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# ACCRUED INTEREST

A Finance Newsletter from Haynes and Boone, LLP **MAY 2016**


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The current edition of *Accrued Interest* focuses on the Finance professionals in our New York Office. Each of the articles was authored or co-authored by one or more of our attorneys resident in New York. We also have provided a partner spotlight on Craig Unterberg, a New York Finance Partner who has recently been named Chair of the firm's Finance Section. We hope you enjoy these various articles and get a sense of the breadth and depth of our New York Finance Practice, which is also fully integrated with all offices of the firm.

## ATTORNEY SPOTLIGHT

### Craig Unterberg – Partner

Craig Unterberg

Haynes and Boone is proud to announce that Craig Unterberg has been appointed as the Section Chair of Haynes and Boone's Finance Section. In addition to his new role as Section Chair, Craig will continue to lead the Firm's New York-based Prime Brokerage and Equity Lending Practice.

As Section Chair, Craig plans to continue the expansion of our Finance Section. Craig recently commented, "I am fortunate to be able to take over from my predecessor, Scott Night, who demonstrated tremendous leadership over the past seven years. I believe our section is as strong as it has ever been due to the skilled and dedicated attorneys within our group."

Craig further noted "We have a deep finance practice, both in seniority and skill set, and we are continuously working to cultivate the future of our group and to build upon the strengths of our finance section."

Craig began his practice in our Dallas Office and then relocated to New York in 2009 to help develop the firm's Finance Section. He has worked on an industry-leading number of single stock and portfolio loan transactions to hedge funds, investment companies, and private equity groups that have established him as a market leader in handling complex onshore and offshore margin facilities. Craig says "It's about being in the trenches with our clients, and we pride ourselves on understanding both the legal and business aspects of the deals and being a value-add to each transaction".

Outside of the office, Craig is on the National Board of Governors for the American Jewish Committee, is the Vice President of the New York Region for the American Jewish Committee, and is on BoardServeNYC. Most recently, he was appointed to the Community Assistance Panel to help former residents of Camp Lejeune, a U.S. Marine base, suffering from health problems stemming from decades of water pollution on the base.

On the weekends, Craig and his family are avid campers, and they frequently trek to scenic locations in and around New York with tent and sleeping bags in tow.

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## Receivables Purchase Agreements – Unlocking Value


Rick Martinez


Eric Filipink

Receivables purchase agreements ("RPAs") are financing arrangements that can unlock the value of a company's accounts receivable. By selling its future flow of receivables by way of an RPA, a company can better manage its cash flow without the need for a revolving loan, which may contain more stringent conditions. An RPA structure makes this possible because it functions as a sale of assets rather than an increase in indebtedness for the company. As such, the company can monetize future payables and, as an added benefit, ensure that its other assets remain unencumbered. When contemplating cross-border, rather than purely domestic, RPAs, additional issues must be considered. Based on our experience, we have compiled a summary showing some of the pros and cons of RPAs and also highlight key issues to evaluate when receivables purchases involve multiple jurisdictions.

**Download the Receivables Purchase Agreements PDF**.

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Brian Sung

## ISDA Publishes 2016 Credit Support Annex for Variation Margin

On April 14, 2016, the International Swaps and Derivatives Association, Inc. ("**ISDA**") published a new version of Credit Support Annex to help market participants comply with new margin requirements for uncleared swaps. The 2016 Credit Support Annex for Variation Margin (the "**2016 VM CSA**") is intended to be used with New York law ISDA Master Agreements and is the first in a series of documents to be published by ISDA over the next few months to facilitate compliance with uncleared swap margin requirements coming into effect in several different jurisdictions.

### Background

Following the financial crisis, the Basel Committee on Banking Supervision and the International Organization of Securities Commissions ("**BCBS/IOSCO**") jointly established a new set of minimum standards for margin requirements for non-centrally cleared derivatives (the "**BCBS/IOSCO Margin Requirements**"). Regulators in several jurisdictions including the U.S., the European Union and Japan have since published rules to implement their own versions of the BCBS/IOSCO Margin Requirements in their respective jurisdictions.

In the U.S., final uncleared swap margin rules were published in October 2015 (for entities subject to the jurisdiction of U.S. prudential banking regulators) and in December 2015 (for entities subject to the jurisdiction of the U.S. Commodity Futures Trading

Commission ("**CFTC**")); the U.S. Securities and Exchange Commission ("**SEC**") has not yet published its own set of final uncleared swap margin rules but is expected to do so in the near future. In March 2016, regulators in Japan published final uncleared swap margin rules and regulators in the European Union also published final draft regulatory technical standards for collateralization of uncleared swaps.

Although the final rules issued by each regulator vary as to certain details, as a general matter, the new requirements for collection and/or posting of variation margin and initial margin will become effective for the largest derivatives users (based on volume of uncleared swap transactions) as of September 1, 2016. Variation margin requirements for other covered entities will become effective as of March 1, 2017, while initial margin requirements for other covered entities will be phased in over a four-year period. As such, swap dealers and their counterparties will need to prepare for the new rules in order to ensure they are in compliance prior to the relevant effective dates.

## 2016 VM CSA

The 2016 VM CSA contains significant revisions from its predecessor, the 1994 Credit Support Annex (New York law). The 2016 VM CSA follows the same overall documentation architecture of the 1994 Credit Support Annex by supplementing, forming part of, and constituting a "Credit Support Document" under, the ISDA Master Agreement. Margin delivery and return amount calculation and transfer mechanics are set forth in a broadly similar pre-printed standard form annex, subject to modification for individually negotiated elections and variables in Paragraph 13 thereof.

Because the 2016 VM CSA only addresses variation margin requirements and contemplates use of a separate Credit Support Annex to address initial margin requirements (if applicable), however, significant changes have been made to various calculations and defined terms to reflect such bifurcation. Other modifications have been made to comply with additional regulatory requirements regarding variation margin, such as changes to eligible collateral types, valuation haircuts, dispute resolution procedures and interest payments. The 2016 VM CSA also now contemplates a certain subset of transactions being designated as "covered transactions" while other transactions would be excluded, to permit the 2016 VM CSA to be used only for in-scope transactions and parties under the applicable rules.

In addition to the 2016 VM CSA, ISDA also plans to publish a form of New York law Credit Support Annex for Initial Margin, as well as forms of English law and Japanese law credit support documents for variation margin and initial margin, and a set of Protocol documents to allow parties to amend existing ISDA documentation to comply with the new rules in a manner similar to previous ISDA Protocols. As with other ISDA and derivatives agreements, parties may also modify or use customized documentation along with or in place of these templates to comply with the new uncleared swap margin rules. ISDA also has an internal group working on developing a new Standard Initial Margin Model ("**SIMM**") to provide a regulatory-compliant model for initial margin calculations.

Given the complexity of the new margin rules, the number of documentation and compliance initiatives underway and the updates or amendments that may be needed to ensure proper compliance, market participants should continue to monitor developments in this area. For more information on the margin requirements for uncleared swaps, the 2016 VM CSA or any of the other new documents or initiatives regarding variation margin or initial margin, please contact one of the lawyers listed below.

[1] Basel Committee on Banking Supervision and International Organization of Securities Commissions, "**Margin Requirements for Non-Centrally Cleared Derivatives**," March 2015 (originally published September 2013). The BCBS/IOSCO Margin Requirements were published by BCBS/IOSCO in consultation with the Committee on Payment and Settlement Systems and the Committee on the Global Financial Systems (collectively known as the "Working Group on Margining Requirements" or "WGMR").

## European Union "Bail-In" Rules Became Effective January 1, 2016

Ellen McGinnis

Gil Porter

Steve Epstein

As part of its effort to eliminate the risk of taxpayer-funded bail-outs of European banks, the European Union undertook a new "bail-in" regime beginning on January 1, 2016, implementing rules which require banks and some other market participants in EU member states to write-down, cancel, convert into equity or otherwise modify certain unsecured liabilities if such steps are required to recapitalize the institution.

Since the January 1 implementation of the new regime, many international banks and other financial institutions have added language to U.S. law governed legal documentation forms to deal with the related issues, which in our experience has generally been accepted by borrowers without significant objection. Questions have also arisen in financial markets regarding whether the currently contemplated language will need to be further revised over time to deal with a number of practical concerns. Generally, the institutions are watching the markets and taking a "wait and see" attitude –but language relating to "Bail-In" seems to have become fairly commonplace in early 2016, in the same manner as FATCA and various sanctions provisions have similarly been added to market documentation in recent years.

The new rules are a result of the EU Bank Recovery and Resolution Directive ("**BRRD**") which requires member states to enact legislation enabling regulators to modify unsecured liabilities in order to effect recapitalization or to capitalize bridge institutions assuming the liabilities of a failing bank. In October, the European Commission referred six countries to the European Court of Justice ("**ECJ**") "for their continued failure to transpose the EU's 'bail-in' laws into national legislation,[1]" after issuing prior warnings, but other EU countries such as Germany and the UK have begun implementation.

The rules require that when covered institutions enter into transactions governed by non-European law, their contracts (which would include loan and other credit agreements and other typical loan market documentation governed by any U.S. state law) will need to include a "contractual recognition provision" which gives notice of the bail-in liabilities and obtains acknowledgment by the other parties to the transaction.

It is important to understand that the new rules are not retrospective in nature and relate only to obligations incurred after January 1, 2016, but could apply to preexisting agreements if they are amended or new liabilities otherwise arise under the document after that date. According to the Loan Market Association ("**LMA**"), the obligation to add the "contractual recognition provision" to documentation governed by the law of a non-European country will apply if the European financial institution has any potential liability under the document (whether contractual or non-contractual and regardless of its capacity as a party to the document) and if after January 1, 2016, (i) the financial institution becomes a party to the document (either as an original or as a transferee lender), (ii) the document is materially amended, or (iii) new liabilities arise under the document.[2]

The LMA has also pointed out that since these obligations apply to both contractual and non-contractual obligations, they can arise, without limitation, in the context of (i) lending commitments; (ii) indemnities given to agents or issuing banks; (iii) requirements to share or turnover recoveries made from the borrower; (iv) confidentiality duties; (v) requirements to obtain borrower consents or consultations prior to transfer; (vi) restrictions on a creditor's actions typically found in intercreditor documentation; (vii) administrative obligations, such as notifications of tax status or requirements to make other notifications or to supply and forward information; and (viii) potential non-contractual liability under loan market documentation such as potential claims in negligence or misrepresentation.[3] The Loan Syndications and Trading Association ("**LSTA**") has published a form of EU Bail-in Contractual Recognition Provision for use in New York law-governed primary market loan documents. More information about the bail-in regulations and links to the proposed language from the LSTA and the LMA can be found at the .

Haynes and Boone is prepared to assist our clients to include appropriate language in loan documentation, and to discuss other aspects of the rules and regulations.

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[1] http://www.telegraph.co.uk/finance/economics/11947986/EU-takes-member-states-to-court-over-bail-in-laws-to-protect-taxpayers.html.

[2] Loan Market Association Bail-In User Guide, Section 1.1(c).

[3] Loan Market Association Bail-In User Guide, Section 1.3(b)(v).

## U.S. Eases Sanctions on Iran on "Implementation Day" – Summary of 10 Key Changes


Eric Filipink


Edward Lebow

As part of the nuclear arrangement reached with Iran, the United States ceased application of its nuclear-related sanctions imposed on entities outside the United States on January 16, 2016, the so-called "Implementation Day" under the Joint Comprehensive Plan of Action ("**JCPOA**"). At the same time, the United States also eased sanctions on foreign subsidiaries of U.S. companies. Apart from a few specific exceptions, however, including new exceptions for U.S. exports of civilian aircraft to Iran and imports of carpets and foodstuffs from Iran, U.S. persons (*i.e.*, U.S. individuals and companies and foreign persons physically in the United States) are still prohibited from transacting any business with Iran or the Government of Iran. The changes to the U.S. sanctions regime against Iran only affect nuclear-related sanctions. The United States will continue to maintain its othersanctions on both U.S. and non-U.S. persons relating to Iran's support for terrorism, its human rights abuses, proliferation of weapons of mass destruction, missile activities and support for persons threatening regional stability.

On July 14, 2015, the P5+1 (China, France, Germany, Russia, the United Kingdom, and the United States), the European Union ("**EU**"), and Iran reached a JCPOA. The agreement came into effect on October 18, 2015. Implementation Day is the day on which the International Atomic Energy Agency ("**IAEA**") verified that Iran had implemented its nuclear-related commitments under the JCPOA. Below is a summary of the key changes to the U.S. sanctions regime against Iran as of Implementation Day and how these changes affect U.S. businesses:

1. **Non-U.S. entities can conduct business with Iran.** The U.S. ceased application of its nuclear-related "secondary sanctions," that is, the sanctions imposed on non-U.S. persons. Foreign companies can therefore now engage in activities that previously had been prohibited. These include activities related to banking and financial transactions involving Iran; financial messaging services; insurance and reinsurance; investment in the oil, gas and petrochemical sectors; the purchase and sale of petroleum and refined petroleum products; shipping, shipbuilding, and ports; the trade in gold and precious metals; the trade in raw and semi-finished metals and software related thereto; and the automotive industry.

2. **U.S. persons remain largely prohibited from conducting any transactions related to Iran.** The United States only eased its nuclear-related secondary sanctions. Its primary sanctions, meaning those that affect U.S. persons, remain. Therefore, U.S. persons are still barred from doing business with Iran or the Government of Iran, except for transactions that have been specifically authorized or licensed by the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC").

3. **Existing exceptions to U.S. primary sanctions**

**continue.** There is no change to the current limited exceptions to U.S. primary sanctions. Under previous authorization, U.S. companies are allowed to export to Iran agricultural products and food, medicine, medical supplies, and hardware, software and services incident to personal communications (e.g., smartphones, laptops, tablets, operating systems, social networking software and apps).

4. **New exception for civilian aircraft.** On a case-by-case basis, U.S. persons may now obtain a license for the export, re-export, sale, lease or transfer to Iran of commercial passenger aircraft, spare parts, and services related thereto (warranty, maintenance, repair services and safety-related inspections) exclusively for the civil aviation sector. U.S. airlines remain prohibited from operating flights to or from Iran, however.

5. **Imports of carpets and foodstuffs from Iran now allowed.** Under a new OFAC general license, Iranianorigin carpets and foodstuffs, such as pistachios and caviar, can be imported into the United States. Such products remain subject to all other laws and regulations related to imports administered by the Departments of Agriculture, Commerce and Homeland Security and by the Food and Drug Administration. U.S. banks are authorized to process transfers of funds to or from Iran to pay for these imports provided that doing so does not involve crediting or debiting an Iranian account. A U.S. bank may issue and process letters of credit for payments for Iranian-origin carpets and foodstuffs provided that only third country banks and no Iranian financial institution or the Government of Iran is involved with such letters of credit.

6. **Foreign subsidiaries of U.S. companies can now transact business with Iran with restrictions.** Under new OFAC General License H, foreign entities owned or controlled by a U.S. person (50 percent or more ownership or control) can transact business with Iran or the Government of Iran in the fields listed in Point 1 above, however, certain restrictions apply. For example, U.S.-owned or controlled foreign entities may not export or re-export to Iran U.S.-origin goods requiring an export license for Iran or reexport from any third countries any non-U.S. goods that incorporate 10 percent or more U.S.-controlled content. In general, a non-U.S. subsidiary seeking to conduct Iran-related business must be able to operate independently of its U.S. parent, with no involvement from any U.S. person employees or U.S. banks.

7. **U.S. persons can provide limited assistance to foreign subsidiaries of U.S. companies doing business in Iran.** Although U.S. persons are generally prohibited from engaging in transactions involving Iran, U.S. persons can assist foreign entities owned or controlled by a U.S. person in certain limited ways. First, U.S. persons are able to set up policies and procedures to comply with General License H. This includes U.S.-based law firms and consultants. It also includes U.S. citizens who are in senior management of the U.S. parent involved in the initial decision-making and other employees who provide training on the new policies and procedures. It is important to note, however, that a U.S. person cannot be involved in the day-to-day transactions conducted with Iran by the U.S.-owned subsidiary. Second, the U.S. parent of a foreign entity doing business in Iran can provide any automated and globally integrated computer, accounting, email, telecommunications or other business support system, database, application or server necessary to collect, transmit, generate or otherwise process documents or information. These systems must operate passively without any human intervention in the United States. U.S. person third-party service providers can provide such systems to the U.S. parent company on a contract basis.

8. **Transactions with Iranian-related persons remaining on the SDN List are prohibited.** The United States removed in excess of 400 individuals and entities from the OFAC Specially Designated Nationals and Blocked Persons List ("**SDN List**"),

including the Central Bank of Iran. However, more than 200 names remain on the SDN List. While foreign entities can now engage in transactions with those persons removed from the SDN List without the risk of being sanctioned, U.S. persons remain prohibited from such dealings under the continued primary sanctions regime. In addition, any transactions with those Iranians remaining on the SDN List, whether by foreign entities or U.S. persons, remain subject to sanctions.

9. **Transactions with Iran must remain outside the U.S. financial system.** With the easing of secondary sanctions, non-U.S. banks may now transact business with Iranian financial institutions and the Government of Iran, but not with any individuals or entities on the SDN List. Neither any of these transactions nor any transactions by foreign subsidiaries of a U.S. person permitted by General License H may travel through the U.S. financial system (except those specifically permitted by an OFAC license). There can be no clearing of U.S. dollar or other currency transactions through the U.S. financial system or involving a U.S. person. Moreover, U.S. dollar "U-turn" transactions related to Iran remain prohibited. These are transactions where two non-U.S. parties acting outside the United States transact in U.S. dollars.

10. **Contracts will not be grandfathered in case of a sanctions snapback.** The JCPOA provides for an automatic "snapback" mechanism for UN sanctions should Iran be determined to have violated the terms of the agreement, and U.S. sanctions may be reimposed in such an event. Although the U.S. cannot retroactively impose sanctions on activity that was approved as of Implementation Day, contracts with Iranian entities will not be grandfathered. In the event of a sanctions snapback, the U.S. government will work to minimize the impact of sanctions on the legitimate activities of the contracting parties.

Now, several months into the implementation of these changes, it will be interesting to see the direct effect they will have on international commerce and international political relations between the two countries. The Iran deal has already been a highlighted issue in the 2016 U.S. Presidential campaign and likely will continue to be into the summer and fall.

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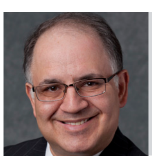

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