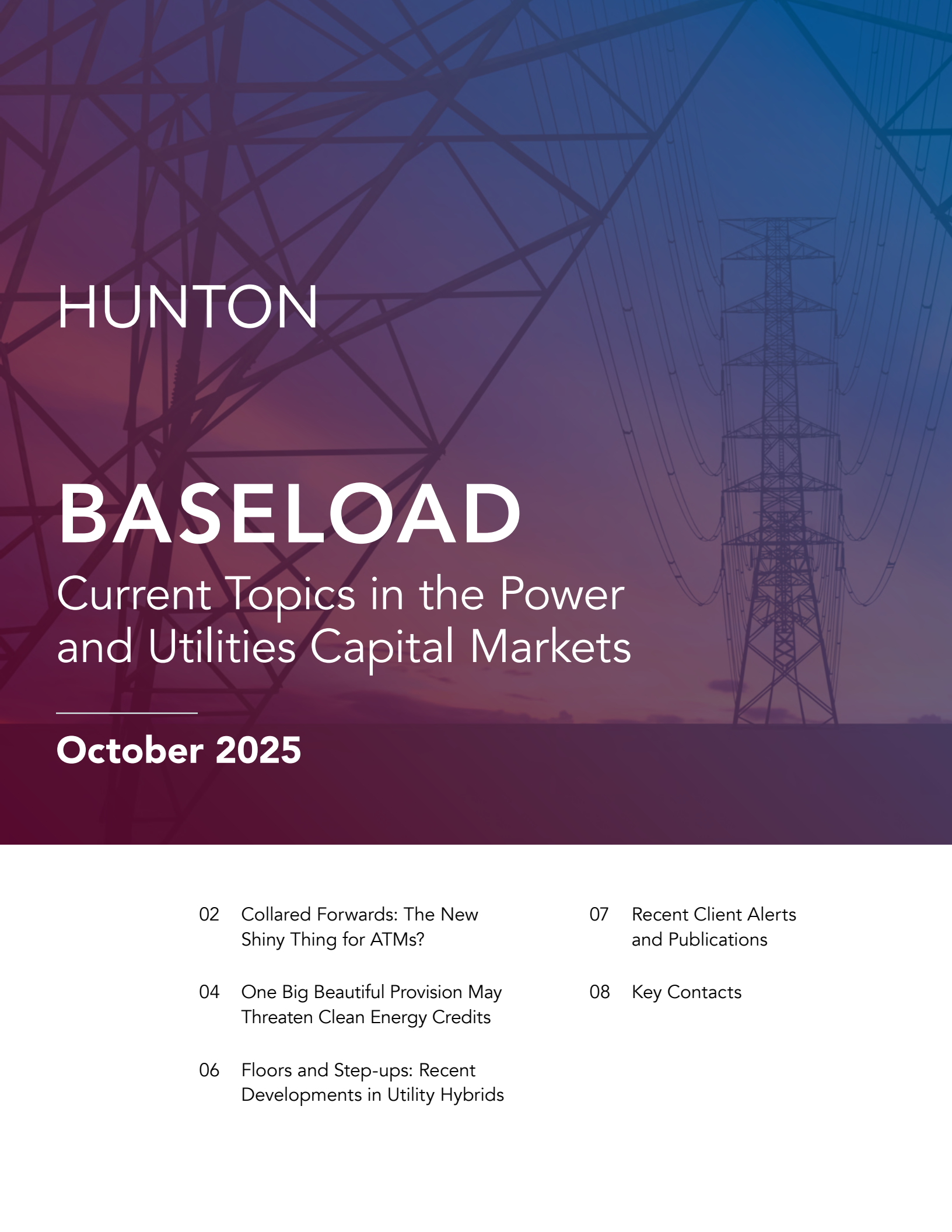




HUNTON

BASELOAD

Current Topics in the Power
and Utilities Capital Markets

October 2025

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Collared Forwards

The New Shiny Thing for ATMs?

In 2024, a movie theater company added a novel structure to its *at-the-market* stock sales program, a “collared forward” (collared forward). A collared forward is an additional option for forward sales under an ATM and allows the issuer to include a “cap price” and “floor price” based on the prices at which the forward purchaser establishes its initial hedge position with respect to the collared forward transaction following the initial trade date.

In August 2025, another issuer, this time a large domestic power utility, also included flexibility in its new *at-the-market* program for sales pursuant to a collared forward.

Traditionally, the forward sales of stock under a utility ATM have been made pursuant to an “initially priced” forward transaction (initially priced forward). The price per share under an initially priced forward is initially based upon either a fixed price or the volume weighted average price per share at which (borrowed) shares are sold by the relevant forward seller.

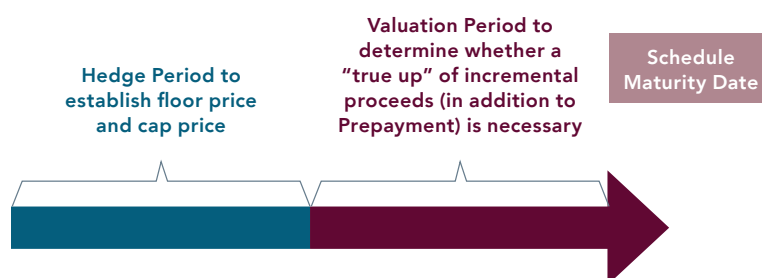
Under a collared forward, the collared forward purchaser will similarly borrow and sell shares into the market. But such sales during the “initial hedging period” will be used instead to set a floor price and a cap price of the collared forward transaction. This floor price and cap price are determined upon completion of the initial hedging period for the collared forward by using the weighted average prices at which the collared forward seller has sold the hedging shares during the initial hedging period.

On a “minimum maturity date” for the collared forward, the issuer delivers the shares to the forward purchaser in exchange for a floor price per share or some percentage of that floor price. This is known as the “prepayment” (a feature not part of an initially priced forward).

Unlike for an initially priced forward, the share sale price under the collared forward is based on the volume weighted average prices of the issuer’s common stock during a subsequent valuation period that runs from the end of the initial hedging period to the maturity date of the collared forward (subject to certain anti-dilution and other adjustments similar to those under an

initially-priced forward, including adjustments related to certain dividends on common stock and in the case of certain customary disruption and extraordinary events). At the termination date of the collared forward, the forward purchaser, depending on the prepayment percentage and the stock performance during the valuation period, may be required to pay a “true up” amount of incremental proceeds to the issuer (which true up amount is subject to the cap previously established).

In an initially priced forward, the company may elect physical or (subject to unwind) cash or net share settlement. For the collared forward, the issuer will issue or pledge to the collared forward purchaser, on the prepayment date, a number of shares equal to the aggregate number of shares underlying the collared forward transaction, or if that number of shares is not available to be borrowed from stock lenders at the beginning of the initial hedge period, the issuer will lend those shares to the collared forward purchaser at such time. At maturity of the collared forward transaction (assuming that shares previously were pledged or loaned and were not issued outright on the prepayment date), the issuer’s obligation to deliver shares of common stock to the collared forward purchaser will typically be set off against the collared forward purchaser’s obligation to return pledged or loaned shares to the issuer. However, subject to certain conditions, the issuer has the right at maturity to elect to receive the true up of incremental proceeds in the form of common stock instead of cash.



One benefit of the collared forward is the ability of the issuer to sell a fixed number of shares at a specified floor price. We understand that another advantage of the collared forward may be that downward pressure on the issuer's share price is more limited vis-à-vis a traditional forward sale, given that only a portion of the number of shares underlying the collared forward may need to be placed in the market out the outset (on a net basis) by the agent in order to establish the agent's initial hedge position.¹

The below chart describes certain high-level differences between regular and collared forwards:

	Regular	Collared
Settlement Date	Company may elect multiple dates (in part or whole) up to maturity	Dealer elects in whole on or after prepayment date up to maturity
Settlement Method	Company may elect physical or (subject to unwind) cash or net share	Physical, but company may elect (subject to unwind) final true-up in shares after prepayment
Prepayment	None	Percentage of the floor price vs. pledge or delivery of all shares
Settlement Price	Function of initial forward price adjusted daily by Overnight Bank Funding Rate minus spread	VWAP during a "Settlement Averaging Period" (subject to cap and floor) minus the prepayment amount
Adjustment Events	Increased Cost of Stock Borrow and certain Extraordinary Dividends	Tender Offers and certain Mergers and Disruption Events
Termination Events	Physical Settlement upon Acceleration Events	Cash Settlement upon Dividends differing from expected dividends and certain regular Acceleration Events

Certain Other Considerations

In both of the two collared forward transactions to date, the transaction included a "clear market" provision whereby there were significant restrictions on the issuer's ability to sell common stock during both the initial hedging period and the valuation period (and, if applicable, certain unwind period(s)). Issuers considering the collared forward structure should review these "clear market" restrictions, which are significantly more onerous than other, more familiar, sales methods under an ATM.

Further, in both of the two collared forward transactions to date, the master confirmation with the agent's affiliate was governed by English law. We assume, however, that future iterations of the product may consider the feasibility of a New York-governed collared forward.

¹ We understand that "net basis" is meant to take into account sales of the full number of shares underlying the forward **minus** purchases of shares effected by the agent pursuant to its dynamic hedging practices. See the October 9, 2003 no action letter to Goldman, Sachs & Co. In the corresponding October 6, 2003 letter to the Securities and Exchange Commission (SEC), counsel sought interpretative advice regarding the sale of equity securities by Goldman, Sachs & Co. in connection with Goldman's entry into a derivative contract with an issuer.

One question posed to the SEC was if the maximum number of shares deliverable pursuant to the contract are registered under Section 5 of the Securities Act of 1933, as amended (1933 Act), and prospectuses are delivered in connection with the sale of the maximum number of shares, would (i) further sales of shares by Goldman in connection with Goldman's hedging activities that are settled with unrestricted shares acquired otherwise than from the issuer require registration of additional shares and (ii) delivery of shares (issued pursuant to the contract with the issuer or pledged or loaned by the issuer in connection with the contract) during the term of, or at the maturity of, a contract, up to the maximum number of shares, to close out open borrowings of stock created in the course of such hedging activities require registration of additional shares under the 1933 Act. In the no-action letter, the SEC permitted such sales to occur without further registration.



One Big Beautiful Provision May Threaten Clean Energy Credits

The One Big Beautiful Bill Act (OBBBA) is a US federal statute passed by the 119th United States Congress. The bill was signed into law by President Trump on July 4, 2025.¹

Under the OBBBA, a borrower that has issued at least 15 percent of its debt to certain prohibited foreign entities or individuals (most notably, Chinese or Chinese-controlled entities) is treated as a “foreign-influenced entity,” making the borrower ineligible to claim certain clean energy-related tax credits. Special rules for “**publicly traded companies**” in the OBBBA further provide that a publicly-traded borrower would be treated as a prohibited “foreign influenced entity” and subject to tax credit disallowance if the “...entity has issued debt, as part of an original issuance, in excess of 15 percent of its publicly-traded debt to one or more **specified foreign entities**.”² (We understand a working group of the Edison Electric Institute has recently been in discussions with United States Department of the Treasury (Treasury) for further guidance on this language. It is unclear as to when Treasury might provide guidance and what that guidance might look like.)

A “**specified foreign entity**” (SFE) would generally include organizations included on various lists under national security laws, including:

- those designated as a foreign terrorist organization by the Secretary of State under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189);
- those included on the list of specially designated nationals and blocked persons maintained by the Office of Foreign Assets Control of Treasury;
- certain Chinese battery companies;
- companies listed as part of the Uyghur Forced Labor Prevention Act; or
- a “**foreign controlled entity**.”

¹ Available at <https://www.congress.gov/bill/119th-congress/house-bill/1/text>

² See Section 7701(a)(51)(E)(iii)(II)



A “foreign controlled entity” is defined as:

- a government of a “covered nation” (China, Iran, North Korea, Russia);
- a citizen or national of a covered nation (excluding US citizens and lawful permanent residents);
- an entity incorporated or organized under laws of a covered nation or an entity having its principal place of business in a covered nation; or
- any entity “controlled” by such entities.

Many issuers in the power industry have considered and/or implemented the following steps in recent offerings in order to minimize the risk of tripping the 15 percent threshold and potentially losing eligibility to claim in-scope clean energy-related tax credits:

- removing China and Hong Kong legends from the offering document;
- making clear in any Bloomberg announcement for the transaction that sales are not permitted into China or Hong Kong; and
- discussing with the underwriters, before final allocations in the offering, the information available with respect to potential investors in the offering so as to minimize the risk.

In addition to these steps, issuers have also considered including:

- a deemed representation in the offering document that the purchasers of the securities are not “specified foreign entities” as defined in the OBBBA and
- a redemption right for the borrower to the extent that the borrower determines, as a result of the holdings of its debt, that the series in question contributes to a material risk of the borrower losing the benefit of such tax credits.

This statutory language contains many unresolved questions. Among the ambiguities is how the 15 percent thresholds will be calculated. For example, whether each future transaction will be reviewed alone in order to determine whether the threshold has been breached or, alternatively, whether all future issuances are added together in order to calculate the threshold. Related to this calculation, it is unclear whether there is a lookback to prior issuances of a borrower.

Another unresolved issue is whether there would be a manner available to cure tripping the threshold if the borrower were to later determine that some allocation of a transaction had been made to an SFE. Said another way, if the measurement is made by examining the holders at “the original issuance,” there are no rules addressing whether subsequent transfers of the securities to other permissible holders, or pursuant to a borrower’s redemption right, would work to cure the failure. The hope is that Treasury will issue reasonable guidance in the near term.

Floors and Step-ups

Recent Developments in Utility Hybrids

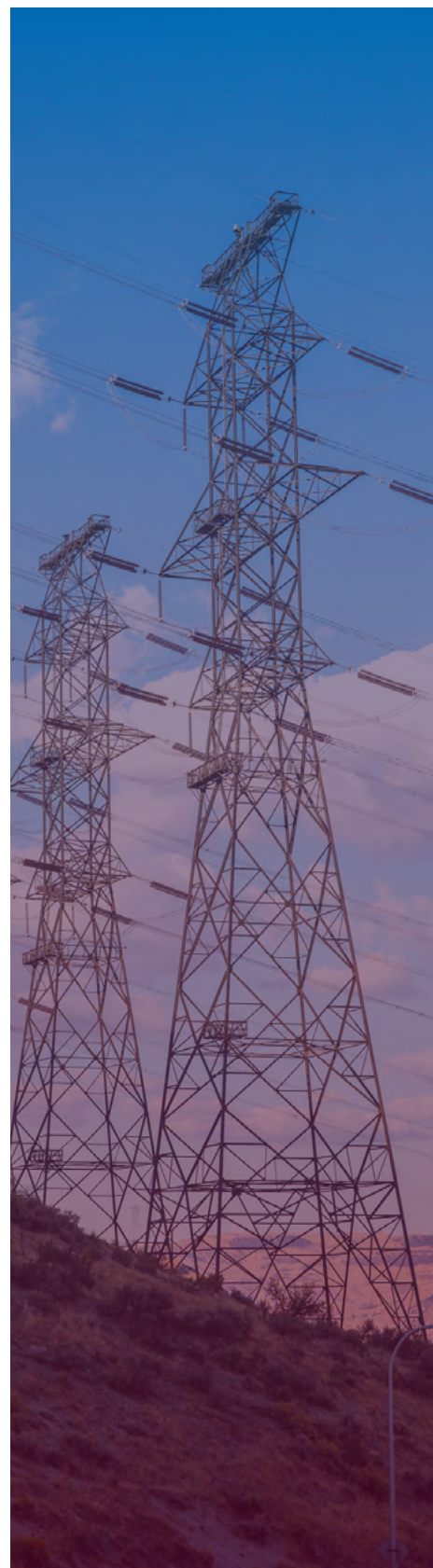
With CapEx budgets on the rise, many utilities have continued to look to hybrid issuances as an important source of capital in 2025. As we previously noted in the October 2024 edition of *BASELOAD*, hybrid issuances increased significantly in 2024. This was likely due in part to the adoption by Moody's in February 2024 of an update to Moody's hybrid methodology for investment grade issuers simplifying equity credit to three baskets (similar to the methodology employed by S&P and Fitch), resulting in 50 percent equity credit for the majority of utility holdco issuances.

Since our last report, we have seen a rise in popularity of a "coupon floor" structure for fixed-rate-reset hybrids, whereby the coupon for each reset period will not slip below the initial coupon at issuance in the event the five-year treasury rate is lower at the time of such reset.

In March 2025, S&P published¹ a FAQ update to provide guidance on several features of hybrid securities, including coupon floors. In its update, S&P noted that it views a hybrid with a coupon floor as providing the issuer weaker protection compared to an equivalent hybrid without a coupon floor in scenarios in which interest rates have fallen but refinancing is difficult. The issuer is not protected against higher interest rates and in a scenario where interest rates have fallen since initial issuance and refinancing is difficult or not possible, the coupon floor could make it more expensive for the issuer to keep the security outstanding. S&P noted, however, that hybrids with a coupon floor are typically still eligible for intermediate (50 percent) equity credit so long as the hybrid does not also contain a coupon step-up (unless the floor alters S&P's view of the issuer's intention to use the hybrid's equity-like features in a stress scenario or unless S&P considers that the floor creates a material incentive for the issuer to redeem the hybrid early).

Coupon step-ups, typical of many European corporate hybrids, are relatively uncommon in the US hybrid market, particularly for utility issuers. A coupon step-up feature could take the form of one or more preset step-ups on subsequent reset dates (regardless of the occurrence of any other conditions). S&P noted that it does not expect to assign intermediate equity content to a hybrid that combines a coupon floor with a coupon step-up or step-ups, unless the coupon floor is set specifically to address situations where interest rates approach zero (to avoid negative coupon payments), given that the combination of a coupon floor with a coupon step-up increases the issuer's incentive to redeem the hybrid in various scenarios.

¹ The March 4, 2025 S&P Credit FAQ also contained a helpful discussion regarding the (1) length of deferral periods ("We assign no equity content to a deferrable hybrid if the issuer is not able to defer payments for at least five years.") and (2) nature of replacement intention language ("No, we do not expect an issuer to include any specific form of replacement intention language in the instrument documentation. We review (but do not draft or approve) any replacement intention language that an issuer has decided to include...").





Recent Client Alerts and Publications

Over the past year, Hunton lawyers have authored client alerts and blog posts covering a range of topics relevant to the power and utilities capital markets industry.

October 7, 2025

FERC to Sunset Regulations Pursuant to Executive Order

September 30, 2025

SEC Requests Comment on RMBS and Harmonization of the “Asset-Backed Security” Definition

August 18, 2025

Remember to Enroll in EDGAR Next by September 12

July 17, 2025

Department of Energy Loan Guarantee Program Update: New Energy Dominance Financing Mechanism

June 2, 2025

Recent Nuclear Executive Orders to Accelerate US Nuclear Renaissance

March 11, 2025

SEC Expands Nonpublic Review Process for All Companies Intending to Issue Securities

March 4, 2025

SEC Staff Issues New Guidance on Shareholder Proposals With SLB 14M

March 3, 2025

Exchanging the SEC: Previewing the Next Four Years

November 19, 2024

New Outbound Investment Rules Restrict US Investment in China

Key Contacts

BASELOAD is prepared from time to time to provide general information about selected power and utilities capital markets developments and issues for Hunton attorneys, and is provided to clients and friends of Hunton. It is not intended to provide legal advice or legal opinions and must not be relied on as such. If you have questions related to any of the articles in this issue, please contact any of the below members of the Power and Utilities Capital Markets group at Hunton:



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