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ICMSA Bulletin with respect to publication of model wording relating to mandatory trustee consent provisions for use on capital market securitisation transactions

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Concerns have been raised by some market participants with regard to common discretionary powers granted to trustees to concur in amending capital market securitisation transaction documentation. In response ICMSA, in consultation with its members, has participated in AFME's formulation of a set of standard provisions (which are referred to in this publication as the model wording) based on which a trustee may be required to agree to certain categories of transaction document amendment, removing the need in these cases for the trustee to exercise discretion.

A copy of the model wording is, with AFME's permission, available on ICMSA's website. ICMSA anticipates it will require adjustment according to the structure of the transaction for which it is to be used.

Typical discretionary powers of the trustee include the ability to effect amendments which (i) will not be materially prejudicial to the interests of defined beneficiaries or (ii) are of a formal, minor or technical nature or made to correct a manifest error.

Certain amendments have proved particularly difficult in recent years. Examples include those arising from changes to rating agency criteria, affecting common transaction parties such as account banks, liquidity providers and swap counterparties as well as changes to law or regulation or the introduction of new regulatory requirements.

The model wording does not replace discretionary consent provisions, but sits alongside these for defined categories of modification, notably those relating to rating agency criteria and regulatory change. The "menu" of circumstances in which an issuer might seek to "hardwire" the consent has been the most debated of the provisions within the clause, though all the provisions will require agreement on a transaction by transaction basis.

Members' attention is drawn also to wording within the provision included at the request of certain institutional investors and which is commonly referred to as a "negative consent" mechanism. This protection for investors requires the issuer to give advance notice of any change proposed under the mandatory consent provision to investors and prescribes a period during which investors who hold a specified percentage of the most senior class of notes (10% under the model wording) may respond with their objection (which would result in the proposal failing). If insufficient objections are received within the prescribed period the trustee will be required to give effect to the proposal, assuming other relevant conditions are met.

The model wording retains the concept of "reserved matters/basic terms modifications", for which an issuer must still seek beneficiary approval. Otherwise the trustee is entitled under the provision to disregard the effect of the proposed change on the interests of its beneficiaries.

By publishing AFME's pro forma on our website, ICMSA is seeking to endorse a market standard for mandatory trustee consent provisions that may be used on or applied to any securitisation transaction under English law. ICMSA believes that the model wording will benefit its members and market participants by standardising and simplifying the approach to making amendments in circumstances which have otherwise proved difficult for trustees and issuers.