well as to streamline the negotiation process and achieve a greater degree of consistency in SLL documentation terms. As already noted, they are specifically designed to align with the February 2023 editions of the SLLP and SLLP Guidance.

The provisions have been drafted by reference to the LMA's senior multicurrency term and revolving facilities agreement for leveraged acquisition finance transactions (senior/mezzanine) (the **LMA Leveraged Agreement**). They can, however, be adapted for use in conjunction with any of the LMA's other recommended forms of facility agreement.

During the drafting process it was apparent that, in a number of areas, there remains limited or incomplete consensus on a generally applicable position. As a result, the LMA Draft Provisions expressly note that they are intended to provide a starting point only, are not intended to be a comprehensive analysis of SLL transactions and intentionally omit several features which may be negotiated in practice.

The LMA Draft Provisions also contain various square bracketed options and/or blanks. Extensive drafting guidance is provided in footnotes which seeks to highlight what parties need to think about where there are blanks/drafting options, or where alternative approaches to those included in the drafting have been seen in the market.

As consensus builds around certain outstanding points, it might be expected that the universe of points left open for negotiation will narrow. For now, the LMA Draft Provisions will need to be, and indeed are expected by the LMA to be, customised and negotiated on a case-by-case basis.

The aim of this Part 3 is to assist treasurers reviewing draft SLLs, by outlining the key terms and the common points that require discussion and negotiation. The commentary below explains the background and operation of each definition/clause of the LMA Draft Provisions and how those provisions (or provisions along those lines) are typically viewed, and highlights the key considerations and areas for negotiation.

The numbering in the LMA Draft Provisions reflects the provisions of the LMA Leveraged Agreement. This numbering has been maintained below to enable the commentary to be cross-referenced with the LMA Draft Provisions, but readers should bear in mind that equivalent clauses may appear in various places in practice.

2. Clause-by-clause commentary

The LMA Draft Provisions contain a number of defined terms that are relevant to the substantive SLL terms, as well as details of consequential adjustments to existing LMA definitions if the facility is to be adapted as an SLL.

Clause 1.1 (Definitions) – SLL definitions

"Applicable ESG Standards", "Baseline" and "Calculation Methodology"

The definitions of "Applicable ESG Standards", "Baseline" and "Calculation Methodology" are all placeholders, designed to remind the parties that a KPI should ideally have these supporting characteristics, and that they must be reflected in the documentation.

The definitions of "Baseline" and "Calculation Methodology" cross refer to a Schedule (*Sustainability Calculations*), where it is contemplated they will be specified. "Applicable ESG Standards" are specified in the definition as well as being incorporated in the Schedule. Accordingly, it is in the Schedule (*Sustainability Calculations*) where the substance of the KPIs and these supporting characteristics will be set out.

Comment

The defined term "**Applicable ESG Standards**" specifies the standards used to define the scope and parameters of each KPI and related calculation methodology, and to assess the materiality of the relevant KPI. These standards are the benchmark applicable to the relevant KPI.

The definition contemplates that standards are specified separately for each KPI. This may be an industry standard or that of industry peers. It is acknowledged in a footnote that such standards may not exist or be available for all KPIs. This is particularly the case for social and governance KPIs which tend to be more bespoke.

The definition "**Applicable ESG Standards**" contemplates changes to the specified standards. In effect, the requirement to benchmark the KPI against the relevant standards applies to such standards as amended from time to time, provided that the amended standards are no less stringent in any material respect than the form published as at the date of the Agreement. Borrowers may also wish to cater for changes in the standards themselves – for example, by defining an Applicable ESG Standard as either that specified, or similar generally accepted standards adopted by the borrower from time to time.

Clause 26.11 (*Sustainability Compliance Certificate, Sustainability Report and Verification Report)*, discussed further below, requires that the Verification Report includes details of any changes to an Applicable ESG Standard which could reasonably be expected to affect a KPI or SPT. According to the LMA Draft Provisions, such changes being flagged by a Verification Report amounts to a Sustainability Amendment Event, which results in a reopening of the affected KPIs and SPTs. For further discussion of this point, see Clause 42.6 (*Sustainability amendments*) below.

The "**Baseline**" is the baseline for each KPI against which progress can be measured over the term of the Agreement.

The "**Calculation Methodology**" is the methodology used to calculate the KPI at any given point in time and thus track progress against the applicable SPT. There is a footnote in the SLLP requiring that

calculation methodologies follow international standards and science-based methodologies where available.
In practice, there can be some blurring between an "Applicable ESG Standard", a "Baseline" and a "Calculation Methodology". Some standards, for example, may specify both baselines and calculation methodologies for the relevant KPI. A flexible approach will therefore need to be applied to the use of the definitions in practice in terms of how best to incorporate the relevant measures.

"Declassification Date" and "Declassification Event"

A Declassification Event, in summary, is an event that gives rise to rights for the Lenders to instruct the Agent to "declassify" the SLL or, in other words, to remove its SLL label. The Declassification Date is the date on which such declassification occurs (and therefore the date from which the consequences of declassification flow).

The primary route to declassification under the LMA Draft Provisions is the occurrence of a Sustainability Amendment Event, following which the sustainability provisions of the SLL fall to be renegotiated (see Clause 42.6 (Sustainability *amendments*) below). If such renegotiation is unsuccessful, declassification may follow.

The detail of these definitions is discussed in the context of Clause 42.6 (Sustainability *amendments*), which sets out the consequences of the occurrence of a Sustainability Amendment Event, and at Clause 28.41 (*Declassification Event*), which sets out the circumstances in which the SLL can be declassified and the consequences of such declassification.

"External Reviewer"

Core component 5 of the SLLP requires that the borrower obtains independent and external verification of its performance level against each SPT for each KPI by an independent qualified external reviewer (see section 6 (*Core component 5 - Verification*) of Part 2). This definition is a placeholder for the identity of the external reviewer to be specified. It contemplates that there may be a separate external reviewer for each KPI.

The definition also makes provision for the replacement of the specified External Reviewer. The replacement is appointed by the borrower subject to agreed conditions relating to (i) the professional status of the reviewer ("*an independent [internationally recognised] professional services firm, environmental consultancy firm or ratings agency which is regularly engaged in the application and monitoring of ESG standards and ESG calculation methodologies*") and (ii) the fact that it must not be a Sponsor Affiliate or Affiliate of the Parent.

Comment

Some SLLs currently in the market do not contemplate the involvement of an External Reviewer, although this is increasingly rare in more recent SLLs, in light of the clear expression in the SLLP that external and independent verification is a mandatory requirement of an SLL (see section 6 (*Core component 5 - Verification*) of Part 2 above).

The External Reviewer must have relevant expertise. The suitability of any given third party for the External Reviewer role will therefore depend on the KPI and borrower in question. The SLLP sets out a non-exhaustive list of organisations which may fulfil the role, namely auditors, environmental consultants and independent ratings agencies.

The identity of the External Reviewer will in turn affect the form of verification which can be provided (e.g. limited or reasonable assurance, or verification) – see Clause 26.11 (*Sustainability Compliance Certificate, Sustainability Report and Verification Report*) for further discussion on the different forms of verification.

Some Lenders seek the right to approve the identity of any replacement External Reviewer. In the majority of cases, Lenders are, however, happy to leave the choice of External Reviewer to the borrower subject to the specified conditions as to qualification and experience.

“KPI”, “KPI [1]”, “KPI [2]”, KPI [3]” and “KPI [4]”

The KPIs must be described on a case-by-case basis. The LMA Draft Provisions contain placeholders for up to four KPIs. The definitions cross-refer to the Schedule (*Sustainability Calculations*), where the agreed KPIs will be described alongside the Applicable ESG Standards, Baseline, Calculation Methodology and SPTs applicable to each KPI.

Comment

The criteria and process for the selection of KPIs is discussed in section 2 (*Core component 1 - Selection of KPIs*) of Part 2. The SLLP Guidance indicates that the description of the KPI in the agreement should include the following, which is helpful as a checklist:

- “*an applicable scope;*
- *how the target is linked to the* borrower*’s sustainability strategy e.g. how the target is linked to the borrower’s ambition to become net-zero across their value chain by 2030;*
- *any baseline being used;*
- *what the KPI is being benchmarked against; and*
- *the calculation methodology e.g. clear definition of the denominator of intensity-based KPIs*”.

The structure of the LMA Draft Provisions includes placeholders for the Applicable ESG Standards, Baseline, Calculation Methodology and SPTs applicable to each KPI as noted above, which assists in this analysis.

A footnote to the LMA Draft Provisions reminds users that KPIs (and SPTs) can be set at the Parent, Company or Group level, depending on whether the relevant sustainability strategy is set at an entity level or on a Group-wide basis.

The LMA Draft Provisions acknowledge that the reflection of four KPIs is for illustrative purposes only and is not a recommendation. Users must adapt the drafting to the agreed number of KPIs. As noted in section 2 (*Core component 1 - Selection of KPIs*) of Part 2, the agreed number of KPIs varies, but a minimum of three KPIs is often considered best practice. Lenders may, in some cases, accept fewer KPIs depending on the company in question and the robustness of the selected KPIs.

In some cases, SLLs have been entered into which make provision for additional KPIs to be built in over time as the information and methodologies required to measure additional KPIs become available. Where it is agreed to proceed with an SLL with fewer KPIs, on the basis that further KPIs will be added in time, Lenders are increasingly seeking to put time limits on the inclusion of the additional KPIs (often 12 months, in line with the time limit suggested in the SLLP Guidance for "sleeping SLLs" to "wake up", see further section 3 (*Core component 2 - Calibration of SPTs*) of Part 2).

"SLL Reference Period"

This is the period over which the KPIs are observed and tested. It is used to set the SPTs (in the Schedule (*Sustainability Calculations*)). It also determines the frequency with which a Sustainability Compliance Certificate is required to be delivered (as the requirement applies after the end of each SLL Reference Period) and, therefore, the frequency of the Sustainability Margin Adjustment.

Comment

The SLLP recommend that an annual SPT should be set per KPI for each year of the loan term, although it is acknowledged that there may be instances where this is not appropriate. See section 3 (*Core component 2 - Calibration of SPTs*) of Part 2 for further discussion.

A footnote to the LMA Draft Provisions indicates that the SLL Reference Period may be a period other than a year depending on the nature of the KPIs and the SPTs agreed for a particular transaction.

“SLLP”

This refers to the SLLP as they exist from time to time.

Comment

This definition is dynamic and refers to the SLLP as they may be updated after the date of the Agreement.

This is not a material consideration in the context of the LMA Draft Provisions as drafted, where the defined term is used only in Clause 33.10 (*Exclusion of liability*). This provision (discussed further below and in Part 4 (*Role of the Sustainability Coordinator)*) states that the Agent and Sustainability Coordinator are not acting in an advisory capacity to any person in respect of the SLLP nor will they be obliged to verify compliance with the SLLP on behalf of any Finance Party.

The SLLP are regularly reviewed to accommodate and reflect developments in the SLL market. In SLLs where the term is used more widely, borrowers may need to consider whether to amend this definition so that it refers to the version of the SLLP in force at the date of the Agreement.

“SPT”

This definition cross-refers to the Schedule (*Sustainability Calculations*) which contemplates the insertion of an SPT for each KPI, for each SLL Reference Period.

Comment

The Schedule (*Sustainability Calculations*) leaves the framing of the SPT (i.e. whether it is a range, a maximum or minimum target, a percentage change or an absolute figure) to be decided on a case-by-case basis.

For a discussion of the issues relevant to the setting of SPTs more generally, see section 3 (*Core component 2 - Calibration of SPTs*) of Part 2.

In some cases, SLLs have been entered into which set out the SPTs for the first few years of the loan but leave the SPTs for later years to be set at a later date, for example because such targets go beyond the borrower's strategic planning or because the data required to set the latter targets is not yet available. In such cases, the SLL typically includes an amendment process to allow for the latter SPTs to be agreed and set at a later date, with Majority Lender consent often sufficient.

The SLLP Guidance confirms that such loans can be labelled as SLLs from the outset, notwithstanding the absence of the latter SPTs (in contrast to the position for "sleeping SLLs" as discussed in section 3 (*Core component 2 - Calibration of SPTs*) of Part 2).

"Sustainability Amendment Event"

This definition describes the trigger for a renegotiation of the SLL terms in accordance with Clause 42.6 (*Sustainability amendments*). If that renegotiation does not reach a conclusion, this opens the route to the Lenders deciding to declassify the loan as an SLL pursuant to Clause 28.41 (*Declassification Event*).

The specified triggers cover, in summary:

- a change in the shape of the Group's business (acquisitions, disposals, mergers etc.) which could reasonably be expected to [materially] affect a KPI or SPT;
- the delivery of a Verification Report highlighting information and/or changes which could reasonably be expected to [materially] affect a KPI or SPT; and
- "[ ]", as a marker for the parties to insert additional triggers as agreed.

Comment

This definition is important to both Lenders and borrowers. There is wide variation in how it is framed in practice. As noted in section 3 (*Core component 2 - Calibration of SPTs*) in Part 2, the SLLP Guidance suggests that the triggers for such an amendment should involve material changes, which is not necessarily how this definition is framed in practice.

The nature of the triggers and the appropriate breadth of this definition is discussed in more detail in the context of Clause 42.6 (*Sustainability amendments*) below.

"Sustainability Breach" and "Sustainability Provision"

A Sustainability Breach occurs where there is a failure to comply with a Sustainability Provision or where the sustainability-related representation made at Clause 25.12(g) (*No misleading information)* is or proves to have been incorrect or misleading when made or deemed to be made.

Grace periods are contemplated in both cases but are left to be agreed between the parties.

The definition of Sustainability Provision is intended to capture all the sustainability-related obligations imposed on the borrower/Group under the SLL. Failure to comply with a Sustainability Provision is designated as a Sustainability Breach rather than an Event of Default (see Clauses 29.3 and 29.4 *(Events of Default*) below).

The consequences of a Sustainability Breach are that the SPTs are deemed not to be met and the Sustainability Margin Adjustment therefore reverts to its highest level. See further Clause 15.3 (*Sustainability Margin Adjustment*) below in relation to the consequences of a Sustainability Breach.

Comment

It is important from the borrower's perspective that the definition of Sustainability Provision is complete as failure to comply with a Sustainability Provision is carved out of the Events of Default (see Clauses 29.3 and 29.4 (*Events of Default*) below), amounting to a Sustainability Breach instead.

It is generally agreed that a Sustainability Breach should not amount to an Event of Default, although there are some Lenders which maintain that it should. The only commonly agreed exception to this position is the post-declassification publicity restriction (discussed further at Clause 28.42 (*Sustainability publicity*)). Pursuant to the LMA Draft Provisions, this restriction does not constitute a Sustainability Provision, so if the borrower publicly refers to the loan as an SLL following declassification, this will be an Event of Default rather than a Sustainability Breach.

Borrowers (and their lawyers) should also take care to ensure that to the extent a Sustainability Breach could conceivably constitute breach of another general term of the Agreement (for example, general representations in relation the accuracy of information or compliance with laws), these provisions (and/or the related Events of Default) are appropriately adjusted to make clear that they do not apply to any breach that also constitutes a Sustainability Breach. See further Clauses 29.3 and 29.4 (*Events of Default*).

"Sustainability Compliance Certificate"

This refers to a certificate substantially in the form set out in the Schedule (*Form of Sustainability Compliance Certificate*).

The Sustainability Compliance Certificate is the primary reporting mechanism in the SLL. It presents the borrower's performance against the SPTs for the relevant SLL Reference Period and the applicable Sustainability Margin Adjustment. It is accompanied by the other components of the SLL annual reporting package, being the Sustainability Report and the Verification Report.

See further Clause 26.11 (*Sustainability Compliance Certificate, Sustainability Report and Verification Report*) in relation to reporting requirements and Schedule (*Form of Sustainability Compliance Certificate*) in relation to the content of the Sustainability Compliance Certificate.

“Sustainability Compliance Certificate Inaccuracy”

The consequence under the LMA Draft Provisions of an inaccuracy in the Sustainability Compliance Certificate (which is what is captured by this definition) is not a Sustainability Breach or an Event of Default. Instead, Clause 15.3 (*Sustainability Margin Adjustment*) provides a mechanism for the recalculation of the Margin following receipt of a corrected Sustainability Compliance Certificate, and for the borrower to reimburse the Lenders any additional amounts, where due.

See further comments on Clause 15.3 (*Sustainability Margin Adjustment)* and Clause 26.12 (*Sustainability Compliance Certificate Inaccuracy*).

“Sustainability Coordinator”

The LMA Draft Provisions provide optionally for the involvement of a Sustainability Coordinator, in which case, that entity will need to be named in Clause 1.1 (*Definitions*) of the Agreement.

See Part 4 *(Role of the Sustainability Coordinator)* for further details on this role and how it is reflected in the optional drafting included in the LMA Draft Provisions.

“Sustainability Information”

This definition is cast widely to include information (1) provided by or on behalf of a member of the Group to a Finance Party and/or the Sustainability Coordinator (if there is one) and (2) any information approved by a member of the Group, in each case, solely in connection with, and to the extent it relates to, any of the annual reporting package (i.e. the Sustainability Compliance Certificate, Sustainability Report and Verification Report), a KPI, an SPT, a Calculation Methodology or a Baseline.

Comment

The stated intention of this definition is to capture all sustainability-related information provided to the Lenders (including any such information which is presented or delivered to the Lenders prior to signing) without being prescriptive as to form, content or presentation.

The inclusion of information "approved by any member of the Group" without reference to such information being provided to the Lenders is most likely aimed at public information, but is not so limited by the language and therefore has the potential to bring uncertainty into what is covered.

It is important that the scope of this definition is clear, because the LMA Draft Provisions include a repeating representation as to the accuracy and completeness of the Sustainability Information – see Clause 25.12(g) *(No misleading information)* below.

"Sustainability Margin Adjustment" and "Sustainability Margin Adjustment Date"

These definitions cross-refer to the margin adjustment mechanism set out in Clause 15.3 (*Sustainability Margin Adjustment*) and are discussed in the comments on that clause below.

"Sustainability Provisions"

See comments under "Sustainability Breach" above.

"Sustainability Report" and "Verification Report"

These definitions cross-refer to Clause 26.11 (*Sustainability Compliance Certificate, Sustainability Report and Verification Report*) which sets out the content of the annual sustainability reporting requirements. They are discussed in the comments to that clause below.

Clause 1.1 (Definitions) – amendments to pre-existing LMA definitions

"L/C Margin" and "Margin"

The existing definitions of the Margin are amended to make them subject to the Sustainability Margin Adjustment, discussed further at Clause 15.3 (*Sustainability Margin Adjustment*) below.

Clause 1.2(f) (Construction)

A Sustainability Breach does not give rise to the consequences that flow from a Default or Event of Default, but does give rise to other consequences. As discussed at Clause 15.3 (*Sustainability Margin Adjustment*) below, for so long as a Sustainability Breach is "continuing", the SPTs for a given SLL Reference Period will be deemed not to have been met, with the result that the Sustainability Margin Adjustment is increased to its highest level.

The LMA Draft Provisions include a separate definition of "continuing" in relation to a Sustainability Breach in this new paragraph (f), to be added to the construction clause.

Reflecting the approach to the existing LMA definition of "continuing" in relation to Events of Default, two options are provided – a Sustainability Breach is continuing until it is either (i) waived or (ii) remedied or waived.

Comment

If "continuing" is defined so that the Sustainability Breach is continuing until it has been waived, then the fact that it may have been remedied is of no consequence. In the absence of a waiver from the Lenders, the SPTs would be deemed not have been met for the relevant period notwithstanding that the Sustainability Breach no longer exists.

For this reason, as is the case in relation to Events of Default, borrowers will prefer that "continuing" in relation to a Sustainability Breach is defined as until such time as the relevant Sustainability Breach is remedied *or* waived.

Clause 15.3 (Sustainability Margin Adjustment)

Operation of the Sustainability Margin Adjustment

Clause 15.3 provides a margin grid for the parties to complete, pursuant to which the margin increases, decreases or remains unchanged depending on how many SPTs are met in a given SLL Reference Period, as certified in the most recently delivered Sustainability Compliance Certificate.

The margin adjustment takes effect on the Sustainability Margin Adjustment Date, which can be defined as either (i) the first day of the next Interest Period for a given Loan following receipt by the Agent of the relevant Sustainability Compliance Certificate or (ii) a given number of Business Days after receipt by the Agent of the relevant Sustainability Compliance Certificate.

A footnote highlights that in settling the definition of Sustainability Margin Adjustment Date, consideration may need to be given to any other margin adjustment mechanisms in the Agreement and whether the timing of the relevant adjustments are feasible for the Agent from an operational perspective.

Any margin adjustment made by reference to that SLL Reference Period will only apply until the date on which the Sustainability Compliance Certificate for the following SLL Reference Period is required to be delivered or, where such certificate has been delivered, the subsequent Sustainability Margin Adjustment Date. In other words, the Sustainability Margin Adjustment applies only until the next adjustment – the adjustments are not cumulative.

Further, only one Sustainability Compliance Certificate may be delivered in respect of any SLL Reference Period. The effect of tying the adjustment to the Sustainability Compliance Certificate will therefore mean (if the SLL Reference Period is annual, as is typically the case) that there will be only one adjustment per year.

Comment

This provision is a framework only, to be adapted to reflect the commercial agreement. The grid will need to be adapted and filled in according to the number of KPIs and the agreed quantum and direction of the margin adjustment.

As noted in section 4 (*Core component 3 - Loan characteristics*) of Part 2, in the investment grade SLL market, a cumulative Sustainability Margin Adjustment of somewhere between 2.5bps and 5bps is typical. In the leveraged SLL market, cumulative adjustments are generally higher (reflecting the overall higher margins) and there is a wider range. An adjustment of between 7.5bps and 15bps might be viewed as broadly typical. See further the discussion in that section of Part 2.

A key point to be determined is how many SPTs need to be met before the margin decreases and by how much. The operation of the Sustainability Margin Adjustment in this respect tends to vary. The LMA Draft Provisions note that there may be instances where a different approach to the margin adjustment mechanism from that included is more appropriate, for example a margin adjustment which gives greater weight to the achievement of certain SPTs over others.

Margin impact of Sustainability Compliance Certificate Inaccuracy

If a Sustainability Compliance Certificate turns out to be inaccurate and has to be revised, this clause makes provision for the Sustainability Margin Adjustment for the relevant SLL Reference Period to be recalculated in accordance with the revised certificate.

The revised margin will take effect either on (i) the first day of the next Interest Period for a given Loan following receipt by the Agent of the revised Sustainability Compliance Certificate or (ii) a given number of Business Days after receipt by the Agent of the revised Sustainability Compliance Certificate, depending on the option selected.

Where the revised certificate shows that a higher margin should have applied, the borrower is obliged to promptly pay an amount necessary to put the Agent and Lenders in the position they would have been in had the correct margin been applied in the first place.

Comment

The LMA Draft Provisions do not address the situation where a revised certificate shows that a lower margin should have applied. In practice, borrowers have sometimes been able to agree that in this instance, the extra margin should be returned to the borrower. Borrowers may wish to consider making provision for this scenario.

Margin impact of a Sustainability Breach

For so long as a Sustainability Breach is "continuing", this clause provides that the SPTs will be deemed not to have been met for the applicable SLL Reference Period. The suggestion therefore is that the Sustainability Margin Adjustment will default to its highest level.

Comment

The implications of a "continuing" Sustainability Breach on the Margin calculation pursuant to this provision are not entirely clear. The reference in the LMA's drafting to the SPTs being deemed not to be met for the "applicable SLL Reference Period" might be taken to suggest that the adjustment would apply to the whole period rather than for such time as a breach subsists. Borrowers may take the view that this is unfair.

To take an example: if the Sustainability Breach consisted of the borrower being late complying with its reporting requirements, is it appropriate that the Sustainability Margin Adjustment for the whole subsequent SLL Reference Period (normally a year) defaults to its highest level?

Borrowers may wish to clarify this clause by providing that following an identified Sustainability Breach, the margin for subsequent Loans and for subsequent Interest Periods for outstanding Loans during the applicable SLL Reference Period will be adjusted during such time as the Sustainability Breach is continuing only.

See Clause 1.2(f) (*Construction*) above for a discussion as to the meaning of "continuing" in the context of a Sustainability Breach -

which may mean a breach is continuing until remedied or waived, or just waived, depending on the option selected.

Clause 26.14 (*Sustainability Information*) contains an obligation on the borrower to notify the Agent of the occurrence of a Sustainability Breach, "*promptly upon becoming aware*".

Further comment

The LMA Draft Provisions note that they do not include all clauses that might be negotiated in practice. Examples include the following:

- ***"Pay-away" structures:*** "Pay-away" structures have been a feature of some SLLs. A "pay-away" typically requires that the benefit of any margin reduction or uplift is paid towards a charitable cause or directed to a sustainable objective. There may be sound conceptual arguments in favour of such a structure – is it, for example, appropriate for either party to benefit commercially from failure/achievement of ESG targets?

  The mechanics of such a structure can, however, be challenging to implement (for example, achieving consensus on the charitable cause to which the margin adjustment amount is to be applied). It is perhaps for this reason that the "pay-away" structure has not been widely adopted in practice.

- ***ESG controversies:*** A so-called "ESG controversy" clause provides that where the borrower has been subject to an "ESG controversy", for example, an oil spill, the Sustainability Margin Adjustment will default to its highest level, even if the SPTs have otherwise been met. The mechanics and details of such a clause, including the definition of "ESG controversy" and for how long the contractual implications of the controversy apply, can vary quite considerably.

  An "ESG controversy" is a concept normally designed to capture events with a severe adverse environmental impact, and the clause is therefore typically reserved for borrowers operating in the more environmentally risky industries, but the concept may be cast more broadly (or indeed, narrowly) depending on the risk Lenders are seeking to address. ESG controversy provisions do not feature in the majority of SLLs. Where Lenders do seek to include them, borrowers should pay close attention to the trigger events and consequences.

Clause 21.5 (Indemnity to the Sustainability Coordinator)

The LMA Draft Provisions propose a new indemnity to the Sustainability Coordinator, where one is involved. This new provision is discussed further in Part 4 (*Role of the Sustainability Coordinator*).

Clause 23.2(c) (Amendment costs)

The LMA Draft Provisions address costs associated with amendments which are required by the borrower pursuant to the sustainability amendment mechanism at Clause 42.6 (*Sustainability amendments*) (discussed further below) in the same way as other amendments, namely by requiring the Parent to reimburse the Agent for all costs and expenses reasonably incurred in dealing with such amendments.

Clause 25.12(g) (No misleading information)

This clause introduces an additional representation to be made by the borrower. It is presented as an additional limb of the existing “no misleading information” representation and requires the borrower to represent that all Sustainability Information was true, complete and accurate in all material respects as at the date it was provided and is not misleading in any respect.

Comment

Borrowers may wish to amend this new representation to make clear that the Sustainability Information was true, complete and accurate in all material respects at the date it was provided *or at the date (if any) at which it is stated.* The representation that such information is not misleading in any respect should also ideally be qualified by the date at which it is provided or stated.

Borrowers may also wish to add a materiality qualification to the second part of the representation so that it refers to the Sustainability Information not being misleading in any *material* respect.

The scope of this representation turns largely on the definition of "Sustainability Information", discussed at Clause 1.1 (*Definitions*) – SLL definitions above.

Clause 25.33(d) (Times when representations made)

The new "no misleading information" representation (see above) is deemed to be repeated on the date of each Sustainability Compliance Certificate. In most cases, this will mean that the representation is repeated annually (see Clause 26.11 (*Sustainability Compliance Certificate, Sustainability Report and Verification Report*) below).

Clause 26.11 (Sustainability Compliance Certificate, Sustainability Report and Verification Report)

Sustainability Compliance Certificate

The Parent is required to complete and deliver a Sustainability Compliance Certificate for each SLL Reference Period, the form of which is scheduled (see Schedule (*Form of Sustainability Compliance Certificate*)). The SLL Reference Period will usually be annual, so in practice a Sustainability Compliance Certificate will typically be required to be delivered once a year.

As mentioned at the definition of "Sustainability Compliance Certificate" above, the Sustainability Compliance Certificate is the primary reporting mechanism in the SLL.

This clause specifies the precise contents of the certificate. In summary, it must:

- detail the borrower's performance in respect of each SPT for each KPI for the relevant SLL Reference Period, together with calculations;

- confirm the Sustainability Margin Adjustment to be applied (as a result of the borrower's performance in respect of each SPT) and the resulting overall Margin;

- attach a copy of the borrower's Sustainability Report;

- attach a copy of the Verification Report prepared by the relevant External Reviewer in respect of each KPI for the relevant SLL Reference Period; and

- confirm that the attached Sustainability and Verification Reports are correct and complete copies of the originals and have not been amended or superseded.

The certificate must be signed by two directors.

The timeframe for delivery of the certificate after the end of each SLL Reference Period is left to be agreed between the parties. In practice, the certificate is often required to be delivered at the same time as the borrower's financial statements (assuming an annual SLL Reference Period).

Sustainability Report

The "Sustainability Report" is the borrower's annual sustainability report (or, if no such report is produced, a separate sustainability assessment report) which sets out the borrower's sustainability-related information for the relevant SLL Reference Period in sufficient detail for the Lenders to be able to assess whether the SPTs for that period have been met.

A footnote makes clear that there is no intention to duplicate any existing disclosure to the extent that the information required to satisfy the reporting requirements under the Agreement is already available in the form of existing reports/information, reflecting the statements in the SLLP and SLLP Guidance.

Comment

Borrowers will need to ensure that the definition of Sustainability Report reflects what the borrower is practically able to deliver on an ongoing basis.

The nature of the Sustainability Report is especially important to pin down where the borrower does not produce an annual sustainability report as part of its annual reporting process. In these instances, the borrower may be asked to deliver a baseline report as a condition precedent, which will be the reference point with regard to the scope and format of future reporting. This is not reflected in the text of the LMA Draft Provisions, as it will not be relevant to all transactions.

Verification Report

The "Verification Report" is the report produced by the specified External Reviewer for this purpose for any given SLL Reference Period and required by the SLLP (see section 6 (*Core component 5 - Verification*) of Part 2). It may relate to one or more KPIs, depending on whether a different External Reviewer is appointed for different KPIs.

Clause 26.11(d) sets out specific requirements with respect to the contents of a Verification Report. It requires the Parent to procure that each such report (1) measures, calculates and verifies each relevant KPI for the applicable SLL Reference Period and confirms whether the applicable SPTs have been met, and (2) refers to any Sustainability Information and/or sets out details of any changes to the Calculation Methodology and/or Applicable ESG Standards which, in each case, could reasonably be expected to (materially) affect any KPI/SPT.

Comment

Borrowers will need to ensure that the content requirements of the Verification Report reflect what the borrower and the relevant External Reviewer have agreed will be delivered.

It will also be important to clarify that any such reports that the business obtains independently of the SLL satisfy lenders' requirements, if it is proposed that they are used as the "Verification Report" for the purposes of the SLL.

Requirement for the report to measure, calculate and verify each relevant KPI

The requirement that the Verification Report "verifies" each relevant KPI may prove problematic in practice, especially where the External Reviewer is an auditor, as auditors will not usually be able or willing to provide that level of comfort – auditors' practice is to provide assurance (limited or reasonable) rather than verification. The language may therefore need to be amended here depending on the identity of the External Reviewers.

Borrowers may also wish to amend this content requirement so that it better reflects the role of the External Reviewer, namely to confirm the calculation of the KPIs/satisfaction or not of the SPTs (rather than to measure, calculate and verify each KPI).

Requirement for the report to refer to any Sustainability Information and set out details of any changes to the Calculation Methodology and/or any Applicable ESG Standard which could reasonably be expected to (materially) affect any KPI and/or SPT

A footnote states that this content requirement is intended to capture any qualification or issue highlighted by an External Reviewer in a Verification Report. The drafting here is, however, arguably unclear and borrowers may therefore wish to amend the drafting, for example to refer to *any changes in* the Sustainability Information. A footnote suggests that users should consider whether additional factors or circumstances, which may affect the relevance or materiality of a KPI or the level of ambition of an SPT, should be added here.

The clarity and breadth of this content requirement is important for borrowers to consider closely as the delivery of a Verification Report that includes any of this information/changes constitutes a Sustainability Amendment Event which triggers the amendment mechanism in Clause 42.6 (*Sustainability amendments*) and in the absence of agreement may result in declassification of the Facilities. See further the discussion at Clause 42.6 (*Sustainability amendments*) and Clause 28.41(*Declassification Event*) below.

It is worth noting that while this content requirement is drafted to capture changes to any Applicable ESG Standard, it should only capture changes to the standards beyond those envisaged in the definition of “Applicable ESG Standards”. As noted above, the definition of “Applicable ESG Standards” contemplates changes to the specified standards from time to time, where the amended standards are no less stringent in any material respect. Such changes will therefore be captured as part of the definition of “Applicable ESG Standards” rather than constituting a change to the Applicable ESG Standards required to be addressed in a Verification Report.

Reliance by Lenders

Borrowers should note that their obligation under the SLLP and the LMA Draft Provisions is to deliver a “Verification Report” in the required form. There is no suggestion that such reports should be capable of reliance or re-addressed to the Lenders for the purposes of the SLL, and this is not market practice.

Clause 26.12 (Sustainability Compliance Certificate Inaccuracy)

There is an obligation on the Parent to notify the Agent upon becoming aware of any inaccuracy in a Sustainability Compliance Certificate, together with a description of the inaccuracy and a revised certificate which corrects the inaccuracy.

This clause makes clear that such an inaccuracy shall not constitute a Sustainability Breach, Default or Event of Default. Instead, Clause 15.3 (*Sustainability Margin Adjustment*) provides a mechanism for the recalculation of the Margin following receipt of a corrected Sustainability Compliance Certificate, and for the borrower to reimburse the Lenders any additional amounts, where due. See Clause 15.3 (*Sustainability Margin Adjustment*) above.

Clause 26.13 (Sustainability Information)

This clause sets out a number of additional information undertakings for the benefit of the Lenders, namely:

- to supply any additional information a Lender may reasonably request to determine and confirm if any SPT has been met, and otherwise determine compliance with any Sustainability Provision;
- to promptly notify the Agent of any Sustainability Breach; and
- to promptly notify the Agent upon becoming aware that an External Reviewer has threatened to terminate its appointment or that its appointment has been terminated, and the appointment of any successor reviewer.

This clause also contains a reliance provision pursuant to which it is acknowledged that the Agent, Sustainability Coordinator (if there is one) and Lenders may rely without independent verification on the accuracy, adequacy and completeness of the Sustainability Information, and that they do not assume responsibility or have any liability for such information.

Comment

Some Lenders are seeking more extensive ESG-related information undertakings – in all loans, not just SLLs – in order to ensure that they have the information they need in order to comply with their own regulatory reporting requirements. In most corporate financings, borrowers will resist the inclusion of such additional information undertakings, on the grounds that the existing information undertakings in the LMA recommended form facility agreements are adequate.

Clause 28.41 (Declassification Event)

This clause establishes a right for the Lenders, via the Agent, to declassify the Agreement so that it is no longer labelled as an SLL. Specifically, the clause provides that, at any time after the occurrence of a Declassification Event, the Agent may, and shall if so directed by a specified proportion of Lenders, by notice to the Parent declassify the Facilities as "sustainability-linked".

The consequences of declassification are two-fold: (1) the margin adjustment mechanism and each Sustainability Provision cease to apply, and (2) no future publicity of the Facilities as sustainability-linked is permitted (see
Clause 28.42 (*Sustainability publicity*) further below).

The LMA Draft Provisions do not permit the Facilities to be reclassified as sustainability-linked.

Comment

"Declassification" clauses came to the fore during 2021 as SLLs began to proliferate. Such provisions describe the circumstances in which a loan will cease to be classified as an SLL and the consequences of this (principally the falling away of the sustainability margin adjustment mechanic).

Declassification provisions have long been a hot topic in green loans and other use of proceeds products where, if a borrower is in persistent breach of reporting obligations, a Lender cannot verify how funds are used and may consider itself exposed to greenwashing claims. The need for such provisions might be considered to be less fundamental in SLLs where there are no restrictions on the use of the loan proceeds and where margin increases typically apply in the event of the borrower's breach or failure to report.

Declassification provisions are nevertheless often proposed for SLLs, driven at least in part by Lenders' internal reporting requirements (particularly where they have targets for deploying capital towards sustainable finance) as well as greenwashing concerns. Declassification provisions are very commonly raised on more broadly syndicated deals, where perhaps there is a wider lender group and their individual policies on SLLs need to be considered.

The loan market is a private market. Borrowers are unlikely to be obliged to disclose publicly their entry into an SLL, but may choose to do so. If the borrower's entry into an SLL is made public, it is possible that declassification could trigger disclosure requirements. Given that this may have significant reputational and even economic consequences for the borrower (for example, in terms of its share price), borrowers will often seek to resist declassification provisions where possible.

Where Lenders insist on their inclusion (which is now generally the case), borrowers will want to be closely involved in framing the provisions to ensure that the circumstances in which declassification is triggered and the consequences of declassification are set appropriately.

There is as yet no standard approach to declassification provisions in the market. These provisions, therefore, tend to be one of the more heavily negotiated areas of SLLs.

There are a number of points for borrowers to consider in relation to the operation of the declassification provisions proposed in the LMA Draft Provisions.

"Declassification Event"

A "Declassification Event" is the trigger or route into declassification. The occurrence of a Declassification Event gives Lenders the right to instruct the Agent to declassify the Facilities. Borrowers should be wary of agreeing to any circumstances which are too easily triggered, which are not in their control and/or which are not linked to objective criteria. Borrowers are also likely to want to resist triggers that result in automatic declassification i.e. without a grace period and/or consultation process to determine whether the trigger event can be resolved.

"Declassification Event" is defined narrowly in the LMA Draft Provisions as a failure by the parties to agree sustainability amendments pursuant to the agreed mechanism within a specified number of Business Days following the occurrence of a Sustainability Amendment Event.

The definition of "Sustainability Amendment Event" can be quite broadly cast (see comments under Clause 42.6 (*Sustainability amendments*) below). The potential for a sustainability amendment process to trigger declassification rights is especially important to bear in mind when settling the definition of "Sustainability Amendment Event".

The LMA Draft Provisions include a placeholder for the inclusion of additional declassification triggers. A footnote states that users should consider the inclusion of additional declassification triggers on a case-by-case basis, taking into account the context of the relevant KPIs and the specific circumstances of the transaction, as well as market practice at the time. Examples of additional triggers that are proposed in practice include misreporting or failure to report, consecutive non-achievement of SPTs, Sustainability Breaches that continue unremedied for an extended period and Lenders' belief that the KPIs/SPTs no longer comply with the SLLP.

Borrowers may wish to remind Lenders in this context of the paragraph of the SLLP Guidance quoted in section 3 (*Core component 2 - Calibration of SPTs*) of Part 2, which suggests that sustainability amendments are intended to be prompted by "*significant M&A activities, extraordinary/extreme events, and/or drastic change in the* *regulatory environment”*. Certainly, declassification triggers should be focussed on similarly extreme events.

“Declassification Date”

“Declassification Date” aims to capture the date on which declassification actually occurs. It is defined in the LMA Draft Provisions as the date on which the Agent (acting on the instructions of a specified proportion of Lenders – see below) exercises its right to declassify the Facilities by notice to the Parent (i.e. the borrower). It would be preferable for declassification to occur following receipt by the Parent of such notice – the borrower could otherwise become subject to the consequences of declassification including restrictions on future publicity without being aware. For the same reason, borrowers will want to resist any attempts by Lenders to make declassification automatic on the occurrence of a Declassification Event.

Lender voting requirements

The LMA Draft Provisions require the parties to agree on the proportion of Lenders able to direct the Agent to declassify the Facilities i.e. all Lenders or Majority Lenders. It will be in the borrower’s interest for this to be an all-Lender decision so as to make declassification as hard to trigger as possible. In practice, both options are seen.

Impact of declassification decision

The LMA Draft Provisions provide that, with effect on and from the Declassification Date, the whole Sustainability Margin Adjustment mechanism falls away. This is the most common position being taken in the market at the time of writing. In some cases, Lenders are arguing that declassification should result in the highest margin in the sustainability margin ratchet applying instead (as if the borrower had not met any of the SPTs). The borrower’s counter-argument here is that on declassification of the Facilities, all the sustainability-related features, including the sustainability margin rachet, should fall away as the loan is no longer an SLL.

The LMA Draft Provisions provide that following declassification, no margin adjustment will apply to any Utilisation. Borrowers may wish to make it clearer that, with effect on and from the Declassification Date, no margin adjustment will apply to any outstanding Loan from the start of the next Interest Period, as well as to any subsequent Loan.

The LMA Draft Provisions treat declassification as irreversible, specifically providing that no Facility may be reclassified. Some agreements to date have included reclassification provisions pursuant to which the loan becomes an SLL again if, for example, a Sustainability Compliance Certificate is subsequently delivered. The desirability for, and relevance of, reclassifications provisions will largely depend on the triggers for declassification in the first place.

If the Agreement documents more than one facility, an additional question is whether the Declassification Event should trigger the potential declassification of all the Facilities. Consideration may need to be given to whether declassification should occur in relation to affected Facilities only, or all of the Facilities, as contemplated in the LMA Draft Provisions. Whether only certain Facilities are affected will again depend on the triggers for declassification in the first place.

Further comment – the LSTA approach to sustainability amendments and declassification

It is interesting to note that declassification provisions are not a feature of the LSTA Drafting Guidance (one of a number of differences between that document and the LMA Draft Provisions). Further, there is a divergence in their respective approach to sustainability amendments. Accordingly, the nature and emphasis placed on these provisions in English law transactions may depend on the mix of nationalities in the syndicate.

The LSTA Drafting Guidance does not include amendment provisions in the body of the drafting. Instead, example drafting is set out in a footnote in acknowledgement of the fact that the occurrence of certain events may result in the need to recalculate or otherwise adjust the ESG metrics.

Similar to the LMA's Sustainability Amendments clause (see Clause 42.6 (*Sustainability amendments*) below), the LSTA example drafting provides that, following the occurrence of a "Sustainability Recalculation Event" (which is defined to include acquisitions/disposals and changes in law) and at the request of either the borrower or Required Lenders, the borrower and Agent are required to negotiate in good faith for a specified period (30 days is included as a placeholder).

The LSTA drafting, however, deviates from the LMA drafting in terms of what happens at the end of the negotiation period in the event that no agreement is reached. The LSTA example drafting provides that, in this event, the sustainability margin adjustment ceases to apply until agreement is reached. During such period, provision is made to specify an alternative positive margin adjustment that will apply for a specified number of days, following which such pricing adjustment will also cease to apply and no party will be permitted, without prior written consent of the others, to refer to the facility as sustainability-linked.

Clause 28.42 (Sustainability publicity)

This clause addresses a further consequence of declassification, namely that following declassification of the **Facilities**, no member of the Group is permitted to refer to the Facilities or any Utilisation as "sustainability-linked".

Comment

Restrictions on publicity of the loan as an SLL following declassification are commonly included in SLLs. Borrowers should, however, be aware of Lender attempts to impose wider restrictions than those contemplated in the LMA Draft Provisions. There has been some discussion, for example, as to whether borrowers should be subject to an obligation to remove historic references to the Facilities being sustainability-linked (as noted in a footnote to the LMA Draft Provisions). Such an obligation is not standard market practice, and borrowers will likely want to resist. Where the parties agree to include such an obligation, borrowers should ensure that it is reasonable and practically achievable both in terms of timeframe and the level of effort required (given that there may be historic references which the borrower will simply be unable to remove, for example references in previous annual reports).

The LMA Draft Provisions do not include a positive obligation on the borrower to publicly announce a declassification of the Agreement. Borrowers will want to resist any attempts by the Lenders to include such an obligation (in particular, where the borrower is not obliged to make any announcement of its entry into the SLL). As noted at Clause 28.41 *(Declassification Event)* above, it is possible declassification could trigger disclosure by the borrower even in the absence of any contractual obligation under the Agreement.

Failure to comply with the publicity restriction in the LMA Draft Provisions will amount to an Event of Default – the provision is not defined as a Sustainability Provision and therefore not carved out of the Events of Default in the same way as the other sustainability-related provisions (see the discussion at Clauses 29.3 and 29.4 (*Events of Default*) below). Borrowers will therefore need to make sure that the restriction is framed appropriately and can be practically complied with.

Clauses 29.3 and 29.4 (Events of Default)

The LMA Draft Provisions carve out the sustainability-related aspects of the Agreement from the Events of Default provisions. Specifically, they provide that:

- No Event of Default will occur under the "Other obligations" Event of Default by reason only of an Obligor's failure to comply with a Sustainability Provision; and

- No Event of Default will occur under the "Misrepresentation" Event of Default to the extent that the representation or statement concerns, or document consists of, Sustainability Information.

It is also made clear at Clause 26.12 (*Sustainability Compliance Certificate Inaccuracy*) – for which see further above – that a Sustainability Compliance Certificate Inaccuracy shall not constitute a Default or Event of Default.

Comment

The carving out of the sustainability-related aspects of the Agreement from the Events of Default provisions is generally accepted in the market. Borrowers will want to resist any attempts by Lenders to restrict the carve out of these provisions.

A breach of the publicity restriction following declassification is the exception, which may constitute an Event of Default (as reflected in the LMA Draft Provisions). See
Clause 28.42 (*Sustainability publicity*) above for further discussion.

Borrowers should also note that if a Sustainability Coordinator has been appointed, obligations to that entity (e.g., indemnity obligations) are typically not treated as sustainability-related provisions of the Agreement, breach of which does not constitute an Event of Default. This is also reflected in the LMA Draft Provisions.

Clause 33 (Role of the Agent, the Arranger[,] the Issuing Bank [and the Sustainability Coordinator])

The LMA Draft Provisions propose various amendments to existing Clause 33 (*Role of the Agent, the Arranger and the Issuing Bank*) of the LMA Leveraged Agreement to address the Agent's limitation of liability and responsibility with respect to sustainability-related aspects of the financing.

A footnote notes that these amendments should be included irrespective of whether or not a Sustainability Coordinator has been appointed in relation to the financing. Where a Sustainability Coordinator has been appointed, the LMA Draft Provisions envisage certain of these amendments extending to cover the Sustainability Coordinator as well. See Part 4 (*Role of the Sustainability Coordinator*) below for further discussion in this regard.

With respect to the Agent, the LMA Draft Provisions propose the following amendments to existing Clause 33:

- ***Responsibility for Sustainability Information*** – this new provision seeks to ensure that the Agent is not responsible for the adequacy, accuracy or completeness of any Sustainability Information.

- ***No duty to monitor*** – it is made clear that the Agent is not required to enquire whether any particular sustainability-related event has occurred nor is the Agent required to enquire as to the performance, default or breach of any Sustainability Provision.

- ***Exclusion of liability*** – this sub-clause has been expanded to make clear that the Agent is not acting in an advisory capacity to any person in respect of the SLLP nor will it be obliged to verify whether any Facility will comply with the SLLP, each Finance Party being solely responsible for making its own independent appraisal of the sustainability-related aspects of the Agreement.

Comment

The amendments proposed to existing Clause 33 (*Role of the Agent, the Arranger and the Issuing Bank)* should not be controversial, as they largely seek to extend existing market standard agency protections to cover the new sustainability-related aspects of the Agreement.

The LMA Draft Provisions do not include any new provisions relating to disclosure by the Finance Parties of the existence and details of the SLL and their role in the transaction, nor do they include any provisions expressly restricting such disclosure. The Finance Parties are, however, subject to the general confidentiality provisions in the Agreement in this regard.

Lenders have, in a number of instances, sought to include express provisions permitting such disclosure. Where new disclosure provisions are proposed by the Lenders, borrowers will need to ensure that they are happy with the level of publicity and disclosure being sought. Whether such provisions are acceptable may depend on whether the borrower itself plans to make public details of the SLL.

Clause 42.6 (Sustainability amendments)

This clause sets out a mechanism for agreeing amendments to the KPIs and SPTs, often referred to as a rendez-vous clause (in recognition of the fact that the process involves the coming together of the parties to agree necessary changes).

The amendment mechanism is triggered by the occurrence of a "Sustainability Amendment Event", which is defined, in summary, as a change in the shape of the Group's business (by way of acquisition, disposal, merger etc.) or a qualification or other issue highlighted in a Verification Report (see the discussion at Clause 26.11 (*Sustainability Compliance Certificate, Sustainability Report and Verification Report*) above), in each case which could reasonably be expected to (materially) affect any KPI/SPT. A placeholder is included for the addition of further trigger events as agreed.

Following the occurrence of a Sustainability Amendment Event, the borrower and Agent (acting on the instructions of a specified proportion of Lenders) are required to enter into negotiations in good faith with a view to agreeing such amendments to the Agreement as are necessary for the purposes of eliminating, accommodating or otherwise taking into account the effect of the relevant event.

There is an obligation on the Parent to notify the Agent of any Sustainability Amendment Event as soon as reasonably practicable and in any event within a specified number of Business Days after the occurrence of the event and to propose any amendments, but there is no time period specified for the negotiations to agree the amendments themselves. The LMA Draft Provisions, instead, provide that a Declassification Event will occur if agreement is not reached between the parties within a specified number of Business Days following the *occurrence* of the Sustainability Amendment Event. The exact number of Business Days is left to be agreed between the parties.

Comment

Most SLLs entered into at the time of writing make provision for adjustments to be made to the KPIs and/or SPTs during the life of the loan. This is important for a number of reasons, including:

- to ensure the KPIs remain relevant and fit for purpose;
- to ensure the SPTs remain ambitious, for example where a borrower overshoots its existing targets;
- to cater for situations where the borrower is no longer able to report on a specific KPI, for example, due to a lack of data; and
- to cater for changes to the borrower's business, for example if the borrower acquires a business with a significant carbon footprint, any SPT related to the carbon footprint of the Group as a whole would need to be adjusted.

An amendment mechanism will be especially important for loans with longer tenors and those subject to extension options.

There are a number of points for borrowers to consider in relation to the operation of the sustainability amendment provisions proposed in the LMA Draft Provisions.

Amendment triggers

The precise circumstances in which the amendment mechanism is triggered requires close attention. The LMA Draft Provisions contemplate two trigger events (as set out above) and include a placeholder for additional trigger events to be added by the parties where appropriate. A footnote to the definition of "Sustainability Amendment Event" makes clear that the definition is not intended to be exhaustive, and that the inclusion of additional events should be considered on a case-by-case basis.

Examples of additional trigger events include the borrower and/or Lenders taking the view that the KPIs and/or SPTs are no longer appropriate, the borrower ceasing to be able to calculate a KPI on a prolonged basis, and the borrower ceasing to target a particular KPI as part of its broader sustainability strategy.

Borrowers will want to ensure that the definition is wide enough to capture all the circumstances in which a borrower may wish to amend the ESG metrics, although not too wide given the risk of declassification in the event agreement following the occurrence of an amendment event cannot be reached. For a similar reason, triggers which are not within the borrower's control should be avoided, or at least limited, to the extent possible.

Parties will also want to ensure that any additional events are not capable of being triggered so frequently as to involve the parties having to regularly renegotiate and amend the sustainability terms of the Agreement.

As already noted, borrowers should bear in mind that the intention of these provisions is not to enable the frequent revisiting of KPIs and SPTs during the tenor of the loan; rather, they provide the flexibility to cater for significant changes. This is reflected in the SLLP Guidance (see the extract quoted in section 3 (*Core component 2 - Calibration of SPTs*) of Part 2). The notes to the equivalent provision in the LSTA Drafting Guidance make a similar point.

See Clause 28.41 (*Declassification Event*) for a discussion on declassification and its consequences.

MFN provisions

The SLLP Guidance notes that safeguards should be included in documentation to allow for the updating of SPTs so they are never less ambitious than those publicly announced (see section 3 (*Core component 2 - Calibration of SPTs*) in Part 2). This point is normally dealt with as part of the Sustainability Amendment Event definition.

The LMA Draft Provisions do not specifically contemplate "most favoured nation" or MFN provisions, which are not currently a common feature of SLLs. MFN provisions go slightly further, being designed to ensure that if the borrower sets more ambitious targets in other financing products or as part of its broader sustainability strategy, the

SLL will be updated automatically by reference to the more ambitious target.

Lender voting on amendments

A footnote in the LMA Draft Provisions acknowledges that the market has not yet settled on an agreed approach to the level of Lender consent required for amendments pursuant to this clause (and sustainability-related amendments more generally), and the LMA Draft Provisions therefore leave the level of Lender consent required to be decided by the parties on a case-by-case basis. On a number of recent deals, sustainability-related amendments have been designated as Majority Lender matters, which will be preferable to borrowers in most instances.

Length of negotiation period

The LMA Draft Provisions do not provide for a negotiation period of a specified length. Instead, "Declassification Event" is defined such that a Declassification Event occurs if no agreement is reached within a specified number of Business Days following the *occurrence* of a Sustainability Amendment Event. Borrowers will want to ensure that this time period is long enough to allow for both notification of the Sustainability Amendment Event and a sufficiently long negotiation period. Alternatively, it may be preferable to amend the definition of "Declassification Event" such that a Declassification Event occurs at the end of an agreed period of negotiation between the parties in the event that agreement between them cannot be reached (rather than at the end of a specified period following the occurrence of the Sustainability Amendment Event itself).

Schedule (Form of Sustainability Compliance Certificate)

This Schedule contains the agreed form of Sustainability Compliance Certificate to be delivered by the borrower for each SLL Reference Period. As drafted, the form of certificate addresses the content requirements detailed in Clause 26.11 (*Sustainability Compliance Certificate, Sustainability Report and Verification Report*) – for which, see further above.

Schedule (Sustainability Calculations)

This Schedule sets out the KPIs and SPTs, together with the supporting ESG metrics including the Calculation Methodology, Baseline and any Applicable ESG Standards, with the relevant definitions cross-referring to this Schedule as discussed at Clause 1.1 (*Definitions) – SLL definitions* above.

Provision is made for the SPTs for each KPI to be set by reference to each SLL Reference Period.

Conditions precedent

The LMA Draft Provisions do not include conditions precedent relating to sustainability. As noted in a footnote, such conditions precedent have been left for the parties to negotiate on a transaction-specific basis.

In many cases, sustainability-related information and documentation will be requested as part of the Lender due diligence process pre-signing, rather than as a condition precedent to funding, so that Lenders have the necessary information to be able to agree on the KPIs, SPTs and other sustainability-related aspects of the Agreement.

The Agreement will then contain ongoing reporting and information undertakings to ensure that the Lenders have access to updated information over the life of the facility (see Clause 26.11 (*Sustainability Compliance Certificate, Sustainability Report and Verification Report*) above).

As part of the due diligence process, Lenders may require a pre-signing second party opinion although this has not been market practice to date. While the SLLP recommend that the borrower obtains input from a third party pre-signing, either by way of a second party opinion or KPI/SPT assessment, to assess, among other things, the relevance, robustness and reliability of the selected KPIs and the level of ambition of the proposed SPTs, this has not been made mandatory (see section 3 (*Core component 2 - Calibration of SPTs*) of Part 2 above). Where third party input is required by the Lenders, it will again generally be required pre-signing rather than as a condition precedent to funding. Indeed, the reference to such input being obtained as a condition precedent to the SLL being made available was removed in the 2023 update of the SLLP.

Whether there are any sustainability-related conditions precedent to funding and if so, what these are, will vary in practice. Examples might include the borrower's latest Sustainability Report, the borrower's up-to-date sustainability strategy and/or the terms of appointment of any External Reviewer. In practice, conditions precedent are most often required from borrowers whose sustainability strategy is not the subject of public reporting, meaning a sustainability presentation and/or baseline report must be prepared for the purposes of the SLL.

PART 4

ROLE OF THE SUSTAINABILITY COORDINATOR

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1. Introduction

The appointment of a Sustainability Coordinator is aimed at smoothing the process of structuring and documenting an SLL. It is not mandatory to appoint a Sustainability Coordinator, but it is increasingly common to do so in syndicated SLL transactions.

The Sustainability Coordinator (also sometimes referred to as a Sustainability Structuring Agent or Sustainability Agent – the various titles are often used interchangeably) will typically be a lead or relationship bank in the syndicate appointed by the borrower. Lenders have, to date, been keen to take on the role, in large part for reputational reasons – fees are rarely the driver. The Sustainability Coordinator function at any given lending institution may sit with a dedicated sustainability team, with the wider loan team or with another part of the organisation.

The SLLP do not address the Sustainability Coordinator role in much detail, save to note that a borrower may elect to structure its SLL with the assistance of a Sustainability Coordinator and to provide a few examples of what the role might involve (see section 3 (*Core component 2 - Calibration of SPTs*) of Part 2 above).

The LMA has, however, published an introductory guide to the role, available from the **LMA website,** which gives readers a high-level overview of the role and the key considerations when looking to appoint a Sustainability Coordinator. The guide was first published in July 2022, and is, at the time of writing, in the process of being reviewed in light of market developments. The LMA is also in the process of drawing up a template mandate letter (see further section 3 (*Terms of appointment*) below). In acknowledgement of the growing use of a Sustainability Coordinator on syndicated SLLs, the LMA Draft Provisions provide optionally for the involvement of a Sustainability Coordinator. The approach taken in the LMA Draft Provisions is discussed in section 4 (*The Sustainability Coordinator and the LMA Draft Provisions)* below.

2. Role of the Sustainability Coordinator

The Sustainability Coordinator's role is typically limited to pre-signing and is more akin to a documentation bank role rather than an agent role.

Specific responsibilities may include, for example:

- Assisting with the selection of KPIs and the calibration of SPTs.
- Assisting with structuring the SLL, including the sustainability margin ratchet.
- Helping to ensure that the transaction is aligned to the SLLP.
- Facilitating dialogue with the syndicate on the SLL terms.
- Answering ESG-specific questions from the syndicate; questions from syndicates have become much more extensive as concerns around greenwashing have become more acute.
- Assisting with the preparation of information packages and Lender presentations, addressing the sustainability-linked features and terms of the loan.

The precise role and responsibilities will vary from transaction to transaction, and will typically be set out in a separate mandate or appointment letter (for which, see section 3 (*Terms of appointment*) below).

While the role is generally limited to pre-signing, there are instances where the Sustainability Coordinator may be involved post-signing, for example in cases where not all the KPIs/SPTs are agreed pre-signing or where the KPIs/SPTs are adjusted during the life of the loan. Where the loan in question is a "sleeping SLL" (see section 3 (*Core component 2 - Calibration of SPTs*) of Part 2 above), it may be that the Sustainability Coordinator is only appointed post-signing prior to the switch from sleeping SLL to SLL.

In all these instances, the role of the Sustainability Coordinator will be similar to that outlined above – essentially to assist with setting the KPIs and SPTs (albeit during the life of the facility) and managing interactions with the wider Lender group on the ESG-related changes being made to the Agreement.

The Sustainability Coordinator is not typically involved in ongoing information and reporting requirements. Ongoing sustainability-related information and disclosure is typically delivered to the Agent on behalf of the Lenders, and (where relevant) verified by an external third party (see Clause 26.11 (*Sustainability Compliance Certificate, Sustainability Report and Verification Report*) in Part 3 above).

3. Terms of appointment

The Sustainability Coordinator's terms of appointment will usually be set out in a separate mandate or appointment letter. Where the Sustainability Coordinator also acts in other capacities, for example as Arranger or Agent, all the appointments may be covered by a single letter.

There is, at the time of writing, no standard approach to Sustainability Coordinator terms of appointment and no template drafting in the European market. This is in contrast to the US market where, in February 2023, the LSTA published Sustainability Structuring Agent Engagement Agreement Inserts (available to LSTA members from the **LSTA website**) intended as initial voluntary drafting guidance in the preparation of a US-style engagement letter.

Having previously determined that there was insufficient market consensus to produce template terms of appointment, the LMA has recently reviewed this decision. A template Sustainability Coordinator mandate letter for the English law loan market is anticipated later this year.

While there remains a fair degree of variation in the documentation relating to the appointment and role of the Sustainability Coordinator, there are a number of key provisions which parties will need to consider on each transaction (some of which are provisions which will be familiar from mandate letters for other Finance Parties, and some of which are specific to the Sustainability Coordinator role). A non-exhaustive list of these provisions is set out below.

- ***Role and responsibilities.*** The role and responsibilities of the Sustainability Coordinator (i.e. what exactly the party is being appointed to do) will need to be precisely defined. In some cases, this will be set out in a separate schedule to the mandate letter.
- ***Fees.*** The terms must specify the fees (if any) payable to the Sustainability Coordinator and the terms of payment.
- ***Indemnity.*** The Sustainability Coordinator will typically seek an indemnity from the borrower for all losses and liabilities incurred in relation to its performance as such. The borrower will want to pay careful attention to the formulation and precise scope of any such indemnity.
- ***Agency-style protections.*** The Sustainability Coordinator will also typically seek various protections akin to those provided to the Agent in the main Facility Agreement. For example, confirmation that it is not a fiduciary or trustee of any other person; limitations on its liability; and confirmation that it has no responsibility for verifying any information supplied by the borrower and is not liable for its accuracy or completeness.
- ***Reliance.*** The parties are often excluded from relying on the Sustainability Coordinator for confirmation that the loan meets their own internal requirements and/or any external standards/benchmarks (subject to specified carve outs). The responsibility for that evaluation tends to lie with the individual parties.
- ***Obligations on the borrower.*** The borrower will often undertake to co-operate with the Sustainability Coordinator and provide it with such information, and in some cases, access to management as it may reasonably require.
- ***Representations from the borrower.*** The Sustainability Coordinator may insist on a representation from the borrower to the effect that all of the information provided is true and accurate, and that nothing has occurred or been omitted, and no information has been given or withheld, that results in the information provided being untrue or misleading. As with the new repeating representation in the LMA Draft Provisions given for the benefit of the Finance Parties (see Clause 25.12(g) (*No misleading information*) in Part 3 above), the borrower will want to pay careful attention to the detail of any such additional representation given to the Sustainability Coordinator.

- ***Termination provisions.*** The terms on which the appointment will end must be specified. As discussed above, the Sustainability Coordinator's role will usually be limited to pre-signing. Beyond this, the parties may have rights to terminate the appointment on notice and/or on the occurrence of particular trigger events.
- ***Confidentiality provisions.*** The Sustainability Coordinator may require that its appointment and terms be kept confidential (subject to limited exceptions).
- ***Restrictions on publicity/announcements.*** There may be restrictions on marketing the loan as an SLL without prior consultation with, or consent of, the Sustainability Coordinator.
- ***Conflicts of interest.*** Provisions will often be included to deal with potential conflicts of interest by the Sustainability Coordinator.

4. The Sustainability Coordinator and the LMA Draft Provisions

The LMA Draft Provisions provide optionally for the involvement of a Sustainability Coordinator.

Where a Sustainability Coordinator is appointed, the LMA Draft Provisions assume that the role is limited to the performance of obligations pre-signing, in line with current market practice and as discussed in Section 2 (*Role of the Sustainability Coordinator)* above. The Sustainability Coordinator is not, therefore, made a party to the Agreement, but is instead given express rights to rely on certain provisions as a third party. It will be important to ensure that any Third Party Rights clause in the Agreement permits the Sustainability Coordinator to enforce and enjoy the benefit of these provisions.

To the extent that the Sustainability Coordinator's role extends beyond signing, the LMA Draft Provisions would need to be amended accordingly, for example amending the definition of "Sustainability Coordinator" to include successors, including resignation provisions and rights of appointment, and potentially extending additional agency-style protections to the Sustainability Coordinator.

The involvement of a Sustainability Coordinator pre-signing is principally addressed in section 2.2 of the LMA Draft Provisions

(*Amendments to Leveraged Document relating to the role of Sustainability Coordinator and the Finance Parties' responsibility for information relating to sustainability*) through (i) the inclusion of a new indemnity at Clause 21.5 (*Indemnity to the Sustainability Coordinator*) and (ii) the extension of certain pre-existing and new agency protections to the Sustainability Coordinator, and the inclusion of an additional limitation on liability, in each case at Clause 33 (*Role of the Agent, the Arranger[,] the Issuing Bank [and the Sustainability Coordinator]*).

Clause 21.5 (Indemnity to the Sustainability Coordinator)

The LMA Draft Provisions introduce a new indemnity to the Sustainability Coordinator, to be included at the end of existing Clause 21 (*Other Indemnities*).

The indemnity requires the Parent to promptly indemnify the Sustainability Coordinator against any cost, loss or liability incurred as a result of it (i) acting or relying on any notice/request etc. it reasonably believes to be genuine and (ii) acting as Sustainability Coordinator in relation to the Facilities (other than by reason of its gross negligence or wilful misconduct).

Comment

As discussed in section 3 (*Terms of appointment*) above in the context of the Sustainability Coordinator's mandate letter, the borrower will want to pay close attention to the formulation and precise scope of this indemnity.

The Sustainability Coordinator's mandate letter will often include an indemnity obligation which may survive entry into the Agreement. In such a case, it may be possible to do away with the indemnity in the Agreement. If included in both documents, care will need to be taken to ensure that the indemnities are consistent and that any restrictions or limitations agreed to the scope of the indemnity in one are mirrored in the other.

Breach of this indemnity (which is not treated as a Sustainability Provision) will be an Event of Default.

Clause 33 (*Role of the Agent, the Arranger[,] the Issuing Bank [and the Sustainability Coordinator]*).

The LMA Draft Provisions extend certain pre-existing agency protections to the Sustainability Coordinator, namely (i) that nothing in any Finance Document constitutes the Sustainability Coordinator as a trustee or fiduciary of any other person, (ii) that the Sustainability Coordinator shall not be bound to account to any Lender for the sum or the profit element of any sum received by it for its own account and (iii) that the Sustainability Coordinator is not responsible or liable for (a) the adequacy, accuracy or completeness of any information supplied in or in connection with any Finance Document, (b) the legality, validity etc. of any Finance Document or the Transaction Security or (c) any determination as to whether any information provided to any Finance Party is non-public information.

The LMA Draft Provisions also extend certain new agency protections, added to reflect the new sustainability-related aspects of the Agreement and discussed at

Clause 33 (*Role of the Agent, the Arranger[,] the Issuing Bank [and the Sustainability Coordinator]*) in Part 3 above, to the Sustainability Coordinator. These include (i) confirmation that neither the Agent nor the Sustainability Coordinator is responsible or liable for the adequacy, accuracy or completeness of any Sustainability Information, and (ii) confirmation that neither the Agent nor the Sustainability Coordinator is acting in an advisory capacity to any person in respect of the SLLP, nor will they be obliged to verify whether any Facility will comply with the SLLP on behalf of any of the Finance Parties, each Finance Party being solely responsible for making its own independent appraisal of the sustainability-related aspects of the Agreement.

Finally, an additional limitation on liability has been introduced for the benefit of the Sustainability Coordinator pursuant to which it will not be liable for any action taken or not taken by it in connection with any Finance Document in such capacity, unless directly caused by its gross negligence or wilful misconduct.

Comment

The Sustainability Coordinator’s mandate letter may include a number of these protections. Where that is the case, particularly where the provisions included in the mandate letter survive entry into the Agreement, it may not be necessary to also include them in the Agreement itself. Where provisions are included in both documents, the borrower will want to make sure that the terms are consistent and that any restrictions agreed to the scope of a provision in one document are mirrored in the other.

APPENDIX - FURTHER READING

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LMA MATERIALS

- **Sustainable Lending microsite**

- **Draft provisions for Sustainability-Linked Loans (May 2023)**

  LMA drafting is normally available to LMA members only. The LMA has kindly agreed to make the LMA Draft Provisions available to ACT members on request, for the purpose of building understanding and eliciting feedback. ACT members wishing to access the LMA Draft Provisions should contact Gemma Lawrence-Pardew (Director, Legal) or Hannah Vanstone (Senior Associate Director, Legal) (Gemma.Lawrence-Pardew@lma.eu.com/Hannah.Vanstone@lma.eu.com).

  Treasurers can also speak to their lenders or legal advisers to obtain a copy in the context of potential SLL transactions.

- **Sustainability-Linked Loan Principles (February 2023)**

- **Guidance on Sustainability-Linked Loan Principles (February 2023)**

- **Sustainable Lending Glossary (August 2021)**

- **Guidance for Green, Social and Sustainability-Linked Loans External Reviews (March 2022)**

- **An Introduction to the Sustainability Coordinator Role (July 2022)**

- **Best Practice Guide to Sustainability-Linked Leveraged Loans (July 2021)**

- **Guide for Company Advisors to ESG Disclosure in Leveraged Finance Transactions (October 2022)**

OTHER RESOURCES

- ACT ESG / sustainable finance resources – available to ACT members only
- ICMA Sustainable Finance webpage (includes links to the Sustainability-Linked Bond Principles)
- European Leveraged Finance Association ESG resources
- ESG Integrated Disclosure Project homepage
- APLMA Green and Sustainable Lending Microsite
- LSTA website

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We work closely with regulators, the LMA and other fellow trade associations to ensure that the needs of the corporate sector and the real economy are not overlooked in the transition to net zero and a more sustainable economy.

We welcome input from members on all aspects of lending practice including sustainability by email to **technical@treasurers.org**.

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SLAUGHTER AND MAY

Slaughter and May is a leading international law firm that advises on a wide range of often ground-breaking transactions, with a varied client list ranging from major corporations and financial institutions to governments.

Our loan finance practice represents investment grade and sub-investment grade borrowers in all industry sectors, giving us a depth of understanding of borrowers' needs. We also act for leading financial, commercial and industry players and banks, providing us with a wide perspective on the market.

Our financing team regularly advises corporate borrowers on the full range of sustainable finance products, with almost all our corporate lending work now involving some form of sustainability-related discussion and/or features. This complements our broader sustainability practice which advises a range of clients on the full spectrum of sustainability-related issues, including sustainability strategies and frameworks, regulatory developments, disclosure and governance.

The Slaughter and May team is actively involved in a number of regulatory and industry-led working groups looking at various aspects of sustainable finance and sustainability more broadly, giving us a deep understanding of current issues and upcoming developments.

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