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U.S. and EU CLOs: Market Trends and Recent Regulatory Developments


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Introduction

The market for collateralised loan obligation ("CLO") securities in the United States and Europe was robust in 2024, in both the new issue space and the refinancing space, as the market left behind the turbulence of 2023 that resulted from highly publicised bank failures early in the year, uncertainty around regulations proposed by the U.S. Securities and Exchange Commission ("SEC"), and the transition away from U.S. dollar LIBOR ("USD LIBOR") as a benchmark interest rate. The CLO market continued to see an increase in offerings of middle-market and private credit CLOs. Although the market experienced positive news in 2024, there were some regulatory issues that affected, and will affect, CLO market participants. This chapter discusses current market trends and legal and regulatory developments affecting the CLO market.

SEC Enforcement Actions

Two recent SEC enforcement actions affect how investment advisers manage CLOs and trade loans and CLO tranches. Both SEC cases charged advisers for having inadequate policies and procedures to prevent the misuse of material non-public information ("MNPI").

First, the SEC announced an order against an asset management firm ("Firm 1"), for failing to "establish, maintain, and enforce" written policies and procedures reasonably designed to prevent the misuse of MNPI related to their trading of CLOs. The SEC did not charge Firm 1 with insider trading; however, the order concluded that Firm 1 traded equity tranches of a CLO that contained loans to a company about which Firm 1 had MNPI. According to the SEC, the information possessed by Firm 1 impacted the value of these tranches significantly when the information was made public. Notably, the order is silent as to whether the information was material to the CLOs at the time Firm 1 traded. Instead, the SEC focused on Firm 1's failure to conduct any assessment of materiality in connection with its trading, particularly as Firm 1's business involved managing CLOs and trading in both proprietary CLOs and CLOs managed by third parties. Firm 1 had no policies and procedures requiring a consideration of MNPI in connection with CLO trading. Following the events underlying the SEC's order, Firm 1 established pre-trade compliance reviews for proprietary CLOs but failed to adopt policies governing third-party managed CLOs until several years later. In the settlement, the SEC imposed sanctions, including a cease-and-desist order, censure and a civil money penalty of $1.8 million.

Shortly thereafter, the SEC announced the settlement of a similar enforcement action against a global asset manager ("Firm 2"), a registered investment adviser. According to the SEC, Firm 2 failed to implement proper policies and procedures to prevent the misuse of MNPI in connection with its participation on *ad hoc* creditors' committees. More specifically, the SEC's order found that that Firm 2's policies were inadequate insofar as they failed to "take into account the special circumstances presented by such participation...which included the retention of and consultation with, among others, financial advisers who had access to MNPI". By way of example, the SEC order noted that Firm 2 participated on an *ad hoc* committee that received guidance on restructuring the debt of a foreign company from a third-party financial adviser, but failed to maintain policies and procedures to address the risk of inadvertently receiving MNPI from the financial adviser. During the time period in which Firm 2 was on the committee, it accumulated and sold bonds and credit default swaps in the issuer. Further, Firm 2 did not conduct due diligence on the third-party financial adviser's policies with respect to handling MNPI. The SEC imposed sanctions, including a cease-and-desist order, censure and a civil money penalty of $1.5 million.

These cases are a clear message to investment advisers that generalised MNPI and insider trading policies are inadequate. The SEC expects investment advisers to have policies and procedures that are reasonably designed to address the specific risks of an adviser's business, including those risks presented by serving on *ad hoc* committees and/or coordination with third-party advisers.

Private Fund Advisers Rules

In August 2023, the SEC adopted a new series of rules and amendments ("PF Release") under the Investment Advisers Act of 1940 ("Advisers Act"), applying to private fund managers and advisers registered with the SEC.[1] The five newly adopted rules in the PF Release were intended to further regulate the activities of investment advisers managing private funds.[2] However, because the SEC said in the PF Release that the private fund adviser rules do not apply to investment advisers ("SAF advisers") with respect to securitised asset funds ("SAFs") that they advise[3] and the final rule defined an SAF as "any private fund whose primary purpose is to issue asset-backed securities ("ABS") and whose investors are primarily debt holders",[4] the private fund rules were not applicable for CLO transactions.

After the SEC issued the PF Release, multiple fund industry advocates collectively sued the SEC, arguing that it had overreached by using the Advisers Act to extend its regulatory authority to private funds. In June 2024, a federal appeals court agreed with the industry groups and vacated the private fund rules altogether.

SEC's Proposed Revisions to Custody Rule

In 2023, the SEC proposed revisions to its Custody Rule, which the SEC referred to as the proposed "Safeguarding Rule".[5] As initially proposed, the Safeguarding Rule would impose significant costs and burdens on CLO managers and completely alter the relationship with CLO custodians. A proposed expansion of the definition of "assets" under the rule from "funds and securities" to "funds, securities, or other positions held in a client's account" would include interests in loans and loan participations.[6] The rule as drafted would have imposed audit requirements, imposed requirements to engage a "qualified custodian" and mandated liability standards.

Comments to the proposed Safeguarding Rule were due, following a reopening of the comment period by the SEC, before the end of October, 2023[7] and the SEC received numerous additional comments. However, at the time of writing, the SEC has not made a new Safeguarding Rule proposal and, in light of the federal appeals court setting aside the private funds rules under the PF Release, it is not clear when or if a new proposal will be made.

Uptiering

In recent years, terms have been added to CLO documentation to permit investment in uptier financing. In an "uptiering" transaction, certain existing lenders to the borrower provide the same borrower with a new senior facility, which ranks senior to the existing facility. The new facility frequently consists of an exchange of at least a portion of the debt under the existing facility for debt under the new facility, with an additional loan of new money. These terms were added to CLO documentation as a response to controversial restructuring transactions that were designed to exclude CLOs from participating due to existing indenture terms and other conditions. Because parties often accomplish these transactions through amendments to the applicable debt and lien baskets under the existing credit documentation with the support of majority lenders only, and without any notice to the minority lenders or any ability for them to participate, uptiering transactions resulted in a wave of litigation from excluded minority lenders.

The Court of Appeals for the Fifth Circuit and the New York Appellate Division recently issued two important decisions on the viability of non-*pro rata* uptiering transactions. In a case involving Serta Simmons Bedding, L.L.C. ("Serta"),[8] a three-judge panel of the Fifth Circuit reversed a decision by the U.S. Bankruptcy Court for the Southern District of Texas by finding that a pre-bankruptcy uptiering transaction was prohibited by the terms of the existing credit agreement.

The *Serta* credit agreement excepted "open market purchases" from the general principle that payments be shared *pro rata* among lenders. The lower bankruptcy court concluded that the uptiering transaction fit the "open market purchase" exception because there was open competition among the individual lender groups to provide the company with financing. The Fifth Circuit reversed, finding that the phrase "open market" implies a specific market – in this case, the secondary market for syndicated loans. Because Serta chose to privately engage individual lenders outside the secondary market, the company lost the ability to rely on the "open market purchase" exception.

Conversely, in a case involving Mitel Networks (International) Limited and its affiliates ("Mitel"),[9] the New York Appellate Division found that a similar uptiering transaction was permissible under the existing credit agreement. The uptiering exchange in Mitel relied on language in the credit agreement that authorised the borrower to "purchase by way of assignment...Term Loans at any time". Such purchases did not have to be made *pro rata*, which could allow for different treatment of lenders in the same class. The non-participating lenders challenged the transaction by arguing that an "exchange" of existing debt with new senior debt did not qualify as a "purchase". The Appellate Division dismissed the argument because nothing in the underlying documents suggested that an "exchange" or "refinancing" of debt could not qualify as a "purchase". Thus, under the Appellate Division interpretation of the credit agreement's express terms, the uptiering exchange in Mitel was expressly permitted.

Although judicial interpretation of uptiering transactions is still evolving, the *Serta* and *Mitel* decisions both reinforce the principle that contract language matters – the borrower's unqualified ability in *Mitel* to "purchase" loans allowed a non-*pro rata* uptier transaction; however, ambiguity in the phrase "open market purchase" led the Serta court to conclude the opposite.

SEC Securitisation Conflicts of Interest Proposal

In November 2023, the SEC adopted Securities Act Rule 192, "Prohibition Against Conflicts of Interest in Certain Securitizations", to prohibit conflict of interest transactions in connection with the issuance of ABS.[10] The rule is intended to prevent the sale of ABS that are affected by material conflicts of interest by prohibiting securitisation participants from engaging in certain transactions that could incentivise a securitisation participant to structure an ABS in a way that would put the securitisation participant's interests ahead of those of ABS investors.[11]

The prohibition

The rule prohibits a "securitization participant", directly or indirectly, from engaging in any transaction that would involve or result in any "material conflict of interest" between the securitisation participant and an investor in the ABS. The prohibition applies for a period commencing on the date on which such person has reached an agreement that such person will become a securitisation participant with respect to an ABS and ending on the date that is one year after the date of the first closing of the sale of such ABS.[12] "Agreement" refers to an agreement in principle (including oral agreements and facts and circumstances constituting an agreement) as to the material terms of the arrangement by which such person will become a securitisation participant.[13]

Securitisation participants

The rule defines "securitization participants" as an underwriter, placement agent, initial purchaser, or sponsor of an ABS, or certain affiliates or subsidiaries. An arranger, placement agent or initial purchaser under a typical CLO transaction will clearly be covered by the rule.

The rule defines a "sponsor" in two ways. First, a sponsor is any person who organises and initiates an ABS transaction by selling or transferring assets, directly or indirectly, including through an affiliate, to the entity that issues the ABS. This is consistent with the definition of "sponsor" under Regulation AB (which applies to the SEC's risk retention rule). However, the rule also defines a sponsor as any person that

has a contractual right to direct or cause the direction of the structure, design or assembly of an ABS or the composition of the pool of assets underlying or referenced by the ABS. This would encompass the collateral manager and, where applicable, the sponsoring fund for a CLO, which goes further than the Regulation AB definition of sponsor.[14]

As noted, securitisation participants also include certain affiliates or subsidiaries of the other specified categories, if the affiliate or subsidiary (i) acts in coordination with a securitisation participant, or (ii) has access to or receives information about the relevant ABS or the asset pool underlying or referenced by the ABS prior to the first closing of the sale of the relevant ABS.[15] Whether an affiliate or subsidiary is a securitisation participant depends on the facts and circumstances of the transaction. Mechanisms that prevent the affiliate or subsidiary from acting in coordination with the securitisation participant or from accessing or receiving information about the relevant ABS or the asset pool underlying or referenced by the relevant ABS should support the conclusion that an affiliate or subsidiary is not a securitisation participant. The adopting release provided examples of such mechanisms such as, for example, effective information barriers, separate trading accounts, not having common officers or employees, lack of communication with the affiliated entity and ensuring that shared personnel do not have authority to execute trading in individual securities in the accounts or authority to pre-approve trading decisions for the accounts.[16]

The rule does provide certain specified carve-outs from "securitization participants", including a person that performs only administrative, legal, due diligence, custodial, or ministerial acts related to the structure, design, assembly, or ongoing administration of an ABS or the composition of the pool of assets underlying or referenced by the ABS.[17]

Conflicts of interest

A "material conflict of interest" is identified in the rule as a "conflicted transaction", which is defined as any of three categories of transactions, if "there is a substantial likelihood that a reasonable investor would consider the transaction important to the investor's investment decision, including a decision whether to retain the ABS".[18] The three specified categories are: (i) a short sale of the ABS; (ii) the purchase of a credit default swap or other credit derivative pursuant to which the securitisation participant would be entitled to receive payments upon the occurrence of specified credit events in respect of the relevant ABS; and (iii) the purchase or sale of any financial instrument (other than the relevant ABS) or entry into a transaction that is substantially the economic equivalent of a transaction described in the prior two clauses, other than any transaction that only hedges general interest rate or currency exchange risk.[19]

Exceptions

The rule also provides three exceptions to its prohibition on conflicted transactions, but each subject to conditions. Firstly, risk-mitigating hedging activities are permitted, but only if designed to mitigate specific identifiable risks. The hedging must be recalibrated on an ongoing basis to ensure that the hedging activity satisfies the requirements of the exception and does not facilitate or create an opportunity to materially benefit from a conflicted transaction other than through risk reduction. An internal compliance programme must be established, implemented, maintained and enforced to ensure the securitisation participant's compliance with the requirements set out in the exception. The second exception is for purchases and sales of the ABS pursuant to commitments to provide liquidity for the ABS. The third exception is for *bona fide* market-making activities in either the applicable ABS or the underlying assets. This exception only applies if the securitisation participant routinely stands ready to purchase and sell one or more types of the financial instruments described in the exception as part of its market-making related activities in such financial instruments, and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those financial instruments, in commercially reasonable amounts and throughout market cycles on a basis appropriate for the liquidity, maturity, and depth of the market for the relevant types of the financial instruments. Further, the securitisation participant's market-making activities must be designed not to exceed, on an ongoing basis, the reasonably expected near-term demands of clients, customers and counterparties. There is a prohibition on compensation that would incentivise conflicted transactions. The securitisation participant must be licensed or registered, if required, to engage in the activity described in the exception in accordance with applicable law and self-regulatory organisation rules, and a compliance programme must be established, implemented, maintained and enforced.

Other prohibited activities

If a securitisation participant engages in a transaction or a series of related transactions that, although in technical compliance with the risk-mitigating hedging activities, liquidity commitment and *bona fide* market-making activities exceptions, is part of a plan or scheme to evade the prohibition on conflicted transactions, that transaction or series of related transactions will be deemed to violate the prohibition on conflicted transactions.[20]

Foreign transaction safe harbour

The prohibition on conflicted transactions does not apply if the ABS is not issued by a U.S. Person and the offer and sale of the ABS is in compliance with Regulation S of the Securities Act.[21]

Effective date; compliance date

The rule became effective on 5 February 2024. However, compliance with the rule is required with respect to any ABS *where the first closing of sale occurs* on or after 9 June 2025.[22] Therefore, ABS transactions, including CLO transactions, for which an agreement was reached where a person became a securitisation participant, even if the agreement was reached before 9 June 2025, will be subject to compliance with the rule if the closing of the sale of the ABS occurs on or after 9 June 2025.

Corporate Transparency Act

The U.S. Corporate Transparency Act ("CTA") is part of the Anti-Money Laundering Act of 2020, which requires (by regulations promulgated by the applicable regulatory bodies) the reporting of certain beneficial owner information to the Financial Crimes Enforcement Network ("FinCEN"). During

March, 2025 FinCEN issued an interim final rule ("Interim Final Rule") narrowing the scope of reporting required under the CTA and its implementing regulations to exclude reporting from U.S. entities and U.S. persons (although requiring foreign reporting companies, meaning, generally, those foreign entities registered to do business in any U.S. state or tribal jurisdiction, to provide beneficial ownership information for non-U.S. persons) and reducing the scope of reporting about U.S. individuals by foreign pooled investment vehicles (if required to report due to being registered to do business in a U.S. state or tribal jurisdiction). Although the Interim Final Rule is subject to comments and the publication of an updated final rule, it will be effective immediately upon publication in the Federal Register.

ESMA Template Reporting

In 2022, the European Commission ("Commission") declared that non-EU securitisations (i.e. transactions that involve no EU entity as originator, sponsor or issuer) would be required to satisfy the reporting requirements stipulated by the EU Securitisation Regulation, notably the use of European Securities and Markets Authority ("ESMA") templates, in order for EU investors to invest in them. Otherwise, such investors would not be in compliance with their due diligence obligations under the EU Securitisation Regulation.

At the same time, the Commission invited ESMA to revisit its existing disclosure templates, including considering removing fields that are unnecessary or technically difficult to complete, and aligning the templates more closely to investors' needs. ESMA invited market participants to provide feedback. In December 2024, ESMA published a feedback statement collating the responses it had received where the majority had favoured streamlining the data fields required on the existing templates and developing a new simplified template for private securitisations only, with a large number also favouring undertaking a more comprehensive review of the whole disclosure framework with more significant changes to the current templates as a whole, irrespective of whether the transaction is public or private. However, ESMA noted that, due to the ongoing revision of the EU Securitisation Regulation more generally by the Commission (see "*Future reform to the EU Securitisation Regulation*" below), more comprehensive changes to the transparency framework should be undertaken as part of that effort by the Commission, which could be seen as ESMA shying away from more radical changes to disclosure requirements. ESMA added that it would coordinate with the Commission to assess whether targeted adjustments can be introduced before any change to the primary legislation and that ESMA would focus on disclosure for private securitisations.

In February 2025, ESMA released a consultation paper ("ESMA 2025 Consultation") with its proposal for simplifying disclosure could be simplified for EU private securitisations. This was seen as a stepping stone towards change, although the consensus was that the ESMA 2025 Consultation does not go far enough due to the limitations on when the proposed template could be used. Firstly, ESMA proposed a shift away from granular asset level information disclosure and instead a simplified template reporting on a portfolio basis. This would, however, only apply to private securitisations where all sell-side parties (originator, sponsor, original lender, and the issuer) are established within the EU, and is therefore a significant limitation for both EU investors and third country originators. If the current proposal is implemented by the Commission as it stands, U.S. originators would still effectively be required to provide EU reporting in its current form in order for EU investors to be able to participate in a U.S.-sponsored securitisation. Secondly, ESMA have also proposed a backstop even where parties are only required to provide the simplified reporting under the new proposed regime and have suggested that parties could still be required to provide the full set of reporting (i.e. including the asset class specific data) "upon request" by investors or regulators. If this is included in the final rules, it would effectively cut across any simplified disclosure regime if, in practice, and in order to comply with the backstop, the full set of information being currently reported on would need to be prepared and ready to be provided in case such a request is made. At the time of writing, ESMA is considering and receiving feedback on the ESMA 2025 Consultation and plan to publish their final report alongside draft technical standards to the Commission by Q2 2025. It is also widely expected that the Commission will make proposals focusing on simplifying due diligence and transparency requirements for securitisations.

ESAs Report on EU "sole purpose" Test for Originators

On 31 March 2025, the Joint Committee of the European Supervisory Authorities ("ESAs") published a report (the "ESAs Report") regarding the functioning of the EU Securitisation Regulation. The ESAs Report highlighted the use of third-party origination vehicles in CLOs and expressed the view that many structures may not be compliant with the current rules. The ESAs deemed it necessary to provide clarification on the intent of the phrase "predominant source of revenue", which in their view meant no more than 50% of an originator's income revenues should derive from the exposures to be securitised, risk retained assets or proposed to be retained, or any corresponding income from such exposures and risk retained assets. The ESAs invited the Commission to confirm their interpretation of the rules and make any necessary adjustments to the EU Securitisation Regulation or the related technical standards as part of their wider review of the securitisation framework (discussed below).

Future Reform to the EU Securitisation Regulation

In relation to the EU Securitisation Regulation, the Commission launched a wider consultation in October 2024 looking at the functioning of the regulation in the European securitisation market and subsequently noted the feedback it received in February 2025.

One area the Commission focused on was the definition of securitisation itself and whether that needs to be changed in order for the European market to expand and become more competitive with the United States. Some respondents suggested the definition to be harmonised with the U.S. approach, i.e. a securitisation to be defined as an "asset-backed security", which the Commission noted that existing EU participants are also familiar with. This could have the potential to exclude products like net asset value facilities and warehouses, given they are traditionally structured as loans. Such a move could appear groundbreaking, although the practical effect may be limited when it comes to risk retention, as in many such structures the sponsor generally needs to provide a first loss piece for the transactions to work economically, even if removing the reporting requirement for such structures would be less burdensome. The overall feedback by the Commission, however, did not suggest a clear consensus for

change on this and therefore it remains to be seen whether such a proposal will be adopted.

Other areas for reform could include lightening the criteria to be satisfied in order to qualify as a "simple, transparent and standardised" ("STS") securitisation under the EU rules. For example, CLOs are currently ineligible under STS criteria due to "active management". A transaction with an STS label allows the investor to benefit from more preferential capital treatment for their exposure to that securitisation than it otherwise would. In addition, there is a strong push for risk-based capital and liquidity requirements to be eased on insurers and banks investing in securitisations. The current rules are prohibitive and act as a constraint to growing the investor base and size of the European market. It should also be considered whether retail participation should be encouraged in securitisations and if so what the best way of structuring this should be.

UK and EU Divergence

We expect the EU and the UK to further diverge in their regulation of securitisations. In the UK, the retained EU law version of the EU Securitisation Regulation that applied in the UK since the end of the Brexit transition period has been repealed and the UK securitisation framework ("UK Securitisation Framework") now consists of various statutory instruments and handbook rules adopted by the UK Prudential Regulation Authority ("PRA") and the UK Financial Conduct Authority ("FCA").

Although the rules contained in the UK Securitisation Framework are in substance largely the same as the existing EU Securitisation Regulation, there are some key distinctions:

- the "sole purpose" test for originators in the UK differs from the Final Risk Retention RTS;
- under the UK Securitisation Framework, both credit institutions and investment firms can act as risk retainers if they are established either within or outside the UK to qualify, whereas under the EU Securitisation Regulation, only EU investment firms are expressly stated to qualify; and
- UK institutional investors investing in third country securitisations also have less onerous due diligence standards compared with EU investors. Due to the EU Securitisation Regulation requiring EU investors receive ESMA prescribed reporting, third country originators, including in the United States, must ensure they provide reporting in ESMA form templates. On the other hand, UK investors now only need to receive certain information in a more general sense, provided that it is "sufficient" for the investor to assess the risks prior to investment.

We expect the FCA and PRA over time to create an environment that is conducive to the securitisation market in the UK and this may lead to more divergence with the EU position, including, for example, the type of transactions that fall within the scope of the UK requirements. The FCA and PRA have noted that they expect to consult on further changes to the UK Securitisation Framework in 2025.

Middle Market/Private Credit CLOs

The middle market CLO space saw greater expansion in 2024, with middle market CLO issuances reaching $37.75 billion.[23] Middle market CLOs comprise about 12% of all outstanding CLOs but the pace of middle market CLO issuances has broken records in three of the four prior years.[24] The growth has been fuelled by the general expansion of private credit, with many more direct lenders with deeper pockets. Private credit lenders now compete with the broadly syndicated loan ("BSL") market to finance the largest leverage finance deals.

The middle market CLO space has expanded to accommodate the growing pipeline of private credit loans, including by creating what some consider a new category of CLOs, namely, "private credit CLOs". Many of the features of a private credit CLO track the middle market CLO structure (and so market participants often do not distinguish between such CLOs). Where a private credit CLO may be distinct arises mostly in the concentration limitations. For instance, private credit CLOs may feature larger cov-lite baskets, because the private credit lenders are now competing with the BSL market and must make their terms more attractive to sponsors. The private credit loans are exponentially larger now than in years past and so the obligor and industry concentration limits have expanded.[25]

With private credit lenders taking a larger share of the leverage loan space, traditional banks are looking for ways to obtain exposure to private credit debt. Several banks have formed joint ventures with credit fund managers, such as the venture formed between Citigroup Inc. and Apollo Global Management announced in September 2024.[26] Institutions that traditionally invested only in BSL CLOs are now looking to purchase notes issued by middle market and private credit CLOs as well. The greater appetite for middle market and private credit CLO notes has led to greater pricing compression between the two markets.[27]

Middle market CLO managers have also been able to use the more diverse set of investors to build in terms that are beneficial from the BSL CLO market – features that may have been rejected by a traditional middle market CLO investor in the past. Examples would include re-pricing mechanics and loss mitigation obligation flexibility (i.e. provisions that allow a CLO to participate in restructurings). Meanwhile, we have seen BSL CLOs with larger baskets for middle market loans to capture some of this pipeline. With middle market and private credit CLOs continuing to roll out as the new year commenced, market participants were generally optimistic about this space for 2025.

CLO ETFs

A noted development in the CLO market has been the rise of exchange traded funds ("ETFs") designed to invest in CLO notes. Since the initial CLO ETF appeared in 2020, the CLO ETF market has grown from just $120 million to more than $19 billion.[28] This is partially a result of the overall exponential growth of ETFs, with U.S. ETFs surpassing $8 trillion in assets under management in 2024 and projected to reach $10 trillion by 2027.[29] CLO ETFs have also gained adherents on their own merits. As interest rates continued to climb, investors have sought out fixed income floating rate products while being attracted to the steady growth of CLOs and the leverage loan market generally.[30]

ETFs are essentially mutual funds, regulated under the Investment Company Act of 1940, and with shares that can be acquired by retail investors through a broker. ETF shares trade on stock exchanges. Unlike the share price of a traditional mutual fund, which is set once a day, the share price of an ETF will fluctuate throughout the trading day. A CLO ETF's share price can therefore experience volatility, which may not necessarily correlate with the pricing attributable to the specific pool of CLO notes underlying the ETF or general pricing in the CLO market.

CLO ETFs have generally purchased their investments in the secondary market but the largest CLO ETFs also are purchasers in the primary market. S&P reported in November 2024 that it had determined that the largest CLO ETF likely was the anchor investor for the AAA tranche in a number of CLO issuances.[31] This means CLO ETFs have already had an effect on CLO

pricing. Further expansion of CLO ETFs may very well lead to tighter pricing at primary issuance while expanding liquidity for CLO notes in the secondary market. While most CLO ETFs have been focused on the AAA notes issued by BSL CLOs, there are also ETFs for the more junior portions of the capital structure or that seek to own a mix of tranches. And just as middle market/private credit CLO issuances have expanded (see our discussion above), so too have offerings of CLO ETFs investing in this space.[32]

Some have wondered whether volatility affecting CLO ETFs or the general ETF market could impact the CLO market. For instance, while ETFs have experienced steady inflows, in a down or volatile market, there could be a general existing from ETFs. More particularly to CLO ETFs, if the federal reserve were to return to lowering interest rates, investor desire for floating rate assets may ebb. And a general weakening in the CLO market could be reflected more rapidly in the share prices of CLO ETFs. The degree to which these events may directly impact CLO pricing may be hard to predict. S&P, in its November 2024 report, took the position that structural features of the ETF market might prevent a sell-off of CLO notes by the ETFs and their authorised participants, allowing CLO pricing to stabilise. The S&P report also noted that CLO ETFs are still a smaller portion of overall CLO note ownership, which may further mitigate the impact of a CLO ETF's volatility on the CLO market.[33] This of course may change if CLO ETFs continue to grow.

Conclusion

The CLO market in 2024 was an historic year and it continued at a similar pace at the beginning of 2025. In addition to issuance of new CLOs, refinancing and resets continue to dominate the market. As has been the case in the past, the CLO market remains stout, although U.S. tariff announcements and retaliatory tariff announcements appear to have contributed to pricing disruptions, and a slowing of the market, at the end of the first quarter and beginning of the second quarter. As the CLO market has evolved to address changes in prior years, we expect that CLO structures will continue to evolve over time to address legal, market and regulatory developments.

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Endnotes

1 See Fact Sheet, Private Fund Adviser Reforms: Final Rules, Securities and Exchange Commission, https://www.sec.gov/files/ia-6383-fact-sheet.pdf (last visited 18 March 2024) at 1.

2 *Id.*

3 *Id.* at 3.

4 Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, 88 Fed. Reg. 63,206 (Sep. 14, 2023) (codified at 17 C.F.R. § 275) at 63,220.

5 See Fact Sheet, Proposed Safeguarding Rule, Securities and Exchange Commission, https://www.sec.gov/files/ia-6240-fact-sheet.pdf (last visited 18 March 2024).

6 Safeguarding Advisory Client Assets, 88 Fed. Reg. 14,672 (proposed 9 March 2023) (to be codified at 17 C.F.R. § 275 and 279) at 14,678.

7 Safeguarding Advisory Client Assets; Reopening of Comment Period, Advisers Act Release No. IA-6384, (23 August 2023) (17 C.F.R. § 275 and 279).

8 *In re Serta Simmons Bedding, L.L.C.*, No. 23-20181 (5th Cir. Dec. 31, 2024).

9 *Ocean Trails CLO VII v. MLN Topco Ltd.*, No. 24-00169 (N.Y. App. Div. 1st Dep't Dec. 31, 2024).

10 Prohibition Against Conflicts of Interest in Certain Securitizations, 88 Fed. Reg. 85,396 (February 5, 2024) 17 C.F.R. § 230).

11 *Id.* at 85,397.

12 *Id.* at 85,398.

13 *Id.* at 85,418.

14 *Id.* at 85,406.

15 *Id.* at 85,466.

16 *Id.* at 85,416.

17 *Id.* at 85,412.

18 *Id.* at 85,464.

19 *Id.* at 85,464-5.

20 *Id.* at 85,466.

21 *Id.*

22 *Id.* at 85,443.

23 See "Private Credit and Middle Market CLO Quarterly: Waiting For The Sun", S&P Global Ratings, January 24, 2025.

24 See "CLO Spotlight: Good Things Come In Small Packages: A Short Primer On Middle Market CLOs", S&P Global Ratings, March 27, 2025.

25 See "Private credit elements bring mid-market closer to BSL CLOs as spread basis narrows", 9fin, July 22, 2024.

26 See "Citigroup and Apollo form $25bn direct lending venture", *Private Debt Investor*, September 26, 2024.

27 See "Private credit elements bring mid-market closer to BSL CLOs as spread basis narrows", 9fin, July 22, 2024.

28 See "ABS Frontiers: How The Burgeoning CLO ETF Sector Could Impact The Broader CLO Market", S&P Global, November 26, 2024.

29 See "US ETFs set to top $10T in 3 years", Natixis Investment Managers, June 27, 2024.

30 See "CLOs Are So Hot Right Now, They're Getting ETF'd", *The Wall Street Journal*, October 17, 2024.

31 See "ABS Frontiers: How The Burgeoning CLO ETF Sector Could Impact The Broader CLO Market", S&P Global, November 26, 2024.

32 *Id.*

33 See *Id.* See also "CLO ETFs unlikely to exacerbate market volatility, says S&P", PitchBook, December 5, 2024.

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