

ELFA's Transferability Series

First Series Instalment: Definition of 'Loan to Own/Distressed Investors': Issue in Transfer and Assignment Provisions

ISSUE #1

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19 June 2025

Definition of ‘Loan to Own/Distressed Investors’: Issue in Transfer and Assignment Provisions

Introduction

Welcome to the first instalment of ELFA’s Transferability Series. In this series, we aim to address key transferability issues faced by lenders in the leveraged finance market. Each quarter, we will highlight a specific issue and propose changes to improve clarity, consistency, and fairness in loan agreements and practices. By doing so, we hope to foster a more transparent, efficient, and liquid market.

The leveraged finance market is complex and dynamic, with various stakeholders involved in loan deals and transfers. Lenders face significant challenges regarding the non-uniformity of definitions and market practices related to transferability. This lack of consistency leads to inefficiencies, potentially resulting in operational and related challenges. Such non-uniformity is detrimental to the transparency of the market, hampering liquidity and making it difficult for lenders to navigate the market and transfer process effectively.

By addressing these transferability issues, we aim to create a more standardised and predictable environment that benefits all stakeholders. Clear and consistent definitions and market practices will help foster a common understanding and a more efficient and fair market. This, in turn, will enhance liquidity and ensure that lenders can operate with greater confidence and certainty.

In this first instalment, we address the issue of ‘Loan to Own/Distressed Investors’ in transfer and assignment provisions.

Restrictions On Transfers To ‘Loan To Own/Distressed Investors’: Issue in Transfer and Assignment Provisions

ELFA is concerned about the restrictions on transfers to ‘Loan-to-Own/Distressed Investors’, particularly regarding the definition of this term. These restrictions aim to prevent such lenders from taking control of borrowers. However, the current definition also limits market liquidity and flexibility, posing significant challenges for lenders in the European leveraged finance market. We discuss this further below.

Issues with the definition of ‘Loan To Own/Distressed Investors’

Broad and ambiguous definition: In the current leveraged finance landscape, the transfer of loans and debt securities is a common practice. However, the definition of ‘Loan to Own/Distressed Investors’ is often very broad and ambiguous, making it unclear if an entity is a ‘permitted transferee’. This results in uncertainty, delays, disproportionate transaction costs, and sometimes even prevents transactions from occurring.

Disadvantages for CLO/par lending vehicles: The current definition also places CLO/par lending vehicles at a disadvantage. Multi-strategy managers that pursue both distressed debt and par lending strategies find their CLO/par lending vehicles excluded from becoming lenders of record or from holding voting sub-participation, even where the manager is on the ‘Approved List,’ by virtue of their affiliation with distressed debt funds.

Impact on liquidity and portfolio management: The broadness and ambiguity of the definition impacts the liquidity of the secondary market and hampers efficient portfolio management and asset allocation across a manager’s CLO platform.

Proposed solution

ELFA considers this situation to be less than ideal.

To address these issues, we propose a more standardised definition of ‘Loan to Own/Distressed Investors’ that provides clearer guidelines and reduces ambiguity. By doing so, we aim to create a more consistent and predictable environment for stakeholders.



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Current definition

‘Loan to Own/Distressed Investor’ means any person whose (or any of whose Affiliates’ or Related Funds’ including an Affiliate or a Related Fund of a Lender or a transferee which satisfies the requirements set out under paragraph (b) of Clause [x] (Conditions of transfer)) principal business or material activity is in investment strategies whose primary purpose is:

- (a) the purchase of loans or any other debt securities with the intention of (or view to) owning the equity or gaining control of a business (directly or indirectly); and/or
- (b) investing in equity and/or acquiring control of, or an equity stake in, a business (directly or indirectly),

Provided that:

- (i) any Affiliate of such persons which are a Rated Bank which are managed and controlled independently to any such person who meets any of the criteria referred to in subparagraphs (a) to (b) above and provided that any information made available under the Finance Documents shall not be disclosed or made available to such person or its other Affiliates;

- (ii) any Original Lender,

shall not, in each case, be a Loan to Own/Distressed Investor.

Proposed amendments to the definition

To address the non-uniformity and provide clearer guidelines, the following changes (italicised and underlined) are suggested:

‘Loan to Own/Distressed Investor’ means any person whose (or any of whose Affiliates’ or Related Funds’ including an Affiliate or a Related Fund of a Lender or a transferee which satisfies the requirements set out under paragraph (b) of Clause [x] (Conditions of transfer)) principal business or material activity is in investment strategies whose primary purpose is:

- (a) the purchase of loans or any other debt securities with the intention of (or view to) owning the equity or gaining control of a business (directly or indirectly); and/or
- (b) investing in equity and/or acquiring control of, or an equity stake in, a business (directly or indirectly),

Provided that:

- (i) any Affiliate of such persons which are a Rated Bank which are managed and controlled independently to any such person who meets any of the criteria referred to in subparagraphs (a) to (b) above and provided that any information made available under the Finance Documents shall not be disclosed or made available to such person or its other Affiliates; and/or
- (ii) any such persons whose principal business or material activity is in investment strategies whose primary purpose is the purchase of loans or any other debt securities at, or around, par without the intention of (or view to) owning the equity or gaining control of a business (directly or indirectly) but who, but for this proviso, would be a Loan to Own/Distressed Investor if any of its Affiliates or Related Funds meet any of the criteria in sub-paragraphs (a) to (b) above.

- (iii) any Original Lender,

shall not, in each case, be a Loan to Own/Distressed Investor.

Next steps

ELFA will be engaging with key stakeholders, including lenders, legal advisors, and market participants to further discuss this proposed amendment to the ‘Loan to Own/Distressed Investor’ definition.

Conclusion

The change ELFA is proposing aims to provide a clearer, fairer definition of ‘Loan to Own/Distressed Investors’, ensuring better alignment and understanding among lenders, while promoting a more consistent approach in loan agreements.

About ELFA:

ELFA is a professional trade association comprised of European leveraged finance investors from more than 60 institutional fixed income managers, including investment advisors, insurance companies, and pension funds. ELFA seeks to support the growth and resilience of the leveraged finance market while acting as the voice of its investor community by promoting transparency and facilitating engagement among European leveraged finance market participants. For more information please visit ELFA's website: www.elfainvestors.com.

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