

## An analysis of covered bonds and the US market

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This article examines the two basic models for covered bonds, together with the benefits of covered bonds for investors and issuing institutions. The prospects for the introduction of US legislation on covered bonds are analysed, along with future developments for Europe, the US and cross market.

### WHAT IS A COVERED BOND?

The origins of the modern day covered bond lie in traditional German law debt securities, first issued in 1769, known as "*Pfandbriefe*". *Pfandbriefe* and covered bonds are debt instruments, issued by banks and other financial institutions and secured by a ring-fenced pool of financial assets (generally mortgage loans, public sector debt obligations or ship loans) which are used to guarantee or "cover" the principal and interest obligations owed by the issuer.

There are two basic models under which financial entities issue covered bonds:

- The integrated issuance structure, where the issuer retains certain ring-fenced collateral and directly issues the covered bonds without transferring the pool of assets to another entity (see below, *Integrated issuance architecture*).
- The segregated issuance structure, where the collateral is transferred to an affiliated entity, often a special purpose entity, other than the issuer of the covered bonds, which provides a guarantee of the covered bonds secured by security over those assets (see below, *Segregated issuance architecture*).

Recourse for the covered bond investors is determined by the model used. Under the integrated issuance architecture, primary recourse is against the issuer, with additional recourse against the ring-fenced assets of the issuer. Under the segregated issuance architecture, investors have unsecured recourse against the issuer, with additional secured recourse to a separate entity on its guarantee (see below, *Segregated issuance architecture*).

### DIFFERENCES BETWEEN COVERED BONDS AND ASSET-BACKED SECURITIES

Asset-backed securities include securitisations of mortgage-backed securities such as residential mortgage-backed securities (RMBS) and commercial mortgage-backed securities (CMBS), as well as collateralised debt obligations (CDO). Covered bonds have some similarities to asset-backed securitisation bonds in that both instruments may draw upon a specified pool of collateral to meet existing payment obligations under the bonds and provide security to investors. However,

fundamental differences exist. First, covered bonds are dual recourse instruments, in that investors have unlimited recourse to the issuer bank but also recourse to the pool of assets acting as collateral for the covered bonds (cover pool) in the event of the issuer bank's insolvency. By contrast, in a securitisation, since recourse to the issuing SPV is limited to the realisable assets of the issuer, a securitisation investor in reality only has recourse to the collateral for the securitisation. Second, due to the dual recourse nature of covered bonds, liability for them will remain on the balance sheet of the bank or financial institution which assigned the assets to the cover pool.

Covered bonds are usually issued by regulated financial institutions who are typically also the originators of the assets securing the debt. Credit risk on the assets backing the issuance of covered bonds remains on the originator's balance sheet, even if the assets securing the bonds are transferred to an affiliated entity.

In contrast, asset-backed securities often involve a "true sale" of the relevant assets to a bankruptcy-remote SPV, thereby transferring the risk associated with holding those assets (although, depending on the structure, the transferor may still retain some risk in the transferred assets). Covered bondholders are also commonly provided with a minimum level of protection by statute, including priority over the underlying assets and a minimum level of overcollateralisation for investors to rely on. Protection provided by asset-backed securitisation bonds depends entirely upon the contractual terms of the instrument and related security interests.

Other differences between covered bonds and asset-backed securities relate to the nature of the pool of assets included in the cover pool. In many jurisdictions, legislation prescribes the characteristics of the assets that may be included as collateral for covered bonds. A covered bond issuer is required to "refresh" the cover pool with new, high quality assets when existing pool assets cease to meet the pool criteria, whereas in most securitisations this refreshing of assets is generally not possible.

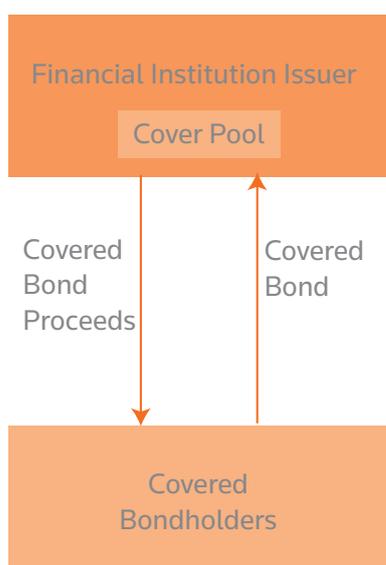
See *Benefits to investors*, below, for details of some of the advantages of covered bonds over other types of asset-backed securities.

### INTEGRATED ISSUANCE ARCHITECTURE

To date, 28 European jurisdictions have passed covered bond legislation to ordain the insolvency remoteness and segregation of the cover pool on the issuer's balance sheet. Almost all of these frameworks utilise the integrated model. Bonds issued in these jurisdictions, commonly referred to as "legislative" covered bonds, are structured with the intention of allowing the institution originating the assets in the cover

pool to issue the covered bonds directly. The legislation under which these bonds are issued governs the legal and regulatory framework, together with the rights of investors and the obligations of issuers. Under this legislation, investors are afforded a priority claim in respect of the collateral following an event of default by the issuer, resulting in automatic segregation of the cover pool upon bankruptcy. As the regulations may vary between jurisdictions, the minimum investor protection afforded by statute will also vary.

## DIRECT ISSUANCE OF COVERED BONDS



## SEGREGATED ISSUANCE ARCHITECTURE

For development of covered bonds in countries without enabling legislation which provides for such ring-fencing of the cover pool, including the US, Canada and the UK, it has been possible to utilise techniques developed for structuring asset securitisations as a means to provide asset segregation and issue covered bonds. These are known as "structured" covered bonds and have some similarity to securitisation structures. The key differentiating factor from other securitisation instruments is the establishment of both primary recourse to the issuer and secondary recourse to a collateral pool in the event that the issuing institution becomes unable to service the debt. In other words, issuers in these jurisdictions have contractually simulated the effect of the legislation by transferring assets included in the cover pool to a bankruptcy remote SPV, thus segregating the collateral.

## COVERED BOND RATINGS

Covered bonds typically achieve investment grade ratings. In part, this occurs as a result of the quality of assets that are placed into the cover pool. Further, investors are protected by the security that the cover pool provides, coupled with the fact that they also have primary recourse to the issuer. In addition, if there are any circumstances which result in a deterioration of the value of assets in the pool below a certain level, the issuer is obligated to replenish it with new assets in order to maintain the value of the cover pool.

However, ratings agencies do typically link a covered bond's rating to the rating of its issuer, for the reason that they believe that there are certain risks, such as commingling risks or asset-liability mismatches which are not structurally addressed. Asset-liability mismatches, for example, often arise because the underlying assets in the cover pool have longer dated maturities than the covered bonds. The covered

bonds may typically have maturities of three to seven years, whereas the assets in the underlying pool will often have maturities in excess of ten years. Amortisation of the cover pool would therefore be insufficient to repay the covered bonds, resulting in a reliance on the issuer's ability to repay the covered bonds from other sources. As a result, Standard and Poor's, for example, will only issue an AAA rating to covered bonds where the issuer is a bank with a minimum unsecured long term debt rating of at least BBB+ (assuming that it has met the relevant credit enhancement targets).

## BENEFITS TO INVESTORS

### High credit quality

The quality of assets contained in the cover pools of covered bonds is typically higher than in many asset pools that back securitisation bonds. In addition, covered bonds are also commonly issued by, or backed by assets originated by, major depository financial institutions, which are regulated entities that are subject to domestic supervision. Such involvement by regulators, both at the issuer level and in respect of enacting legislation covering statutory covered bonds, has resulted in improvements to the credit quality of covered bonds generally. As a consequence, most covered bonds are investment grade-rated.

### High yield

Covered bonds are often highly regarded by investors because they produce a higher yield and provide greater diversification than many debt instruments offering a similar risk exposure (for example, sovereign or agency debt issuances).

### Balance sheet investments

In contrast to more traditional asset-backed securities (where the underlying assets are removed from an originator's balance sheet), both the assets in the cover pool and the liability with respect to covered bonds will remain on an issuer's balance sheet, therefore providing it with an incentive to ensure that its asset origination procedures and standards are sufficiently robust. The result is an alignment of interests between the asset originator (whether that be the issuer in a non-SPV structure, or the asset owner in an SPV structure) and the investors. In contrast, the originate-to-sell model of originating or acquiring loans for the purpose of repackaging them into securitisation bonds, which was popular prior to the financial crisis, did not provide the same alignment of interests.

### Dual recourse

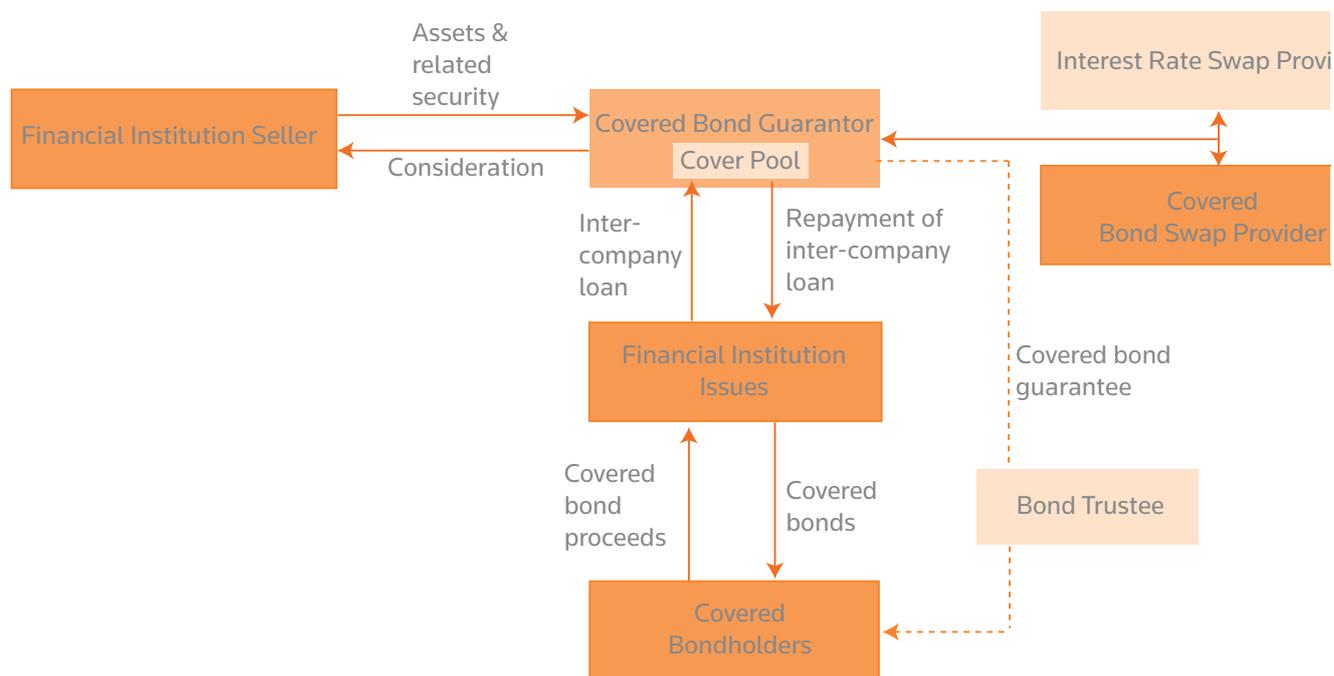
As a result of the dual-recourse nature of covered bonds (described above), they may be viewed as a more palatable alternative for investors who incurred losses investing in securitised debt during the recent financial crisis.

### Avoids "bail-in" risk

Subject to enactment of the proposed Bank Recovery and Resolution Directive in Europe, from 1 January 2016 many unsecured liabilities of financial institutions will become subject to "bail-in" requirements, which ensure that those instruments can be written off or converted into common equity, at the election of the relevant authority, upon the occurrence of a defined trigger event. In accordance with the current draft of this Directive, secured debt obligations, including covered bonds, will be exempt from this treatment.

The result under US law will be similar in that secured creditors avoid write offs that may be applied to senior debt or conversion into common equity.

## TRANSFER OF ASSETS INCLUDED IN THE COVER POOL TO A BANKRUPTCY REMOTE SPV

**Protected maturity/bullet-pay**

Covered bonds are usually structured to provide for the principal to be repaid in a single payment on the maturity date (often referred to as a hard bullet structure), while only the interest element is paid during the life of the security. Some covered bond offerings are structured to provide for an extension of the maturity date for up to one year if the issuing institution is insolvent in order to provide sufficient time to realise proceeds from the cover pool to meet the principal payment obligation on the bonds (a soft bullet structure).

**Low risk of acceleration**

Covered bonds are designed to continue paying scheduled principal and interest resulting from cash flows from the cover pool if the issuer becomes insolvent. In addition, overcollateralisation and substitution requirements provide additional protections to investors. The risk of acceleration of a covered bond is therefore low, unless there is a breach of certain predetermined conditions relating to the cover pool. By contrast, most structured finance transactions are designed to unwind following a default on the payment of the senior classes of securities or loss or deterioration of credit enhancement for those securities. In such cases, the trustee will be required to enforce the security granted over the underlying assets. This exposes the bondholders to what is known as reinvestment risk: the risk that the proceeds received from any acceleration/security enforcement cannot be redeployed for the remaining scheduled maturity of the bonds at the same rate of return.

**Issuance regulated by statute**

In the case of statutory covered bonds, the rights of bondholders and the quality of collateral are uniform across the relevant jurisdiction, despite issuance by many institutions. This simplifies an investor's analysis of covered bonds from that jurisdiction, since the rights in collateral in the cover pool and the minimum quality parameters for the collateral need only be analysed once.

**Preferential rating for liquidity requirements**

Covered bonds can obtain a Level 2A classification as high quality liquid assets for the purpose of the Basel III liquidity coverage ratio, with a haircut of 15% from their market value. Such assets are consequently able to account for up to 40% of a financial entity's required stock of liquid assets, which makes them more attractive to banks which will be subject to the liquidity coverage ratio. Currently, of the various types of securitisation bonds, only those which are backed by certain types of low loan-to-value residential mortgage loans, and rated AA or higher, may be counted as high quality liquid assets for this purpose. Even then they are subject to a 25% haircut and as Level 2B assets, can only constitute up to 15% of the required stock of liquid assets.

A number of jurisdictions, particularly Denmark, have strongly advocated the inclusion of covered bonds in Level 1 for the liquidity coverage ratio under CRD IV. (In the EU, the Basel III reforms have been implemented through the CRD IV package of reforms. CRD IV is the name given collectively to EU Regulation 575/2013 (CRR) and Directive 2013/36/EU (CRD). CRD IV replaces the current Capital Requirements Directives (2006/48 and 2006/49) with "CRD" and "CCR" respectively.) However, in December 2013, the European Banking Authority (EBA) recommended that no covered bonds should be included in Level 1. It is expected that the liquidity coverage ratio definition for CRD IV will be finalised by mid-2014.

In the US, the initial proposed rule for implementing a liquidity coverage ratio would exclude covered bonds from the definition of high quality liquid assets. This may reflect the small relative size of the covered bond market in the US. Hopefully, as the US market continues to grow, this exclusion will be eliminated.

### **Undertakings for Collective Investment in Transferable Securities (UCITS) Article 52(4) compliant**

Credit institutions issuing European debt securities often strive to ensure compliance with Article 52(4) of the Directive 2009/65/EC on undertakings for collective investment in transferable securities (UCITS) (UCITS IV Directive). This is primarily because funds and other collective investment schemes subject to this Directive are able to invest up to 25% of their assets in Article 52(4) compliant covered bonds (as opposed to just 5% for non-Article 52(4) compliant covered bonds). Such covered bonds also attract a preferential risk weighting under the CRD IV, making them a more attractive investment for banks and other institutions subject to that Directive.

In order to be Article 52(4) compliant, a credit institution must meet all the requirements detailed in that Article. This poses an obstacle for structured covered bonds, which are governed by contract, as one of the conditions to be met is that the covered bonds being issued must be subject by law to special public supervision designed to protect bondholders. In the UK, the Regulated Covered Bond Regulations 2008 (the Regulations) were enacted in order to provide for such special supervision and therefore ensure that structured covered bonds issued in the UK could compete with legislative covered bonds issued in continental Europe. The Regulations allow for UK covered bonds to be Article 52(4) compliant while following the segregated issuance model.

#### **Investor friendly**

**No complex tranching.** Securitisation techniques often require complex tranching and structuring in order to ensure that some of the bonds are able to achieve sufficiently high credit ratings. This is because the lower-rated series of securities need to absorb losses first, in effect reducing the losses required to be absorbed by the higher-rated tranches. The result is that investors must spend time and money analysing complex cash flows. In the case of covered bonds, complicated tranching techniques are not required to obtain high credit ratings, resulting in a more simple and transparent structure. Such bonds' high credit ratings are attained instead as a result of (amongst other things) the quality of the collateral in the pool and the level of overcollateralisation, and the fact that investors have primary recourse to the issuing institution and then recourse to the segregated pool in the event that things go wrong (see above, *Covered bond ratings*).

**No negative convexity (prepayment) risk.** As stated above, there is limited prepayment risk with respect to covered bonds, which can often reduce expected returns on other similar types of securities. Securities issued through a securitisation vehicle, for example, will often be structured so as to ensure repayment at a specified future date, subject to principal prepayments being within an expected range. In the event that principal prepayments are received with respect to the underlying assets at a higher than expected rate, there is a risk that such principal amounts would be "passed through" to the bondholders, generating an early redemption of the securities.

**100% skin-in-the-game.** In recent years securitisation vehicles or asset originators have been required to retain a certain amount of credit risk on the underlying assets (or "skin-in-the-game") via the Dodd-Frank Act in the US and CRD IV in Europe. This requirement is intended to align, to some extent, the interests of issuers/originators with investors. However, such measures only require an issuer to retain a minimum 5% of the loan issuance value of a securitisation, whereas the on-balance-sheet nature of a covered bond ensures that the issuer retains 100% skin-in-the-game at all times.

## **BENEFITS TO ISSUING INSTITUTIONS**

### **Very large liquid market**

The global demand for covered bonds is substantial and has generally held up well in recent years, despite the onset of the financial crisis (estimated by Standard & Poor's in November 2011 to be worth US\$3 trillion, based on data provided by the European Covered Bond Council; see *Special Report: Global Demand for Covered Bonds is Growing*, Standard & Poor's, 2 November 2011). While a significant proportion of the market is concentrated in a relatively small number of countries (in particular, Germany, France, Denmark, Spain and the UK), the demand for high quality, low cost funding is increasingly resulting in the opening of new markets in countries such as Australia, Turkey, the US and Canada.

### **Extended Weighted Average Maturity (WAM) of bank debt**

Typical maturities for covered bonds tend to be around three to seven years (although they can extend up to 15 years), allowing issuing institutions to extend the weighted average maturity of their liabilities. During the financial crisis many institutions found the weighted average maturity of their liabilities shortening sharply as creditors extended financing on shorter maturities. In the US, the weighted average maturity of bank liabilities traditionally was about seven years, but during the financial crisis the weighted maturity was reduced to about three-and-a-half years, increasing exposure to refinancing risk. Covered bonds can be helpful in rebuilding longer weighted average maturities.

### **Greater flexibility with respect to collateral**

During the financial crisis, many mortgage loan borrowers who encountered difficulties in meeting their payment schedules found that their lenders were unable to accommodate them with an adjusted payment schedule because they had sold the loan into a securitisation. Servicers of loans in securitisations have limited ability to change the terms of a loan. As a consequence, many loans defaulted that might have been kept current if an adjusted payment arrangement could have been made available to the borrower.

Covered bond financing does not have this failing. The lender retains ownership of the mortgage loans. The lender may remove loans from a cover pool and substitute other loans, giving the lender the ability to work out a loan with a borrower who is in difficulty and possibly avoid default and foreclosure.

## **LIMITATIONS**

While it is clear that there are numerous benefits associated with covered bonds (see above, *Benefits to investors* and *Benefits to issuing institutions*), there are also a number of limitations that may prove restrictive for both issuers and investors. Issuers, for example, may prefer to remove the underlying assets from their balance sheet, and transfer the risk of default to investors. This may assist in respect of compliance with any applicable balance sheet encumbrance limits imposed by local regulators, and may free up regulatory capital that would otherwise need to be maintained in respect of the transferred assets. Covered bonds also offer limited customisation of interest rate payments, as most are structured to provide a fixed rate bullet repayment.

## **ENCUMBRANCE CONCERNS**

There has been a continued growing concern among regulators about the levels of encumbrance of assets by banks issuing covered bonds. Some of the concern appears misplaced as it relates to apparently very

high overcollateralisation levels in some European covered bond programmes that result not from legal requirements, but rather from the structure of the issuer as a specially created covered bond issuer all of whose assets are available to support its covered bonds. In other cases, heavy reliance on covered bond issuance by some banks, particularly at a time of difficult senior debt markets, has worried regulators. The regulators have been concerned that the encumbrance represented by cover pools can significantly reduce the availability of quality assets to support depositors and that the preference for covered bond holders in effect subordinates depositors.

At the same time, changing rating agency requirements have led to downgrades and higher overcollateralisation levels for some issuers and, as a result of the Euro crisis and the difficulty at times of issuing senior debt, banks have been more reliant on covered bonds.

In some countries, there are limits on the percentage of bank assets that can be encumbered by covered bonds: Canada, for example, has a 4% limit, the UK started with a 4% monitoring limit (above which notification to the FSA was required) and a "soft" upper threshold of 20%. However, following communication by the FSA (as it was then known: on 1 April 2013, the FSA was abolished and the majority of its functions transferred to two new regulators, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA)), limits were replaced by determination on a case-by-case basis. Australia and New Zealand each have an 8% limit. Similar concerns have been raised by the Federal Deposit Insurance Corporation about the proposed US covered bond legislation and a 4% limit has been discussed.

There are generally no such limits on securitisations, which tends as a policy matter to encourage securitisation over covered bonds. The wisdom of this policy choice may be questionable.

## US MARKET

2012 proved to be an interesting year for the US covered bond market and 2013 brought important new developments. 2012 saw significant growth in the number of foreign banks accessing the US dollar market as the market continued to provide attractive financing opportunities for European banks, with about US\$50 billion of private placements into the market. The year also saw the first US Securities and Exchange Commission (SEC)-registered covered bond offering when Royal Bank of Canada came to market with a US\$2.5 billion offering in September that was very well received and brought many new investors into the market.

While there were some occasional sales of covered bonds into the US before the financial crisis, 2010 saw the first really significant sales of covered bonds into the US with about US\$30 billion of sales by non-US banks. 2011 and 2012 saw continued growth in the market as Canadian and European banks increased their use of the market and Australian and New Zealand banks appeared for the first time. Issuance was approximately US\$40 billion in 2011 and US\$50 billion in 2012. There is now more than US\$100 billion in covered bonds outstanding from US issuance. All of these offerings (other than that of the Royal Bank of Canada) have been made as private placements relying on Rule 144A.

SEC-registered covered bonds have a number of advantages over privately placed bonds. Importantly, SEC-registered covered bonds are eligible for the major bond indices, such as the Barclays Aggregate Index, which is expected to result in a much more liquid secondary market. Also, SEC-registered covered bonds are eligible for the TRACE

reporting system, which significantly improves the transparency of covered bond pricing for investors.

From the issuer's perspective, issuing covered bonds in the US has several advantages. US banks are not presently issuing covered bonds, as there is no enabling statute in the US for US banks to rely on and the structure used for previous structured covered bonds in the US is not currently economically viable. Foreign banks, on the other hand, have found the US market attractive because it allows them to diversify their funding base by attracting new investors in a new and growing market. Assuming the cost of issuing in US dollars and converting to their home currency is manageable, the ability to broaden their investor base will generally reduce their funding costs.

2013 was a disappointing year for issuance of covered bonds in the US market. For much of the year the Canadian banks were awaiting approvals of their covered bond programmes from their new regulator, Canada Mortgage Housing Corporation (CMHC), a Canadian crown corporation. European issuers, on the other hand, were deleveraging their balance sheets and obtaining cheap funding from central banks. In many cases, the cross-currency swap rates also became less favourable to issuance in US dollars. The net result was that less than US\$25 billion of US dollar denominated covered bonds were issued in 2013.

In a more positive development, two additional Canadian banks, Bank of Nova Scotia and Bank of Montreal, obtained approval from the SEC for registered covered bond programmes. However, neither bank was able to issue covered bonds under their registered programmes in 2013 as they were awaiting approvals from CMHC. These approvals are expected in early 2014.

For US issuers the hope in 2014 is that this is the magic year for covered bond legislation in the US. Covered bonds provide a ready and growing US investor base created by Canadian and European issuers, a well-established investor base in Europe and Asia and a funding alternative that may be attractive, since changes to the accounting rules and risk retention requirements have made off-balance sheet securitisations more difficult. Moreover, the legislation as previously proposed could provide much improved access to the capital markets for smaller, regional banks, particularly for funding of commercial mortgage loans and for state and municipal debt, but also for residential mortgage loans. The growing recovery in the US housing market and the wind-down of Fannie Mae and Freddie Mac, together with other factors, will create a positive environment for adoption of covered bond legislation.

## TYPES OF ASSETS USED IN THE US AND RECENT TRANSACTIONS

Those issuers that have issued covered bonds in the US all have existing covered bond programmes, and the covered bonds issued in the US have the benefit of the same cover pool that benefits covered bonds sold into Europe. No issuer has established a separate programme for issuance into the US. Accordingly, the assets that are eligible for the cover pool are defined by the covered bond statutes in the issuing bank's home jurisdiction. To date, the cover pool assets related to US dollar issuances have been predominantly residential mortgage loans, with a handful of issuers using public sector covered bonds.

Canadian banks through 2012 used residential mortgage loans insured by CMHC. The sole exception was Royal Bank of Canada, which used only uninsured loans. With the adoption of covered bond legislation in Canada, CMHC-insured mortgage loans may no longer be used

in covered bond programmes to support new issuances of covered bonds. Canadian banks may continue to add insured mortgage loans to their existing covered bond programmes as needed to satisfy the applicable asset coverage test, but have had to establish new covered bond programmes using uninsured mortgage loans in order to issue a further series of covered bonds.

As noted above, US banks are not issuing covered bonds at present. In 2006 and 2007, two US banks issued structured covered bonds utilising securitisation techniques to create a bond with features like a classic covered bond. In the aftermath of the financial crisis, that structure is much too expensive to use for the issuance of covered bonds and it is unlikely that a US bank will issue covered bonds in the absence of covered bond legislation in the US. The legislation that was proposed in 2011 and 2013 would permit a variety of eligible assets:

- Residential mortgage loans.
- Commercial mortgage loans.
- Municipal or state obligations.
- Auto loans or leases.
- Student loans.
- Revolving credit receivables.
- Loans made or guaranteed by the Small Business Administration of the United States.
- Any asset designated by the covered bond regulator in consultation with the issuer's primary federal financial regulator.

However, it should be noted that only one asset type can be used in a cover pool. Use of a second asset type by an issuer would require the establishment of a separate covered bond programme.

## PROSPECTS FOR US LEGISLATION AND PROBABLE FEATURES OF A STATUTE

Covered bond legislation was first introduced in the US Congress in 2008 by Representative Scott Garrett (R-NJ), who was a member of the Financial Services Committee in the House of Representatives. Representative Garrett introduced further legislation in 2009, 2010 and 2011. The legislation introduced in 2011 (H.R. 940) was assigned to both the Financial Services Committee and the House Ways and Means Committee, which considered the Bill's impact on tax revenue.

Following committee hearings, the Financial Services Committee approved H.R. 940, with some amendments, by a strongly bi-partisan vote of 44-7 in June 2011. The Ways and Means Committee, however, continued to review the legislation and, as a result, the legislation could not be voted on by the full House of Representatives while the Ways and Means Committee continued its deliberation of the Bill.

A Bill similar to H.R. 940 (S.1835) was introduced in the US Senate in September 2011 by a bi-partisan group of Senators, but no hearings were held.

As a presidential election year, 2012 was an unlikely year for the passage of anything other than essential legislation. This proved to be the case with covered bond legislation when no action was taken in either house of Congress other than an abortive attempt to tack on covered bond legislation to the JOBS Act in the Senate. This attempt could not pass muster under the Senate's procedural requirements for amendments to a Bill.

2013 saw the convening of a new session Congress, which continues for two years. All unfinished legislation of the old Congress had to be reintroduced in the new Congress. Accordingly, a new version of covered bond legislation needed to be introduced in the House of Representatives and considered by the Financial Services Committee and the Ways and Means Committee. Similarly, a new covered bond Bill had to be introduced in the Senate.

Covered bond legislation was included in H.R. 2767, a GSE reform Bill, in the House of Representatives in 2013. These provisions tracked very closely the provisions of H.R. 940. However, this has been a bitterly partisan Bill due to the GSE provisions and it was approved by the Financial Services Committee on a strictly partisan party-line vote. The Bill has not been taken up by the full House for a vote. It continues to be a live Bill in the House for the rest of this session of Congress.

A very different GSE reform Bill introduced in the Senate (S.1217) does not contain covered bond provisions. While it is reported that S.1217 is likely to be the template of an eventual GSE reform Bill, it does not appear that any GSE reform Bill is likely to pass Congress in 2014. Accordingly, if covered bond legislation is to be adopted in 2014, it would need to be taken up separately, which seems unlikely given the many higher priority items on the legislative agenda, or included in another Bill that is likely to achieve passage. To date, we have no indication that either of the alternatives is being pursued.

The prospects for eventual adoption of a covered bond Bill are good, despite the uncertainty about the timing. The best prospects for passage of covered bond legislation occur if the Bill is attached to an important piece of other legislation. On its own, a covered bond Bill is subject to being crowded off the legislative agenda by more urgent Bills. A covered bond Bill addresses a relatively narrow need, although certainly anything that assists housing finance in the US is likely to get attention. While in the past Bank of America supported covered bond legislation, none of the major money centre banks to date has pressed Congress for adoption of a covered bond statute. Their attention has been focused instead on the many challenges arising under provisions of the Dodd-Frank Act affecting banks and in dealing with the deluge of litigation following the financial crisis. With the expansive funding limits provided by Fannie Mae and Freddie Mac, Federal Deposit Insurance Corporation (FDIC) insurance coverage for deposit accounts of any size attracting large corporate deposits to banks, and a severely depressed residential real estate market, there has been no funding pressure on banks in connection with their mortgage loan origination.

In 2014 many of these considerations are changing favourably for covered bond legislation, improving the prospects for passage. The residential real estate market began improving in the spring of 2012 and that development continued to gather force in 2013. This may result in increased mortgage loan origination for 2014 and, in particular, increased origination of loans that exceed the funding limits of Fannie Mae and Freddie Mac. However, tapering of the QE III programme by the Federal Reserve has resulted in higher interest rates and a corresponding decline in mortgage loan borrowing in late 2013. The overall effect on mortgage loan borrowing is still expected to be positive.

With the recovery of the housing market, the process of shrinking the presence of Fannie Mae and Freddie Mac in the US housing market has begun. Their portfolios of mortgage loans are being reduced and the limits on the size of loans they can guarantee will be reduced. What other actions will be taken with respect to the two agencies as a result of their conservatorship and the large losses they imposed on the government remain to be seen. Whatever the result, it is unlikely that

the government will continue to guarantee approximately 95% of newly originated mortgage loans as it did through Fannie Mae, Freddie Mac, the Federal Housing Administration and the Veterans Administration in the aftermath of the financial crisis. This will compel banks to look elsewhere to fund some of their mortgage loan production.

At the end of 2012, the FDIC guarantee of deposit accounts of any size terminated. The guarantee had attracted large deposits from corporations and others, but with its termination and the resumption of the US\$250,000 limit on insurance coverage on deposit accounts, many large depositors can be expected to withdraw their funds and allocate them elsewhere. This reduction in deposits will occur at a time when cash needs are increasing at banks to meet growing mortgage loan origination, again forcing banks to look elsewhere for funding.

With the presidential election behind us, the chances have improved for getting some bi-partisan legislation through the Congress. Despite the deep divide in the Congress between Democrats and Republications, on some issues there will be common agreement. Covered bond legislation could well be one of those rare areas of agreement. The actions in the House and the Senate in 2011 on covered bonds suggest that covered bond legislation could have strong bi-partisan support.

Also, the irony of the rapidly developing covered bond market in the US is not lost on the Congress. The fact that US investors are financing mortgage loans in foreign jurisdictions through their purchase of covered bonds issued by non-US banks, at a time when US banks cannot issue bonds to the same investor base, is increasingly drawing attention. Every sale of covered bonds into the US by non-US banks increases the likelihood that Congress will act to adopt a covered bond statute so that US banks can access the same investor base.

The approval of three registration statements for covered bonds programmes by the SEC creates a similar irony. A US government agency has approved covered bond issuance to US investors by a non-US bank, but US banks are unable to take advantage of it without the passage of legislation. When the SEC issued a no-action letter permitting RBC to file its registration statement, Senator Kay Hagan (D-NC), a member of the Senate Committee on Banking, Housing and Urban Development, stated that: "The growing acceptance of covered bonds among US regulators is a positive development. Unfortunately, until a legislative framework for covered bonds is in place in the US, our economy, US lenders and their customers will be unable to benefit from the low cost funding that covered bonds provide. This is all the more reason for the Congress to act swiftly to pass legislation to authorise this mainstream capital markets product."

The probable features of a US covered bond statute are suggested by H.R. 940 and H.R. 2767. It is likely that any new covered bond Bill will contain most of the covered bond features of H.R. 940 and H.R. 2767.

Under those Bills, eligible assets in a cover pool for covered bonds were defined as:

- First lien residential mortgage loans.
- Commercial mortgage loans.
- Loans or securities of states or municipalities.
- Auto loans or leases.
- Student loans.
- Credit or charge card receivables.

- Loan made or guaranteed by the Small Business Administration.
- Any asset designated by the Secretary of the Treasury in consultation with the covered bond regulators.

"Substitute assets" are defined as:

- Cash.
- Any direct obligation of the US government or obligations guaranteed by the US government.
- Any direct obligation of a US government sponsored enterprise of the highest credit quality, or any obligation of the highest credit quality that is guaranteed by such enterprise.
- Overnight federal funds.
- Any other substitute asset designated by the Secretary of the Treasury in consultation with the covered bond regulators.

Eligible issuers were defined under H.R. 940 as:

- Any FDIC insured depository institution or subsidiary.
- A bank or savings and loan holding company or subsidiary.
- Any non-bank financial company supervised by the Federal Reserve and any subsidiary.
- An entity sponsored by an eligible issuer for pooled issuance.

Under H.R. 940 and H.R. 2767, "covered bonds" must be full recourse obligations of an eligible issuer, secured by a cover pool of eligible assets and issued under a registered covered bond programme. A "covered bond programme" must be approved by and registered with the applicable covered bond regulator. One or more series or tranches may be issued under a covered bond programme and the issuer may have more than one covered bond programme, but only one type of eligible asset may be used in each covered bond programme. If an issuer wishes to fund both commercial mortgage loans and residential mortgage loans, for example, it will be required to establish two covered bond programmes, one for each asset type.

Upon the insolvency of a covered bond issuer, there can be two results depending on whether the FDIC is receiver or conservator for the issuer. If the FDIC is the receiver or conservator under applicable laws, the FDIC would have one year after the insolvency of the institution to find another institution to assume the obligations under the covered bonds and to take the cover pool. In the event that the FDIC is unable to find an assuming institution within the one-year period, the cover pool is separated from the estate of the failed institution and administered as a separate estate to pay the covered bonds in accordance with their terms.

For those issuers for which the FDIC is not the receiver under applicable law, upon the insolvency of the institution the cover pool is separated immediately from the estate of the failed institution and administered as a separate estate to pay the covered bonds in accordance with their terms.

Upon default of the issuer prior to insolvency, whether by failure to pay the bonds as required by their terms or by breach of any covenant, including the asset coverage test, the cover pool is separated immediately from the estate of the defaulting institution and administered as a separate estate to pay the covered bonds in accordance with their terms. The creation of a separate estate occurs immediately regardless of whether the FDIC would be the appropriate receiver if the issuer were insolvent.

The "covered bond regulator" under H.R. 940 and H.R. 2767 would be the issuer's appropriate federal banking regulator, and if the issuer has no federal banking regulator, the Secretary of the Treasury.

## PROSPECTS FOR THE FUTURE

### Europe

The number of covered bond downgrades is likely to continue to decrease in 2014. Covered bonds will also benefit from a more stable environment, as the European economy emerges from recession and looks set for a period of somewhat greater stability over the coming 24 months. Ongoing regulatory and legal developments in Europe will continue to strengthen the credit quality of covered bonds in 2014 and increase transparency for covered bond investors. (*Moody's Investor Service, Global Covered Bonds: 2014 Outlook, 13 December 2013*). The Proposed Bank Recovery and Resolution Directive (RRD), for example, finalised in 2013 (although not yet in force), has provided additional clarity in respect of issues such as bail-in risk.

It is also likely that the encumbrance debate will continue, with concerns persisting that encumbrance of assets resulting from covered bond issuance can reduce the amount of assets available for unsecured creditors. The finalised version of the RRD expressly provides that secured assets, including covered bonds, will not be subject to bail-in and leaves it, initially, to relevant national authorities to set the minimum levels of bail-inable obligations, based on assessment criteria to be specified by the European Banking Authority. The European Commission also has the power to propose further legislation by the end of 2016, to establish harmonised minimum levels of bail-inable obligations. It is difficult to be certain what impact this will have on the European market as a whole, but clearly if regulators and/or the European Commission take the view that larger percentages of financial institution's balance sheets should remain unencumbered, this could have severe adverse implications for covered bond issuance, among other types of secured debt.

### The United States

Future prospects for covered bond issuance by US banks turns on the prospects for adoption of US legislation for covered bonds (*see above, Prospects for US legislation and probable features of a statute*). Coming into 2014, many of the factors affecting the prospects for adoption of US legislation are trending favourably for adoption. In particular, the housing market recovery is gathering pace from last year and the market presence of Fannie Mae and Freddie Mac are shrinking, which suggest that residential mortgage originators will begin to look for private sector financing for their portfolios. In this environment, prospects for covered bond legislation pick up considerably.

### Cross market

Future prospects for cross-market issuance from Europe into the US or the US into Europe look pretty one-sided at the moment. Without a US statute it is unlikely that US banks will issue covered bonds in the US or in Europe. US banks will issue into Europe if US covered bond legislation is passed, although you would expect the US banks will focus first on the US market before venturing into Europe, so probably the prospects for US bank issuance into Europe for 2014 are likely to be pretty remote.

However, we should see continued growth in the issuance of covered bonds by European and Canadian banks into the US. Canadian banks now have a covered bond statute and are revising their issuance

programmes to comply with the requirements of the statute and the new regulations adopted by CMHC, which is the new covered bond regulator. The expectation is that Canadian banks will return to the US market in 2014, probably in real volume given the enforced absence from the market.

The hallmark issuance of SEC-registered covered bonds into the US by Royal Bank of Canada brought new investors into the market and enjoyed enviable pricing. This performance is likely to induce other Canadian banks to follow, so it would not be a surprise to see possibly three or four of the Canadian banks issuing SEC-registered covered bonds in the US in 2014. This issuance of SEC-registered covered bonds will continue a transformation of the US covered bonds into the main stream of the capital markets. While the sale of SEC-registered covered bonds may free up capacity for covered bonds sold in private placement under Rule 144A, the SEC-registered product can be expected to begin to dominate the market.

There is every reason to expect European, Australian and New Zealand banks to continue accessing the US dollar market. Currency swap prices are not as favourable as in 2011 or 2012, but the US investor base continues to provide important diversification, particularly for the European issuers. European banks have constituted about 50% of the US covered bond market over the past four years, with the Canadian issuers providing the balance. The level of issuance by European banks in 2014 will depend on the extent of inexpensive funding provided by central banks, such as the ECB and the Bank of England, the availability of the senior debt market, developments regarding the Euro crisis and, of course, the overall economic vitality of the eurozone. The current environment suggests that European banks will continue to provide about 50% of 2014 issuance in the US covered bond market. One can expect also that one or two of the larger European issuers that already report to the SEC may establish the capability to issue SEC registered covered bonds. If the pricing advantages from the early offerings from RBC prove durable, the savings in financing costs will prove irresistible.

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