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Bank Counsel Roundtable
Recent Developments in Commercial Lending and Finance

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OVERVIEW

- **TRENDS IN LOAN DOCUMENTATION**
- **LIBOR REPLACEMENT**
- **ISSUES IN SYNDICATED CREDIT AGREEMENTS FOR SYNDICATE MEMBERS**

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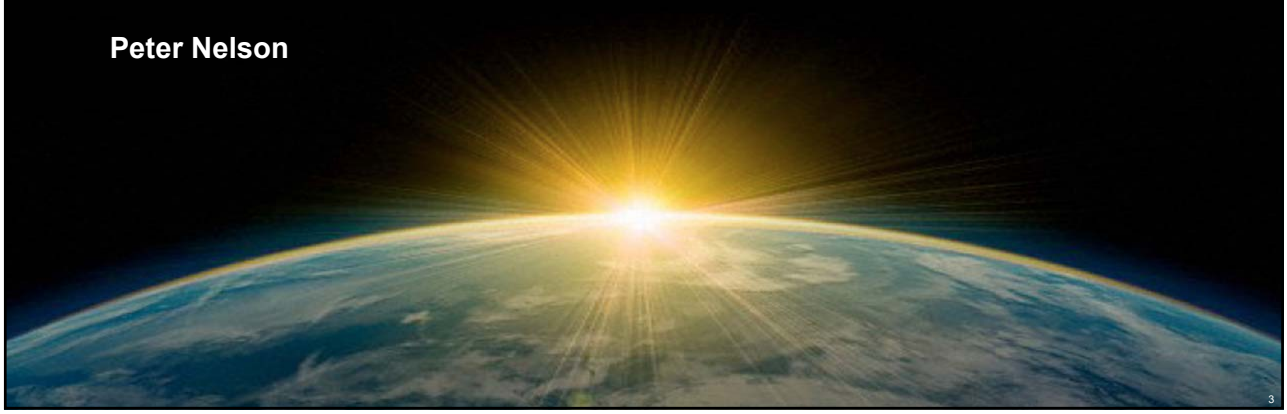
Trends in Loan Documentation

Peter Nelson



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- **State of the Market**
- **Recent Trends in Legal Documentation for Leverage Lending Transactions**
- **Conclusions**

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Overview

- **Upper Middle Market (generally companies with $500mm to $1bn in EBITDA) continues to lead the way with Borrower/PE Sponsor friendly terms for Loan Documents**
- **Middle Market (generally companies with $50mm to $500mm in EBITDA) and Lower Middle Market (generally companies with $5mm to $50mm in EBITDA) are slower to adopt new documentation trends, but they are creeping in…**
- **In the Upper Middle Market more and more deals are going "covenant light"**
- **Current Economic cycle is driving the market**
- **Regulatory uncertainty doesn't look to provide changes to market dynamics any time soon**

Market Conditions

- **State of the Market**
  - More and more, borrowers and private equity sponsors in the Middle to and Upper-Middle Markets are seeking and obtaining fully underwritten financing commitments, both at closing and for future acquisitions.
  - M&A markets continue to get more and more competitive, especially for high quality target companies.
  - Competitive M&A markets have resulted in increased EBITDA multiples for high quality targets (10x EBITDA and higher) and a more competitive buyer's side market as more and more buyers have cash to deploy.
  - Sellers continue to maintain leverage over buyers, in particular in the Middle/Upper-Middle space.
  - Financing contingencies are becoming increasingly rare and reverse break-up fees are more and more common.
  - Many M&A transactions for high quality targets result in numerous attractive bids from multiple buyers.
  - Unitranche and first lien/second lien financing options are increasing in popularity and becoming more attractive as a way to stretch leverage - adding increased pressure on traditional commercial lenders and further pushing documentation.
  - PE Sponsors and other Borrowers are demanding stronger financing commitments from all of their capital providers to provide greater flexibility to close deals quickly and reduce execution risk.
  - Regulatory guidance has tempered commercial bank's interest and ability to stretch to meet these demands for greater leverage, continuing to open the door to unregulated lenders.
  - To stay competitive, more commercial lenders are offering underwritten commitments during the bidding and LOI stages to stay competitive with finance companies and debt funds

Market Conditions

- **Regulatory Guidance***
  - October 2017, the U.S. Government Accountability Office issued an opinion determining that the 2013 Interagency Guidance on Leverage Lending ("2013 Leveraged Lending Guidance") constitutes a "rule" subject to Congressional approval.
  - Because the 2013 Leveraged Lending Guidance did not follow the protocols for adoption as a "rule", this opinion began a re-assessment of whether 2013 Leveraged Lending Guidance is binding and if not, what impact it does have.
  - February 2018 and then again in May 2018, OCC provides an update to earlier comments suggesting the 2013 Leveraged Lending Guidance is guidance and not a strict rule
  - Since the February OCC comments, leverage multiples have climbed. Leveraged buyouts during the second quarter 2018 have averaged 6.57 times leverage, the highest level since 6.65 times during the third quarter of 2014 and before that 6.71 times during the fourth quarter of 2007, according to data from Thomson Reuters LPC.
  - The number of HLT's underwritten by banks subject to the 2013 Leveraged Lending Guidance has also increased. Such transactions include roofing distributor SRS Distribution's buyout with leverage of 7.5 times, education software provider Renaissance Learning's buyout of 7.8 times and food manufacturer Hearthside Food Solutions' leveraged buyout with leverage of 7.0 times.
  - Some commercial banks have commented that recent OCC guidance has not changed their lending habits dramatically and they are still considering the guidance when deciding to underwrite loans.
  - The FDIC and the Federal Reserve are also responsible for the 2013 Leveraged Lending Guidance and have not provided definitive commentary or guidance.

*** See Reuters Article "OCC head says leveraged lending guidance needs no revisions" by Jonathan Schwarzberg, May 24, 2018**

Market Conditions

- **Current Trends:**
  - **In part as a result of the 2013 Leveraged Lending Guidance, unregulated lenders could provide higher leverage, usually based on the valuation of fixed and current assets**
  - **Non-regulated lenders have aggressively taken share from regulated commercial banks with deals, recently these deals typically include the following:**
    - **Higher leverage multiples, no market flex, no debt ratings**
    - **First lien/second lien debt structure**
    - **Syndicated on a club basis including both regulated banks and non-regulated lenders**
- **Responses from Regulated Banks**
  - **Many are starting to offer skinny amortization – i.e., 1% for 5 years**
  - **Establishing partnerships with direct lenders to provide ABL revolvers on LBOs, participate in Unitranche deals, and other "creative" structures**
- **Takeaway -**
  - **Uncertain regulatory environment**
  - **Record high multiples for M&A deals**
  - **Limited inventory of quality Targets, and**
  - **Record leverage**
  - **Current conditions are ripe for PE Sponsors and other Borrowers to push documentation limits and demand more flexibility, require more certainty and generally loosen the reigns across the board…at least for now**

Recent Trends in Legal Documentation

- **Notable Trends in Middle Market Transactions**
  - **Fully underwritten commitments**
  - **Accordions with more "Predictability"**
  - **Acquisition friendly terms**
  - **Pre-wired terms for dividends, distributions and recaps**
  - **Additional flexibility for Cure Terms**
  - **Borrower/PE Sponsor rights to acquire and hold Loans**
  - **Increased limitations on Lender Assignments**

Recent Trends in Legal Documentation

- **Fully Underwritten Commitments**
  - **Commitment Letters**
    - **Buyers increasingly being pushed to eliminate financing contingencies**
    - **Commitment Letters are becoming more common, even in the Lower Middle Market**
  - **Commitment Contingencies**
    - **PE Sponsors/Buyers are looking to reduce/eliminate risk**
    - **Sellers are able to push Buyers to close**
    - **Reverse break-up fees fuel the need for certainty**
    - **PE Sponsors/Buyers are pushing to eliminate all "outs" – including diligence outs, syndication outs, etc.**
    - **Sun Guard protections are now the market standard – essentially Lenders are required to fund if the Buyer is required to close the acquisition – even if a Default or Event of Default is ongoing**
  - **Fully Committed Deals**
    - **In the Upper Middle Market and top half of the Middle Market, fully underwritten commitments are increasing in popularity**
    - **PE Sponsors and Borrowers push syndication risk on to the lead Agent**
    - **Economics can be attractive, but risks for lenders continues to increase**
  - **Takeaway – As PE Sponsors push for more certainty in their commitments, obvious issues of legal and financial diligence, credit approvals, timing and scope of "outs" become key considerations**

Recent Trends in Legal Documentation

- **Accordion Predictability**
  - **Accordions used to be conceptual "nice to haves"**
    - **Other than permitting the debt if a Lender was willing to provide it, there was limited value due to Lender discretion**
  - **Recently Borrowers are requesting/demanding more "commitment" from accordion terms**
    - **Term Loans and/or Revolving Loans at PE Sponsor's election**
    - **No governors other than pro forma compliance – if that…**
    - **Some deals now adjust leverage covenant levels automatically if Lenders agree to provide the debt**
    - **If used in connection with a Permitted Acquisition, Sun Guard type protections requiring Lenders to fund**
    - **In the upper end of the Middle Market, fully "committed" accordions are starting to appear. Effectively these operate like delayed draw term loans with minimal fees paid by the Borrower**
  - **PE Sponsors, Strategic Buyers and others are fighting for deals just like lenders and want the added predictability to know they have dry powder that will be available = no financing contingencies.**
  - **Takeaway – As PE Sponsors push for more flexibility to add more certainty to Accordion availability and usage, obvious issues of credit approval and how to price any "commitments" as well as timing and minimum performance requirements will be key.**

Recent Trends in Legal Documentation

- **Acquisition Friendly Terms**
  - **Permitted Acquisitions Terms**
    - **Funding Sources are broadening to include accordion exercise**
    - **Permitted deal sizes are growing**
    - **Fewer Restrictions**
      - **Pro foma compliance with covenants is often the maximum restriction**
      - **Test may be measured when deal is inked, as opposed to when it's finally closed = more predictability**
      - **Permit acquisitions of negative EBITDA companies**
  - **Permitted Acquisition Conditions**
    - **Many joinder requirements now post-closing, even if funded with Loans**
    - **Debt and even Liens may be permitted to stay in place**
    - **Sun Guard protections require Lenders to permit and even fund the Acquisition, even if circumstances have deteriorated**
  - **Takeaway – As Borrowers and PE Sponsors push for more flexibility to permit Acquisitions and insert more certainty into their acquisition strategy, focus acquisition conditions on the key elements:**
    - **Target performance**
    - **Borrower performance**
    - **Legal/collateral protections**
    - **Acquisition funding sources**

Recent Trends in Legal Documentation

- **Dividends and Distributions**
  - **Permitted Dividends**
    - **Some PE Sponsors and other high quality Borrowers are getting flexibility to permit dividends subject to pro forma compliance tests**
      - **Mostly happening in the Upper Middle Market and upper half of the Middle Market**
      - **Lower Middle Market seems to continue resisting this trend**
    - **Test measures performance at the time the dividend is announced and permits the dividend even if performance deteriorates**
    - **Funding Sources are broadening to include revolving loans, accordion exercise and even delayed draw term loans**
  - **Takeaway – As Borrowers push for more flexibility to see earlier returns on their investment, beware of the impacts on long term debt service capabilities and ensure the proper protections are in place to limit dividends when performance is deteriorating**

Recent Trends in Legal Documentation

- **Cure Provisions Background –** Generally speaking, the basic point of a Cure Provision is to give a PE Sponsor the ability to cure a financial covenant default or a payment default on behalf of the Borrower by putting capital into the Borrower. While this seems like a "win-win" situation, the details surrounding the terms of the Cure are critical.
- **Issues**
  - **Application of Cure Proceeds –** Will the proceeds be applied to outstanding Term Loans or will they be applied against Revolving Loans or otherwise be put into the Borrower as working capital? Most Borrowers prefer to inject Cure Contributions as working capital. Lenders prefer permanent reduction of Term Loans.
  - **Cure v. Delay of Event of Default** – Many PE Sponsors prefer that if they agree to make a Cure Contribution, that no Event of Default will occur as long as they make the Cure Contribution within the time frame agreed (often 15-30 days). Lenders generally prefer that the Cure Contribution retroactively cure the Event of Default and agree not to take action during the agreed time frame.
  - **Payment Default Cures** – Note that many commercial lenders have internal policies that require that a principal Payment Defaults be an automatic Event of Default. If a Cure Provision includes the ability to cure a Payment Default, additional internal credit approvals may be required.
  - **Increase to EBITDA v. Reduction of Total Funded Debt and FCCR Numerator Reduction** – Depending on the agreement regarding the application of the Cure Proceeds – language needs to ensure the Borrower is not "double dipping" by increasing EBITDA while also taking advantage of a reduction to Total Funded Debt.
  - **Basic Cure Provision Limits –** To reduce the risk that Cure Contributions are being used to disguise systemic long term risks, consider the following:
    - Limit the Dollar amount of any Cure Contribution to the amount necessary to cure the applicable Event of Default.
    - Limit number of total Cure Contributions and number of consecutive quarters
    - Limit the aggregate amount of all Cure Contributions to a specific dollar cap.

Recent Trends in Legal Documentation

- **Cure Provisions – Recent Trends**
  - **Similar to accordions, these used to be conceptual "nice to haves"**
  - **Recent history has seen PE Sponsors using Cure Provisions more often rather than engaging in negotiations for Maintenance Agreements - especially if the cure rights apply proceeds to working capital**
  - **PE Sponsors are requesting/demanding more flexibility**
    - **Cure contributions from subordinated debt or equity**
    - **Increased number of cures, reduced limits on contribution frequency**
    - **Increase the maximum amount of cure contribution**
    - **Cure contributions applied to cure multiple covenant defaults**
    - **Cure contributions as working capital incentivize use of the cure instead of negotiating maintenance agreements or other remedies**
  - **Takeaway – Cure Provisions are ubiquitous and more increasingly being used. As terms become more PE Sponsor favorable, beware of the potential for a Cure to be used to manipulate the Borrower's financial health.**

Recent Trends in Legal Documentation

- **Borrower/PE Sponsor Loan Purchase Right**
  - **More Borrowers and PE Sponsors have been requesting language that permits them to purchase loans**
    - **Gives them flexibility if there is an intransigent Lender**
  - **Equity Conversion - initially these provisions allowed the Borrower or PE Sponsor to purchase senior debt, but required the Borrower/PE Sponsor to convert the debt to equity**
  - **Borrowers/PE Sponsors Holding Debt - recent trend allows for unlimited debt purchases if converted to equity AND permits them to hold loans up to 25% or even 33% of the aggregate debt**
  - **Limited Rights – As a holder of debt, most of these provisions require the Borrower/PE Sponsor to tag along and give no voting rights, effectively turning them into a participant**
  - **Subordinated Debt - Can complicate relationships with Mezz lenders**
  - **Bankruptcy Considerations - Unclear how these arrangements might be treated in BK**
  - **Future Trend – expect to see these more often and don't be surprised if Borrower/PE Sponsor's start to push the boundaries**
  - **Takeaway – Borrowers and PE Sponsors are becoming increasingly aware of preserving maximum flexibility in workout scenarios. Similar to the trends in Cure Provisions, PE Sponsors in particular realize they can use their current leverage to push on the margins, potentially rearranging the "seats at the table" in a distressed scenario.**

Recent Trends in Legal Documentation

- **Assignment Provisions – Recent Trends**
  - **General Policy** – Following any Event of Default, the Borrower's consent shall not be required for ***any*** assignment to ***any*** Person.
  - **Reasoning** – Most Banks' Workout Groups, Legal Departments and Internal Credit have determined that it is critical to maintain maximum flexibility to assign a loan following an Event of Default. Any limitations on this flexibility could impact the amount of recovery in a distressed situation.
  - **Borrower Issues** – Many Borrowers want to control who is in their Lender group. This is especially true in club deals, however, even in a more broadly syndicated transaction, many Borrowers may want to limit specific banks, specific types of Lenders (i.e., hedge funds) or competitors.
  - **Take Away** – There are several "legal" approaches that many Borrowers have attempted to employ over the past several years discussed in the next slides. Any agreement to deviate from the general policy described above will require Credit Approval.

Recent Trends in Legal Documentation

Specified Events of Default – One option many Borrowers try to employ is to limit the types of Events of Default that eliminate their consent right. These are often referred to as "Specified Events" of Default.

- **Borrower's List** – Typically, a Borrower will suggest (i) Payment Defaults and (ii) Bankruptcy Default as the only triggers to eliminate their consent right.
- **Preferred List** – Legal has endorsed a more robust list of acceptable Specified Events of Default, however, it should be noted that Credit Approval is required to approve any Specified Event of Defaults. Credit Approval may receive more scrutiny if the full list is not included.
  - Payment Defaults
  - Bankruptcy Defaults
  - Financial Covenant Defaults
  - Delivery of Financials/Compliance Certificates
  - Restricted Payment Covenant Default
  - Management Fee Payment Covenant Default
  - Cross Defaults
  - Unenforceability of Loan Documents
  - Change of Control
  - Loss of Perfection over Material Collateral
- **Takeaway** – Lenders are increasingly are aware of the trend that Borrowers are pushing for some limitations on this issue. However, given the impact on financial recovery that this issue poses, many lenders require internal credit approval to accommodate this request. Given the importance of the issue, it is strongly encouraged to get this issue settled during the Term Sheet phase of a transaction.

Recent Trends in Legal Documentation

Competitor Lists/Disqualified Lender Lists – Two recent issues being brought up more and more are (i) restricting any competitor from being an eligible assignee, and (ii) restricting certain types of institutions from being eligible assignees, both before and after an Event of Default.

- **Issues** – The reason Borrower's want to limit any competitors or certain types of financial institutions from being Lenders is relatively straightforward. Bank policy on whether to entertain the request will depend in large part on whether the request relates to pre or post Event of Default assignments.
  - **Prior to an Event of Default** – The biggest issue is quantifying who constitutes a "Competitor" and the scope of any Disqualified Institutions.
    - Borrower's List – usually incorporates vague undefined concepts such as: "any Person that is a direct competitor as the Borrower" or "any Person that is in substantially the same line of business as the Borrower". For Disqualified Institutions, the request usually includes "any hedge fund or other Person employing a similar investment strategy".
    - Preferred Approach – require the Borrower to attach a schedule with specific names and then provide for "additional direct competitors of the Borrower that are Person's engaged in substantially the same line of Business as the Borrower, in each case, as approved by the Agent from time to time in its sole discretion".
  - **After and Event of Default** – As is the case with any limitation on assignments after an Event of Default, any exception will require Credit Approval. However, keeping the lists specific, and limiting the ability to add any additional names after Closing will reduce the attendant risks and are therefore preferable.
- **Takeaway** – Lenders are increasingly are aware of the trend to include limitations on Competitors and Disqualified Institutions. However, given the impact on financial recovery that this issue poses, many lenders require internal credit approval to accommodate this request. Given the importance of the issue, it is strongly encouraged to get this issue settled during the Term Sheet phase of a transaction.

Conclusions

Borrowers and PE Sponsors continue to push the limits on Commitment Letters and Credit Agreement terms and conditions.

The higher the credit quality/operating performance of the Borrower, the more likely they are to push.

As a result Credit Agreements, and Loan Documents are constantly evolving.

When you add to the mix the myriad of legal policy updates, regulatory changes and changing market conditions, it's imperative that outside counsel, internal legal, credit and the loan officers work together to ensure that the "legal" issues with credit risk are properly flagged from the initial structuring through the final credit approval process.

QUESTIONS?

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LIBOR Replacement Developments

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LIBOR REPLACEMENT BACKGROUND

- **LIBOR and the British Banker's Association**
- **LIBOR fixing scandal**
- **ICE Benchmark Administration – February, 2014**
- **ICE Roadmap – 2016**
- **July, 2017 – ICE Benchmark Administration announces use of panel banks to end in 2021**
- **FRB established Alternative Reference Rates Committee (ARRC) in 2014 to identify new index rate**
- **In June, 2017, ARRC selected Secured Overnight Financial Rate (SOFR) to be published by Federal Reserve Bank of New York**

WHY IT MATTERS IN GENERAL

- **Market participants believe LIBOR should continue**
- **Markets need a *transactions* based index rate that works with other money market rates to facilitate efficient pricing**
- **$160 trillion of securitization transactions priced at LIBOR**
- **SWAPs**

LIBOR/SOFR COMPARISON

- **LIBOR – London InterBank Offered Rate**
  - **Reflects rates at which banks borrow from each other on an unsecured basis**
  - **Calculated in multiple currencies including US Dollar, Euro and British Pound**
  - **17 participating banks using "expert judgment," not actual transactions**
  - **Published daily at 11:55 a.m. in London**
  - **Could it continue? ICE Benchmark Administration limited direction to panel banks**

LIBOR/SOFR COMPARISON

- **SOFR – Secured Overnight Financing Rate**
  - **FRB of New York began publishing it daily at 8:30 a.m. ET in April, 2018**
  - **Reflects overnight US Treasury repo transactions**
  - **Based solely on transaction data in a market of over $600 billion in transactions**
  - **May only replace US dollar LIBOR, and thus other LIBOR replacements for other currencies are being proposed**
  - **Secured transactions**
  - **Began use in Overnight Index Swaps and SOFR futures contracts**

WHY IT MATTERS IN COMMERCIAL LENDING TRANSACTIONS

- **Interest rate determinations are contractual provisions subject to agreement of the parties**
- **Legacy loan documentation often only contemplates either:**
  - **Temporary unavailability of LIBOR**
  - **Illegality of LIBOR**
- **Prime rate/base rate:**
  - **Are not transactions based so less dynamic**
  - **Often more expensive**

CURRENT APPROACHES ON NEW TRANSACTIONS AND AMENDMENTS

- **General principles:**
  - **Clear trigger on use of replacement index**
  - **Flexible enough to identify new index rate**
  - **Specific enough so new index rate can be applied**
  - **Minimize market distortions**

CURRENT APPROACHES ON NEW TRANSACTIONS AND AMENDMENTS (CONTINUED)

- **Lender's perspective:**
  - **Provide for published – e.g. by ICE Benchmark Administration – successor to LIBOR**
  - **Provide lender with discretion as to identifying a new rate: "such successor rate index determined by the lender if the rate index described above shall become unavailable"**
  - **Provide for mutually agreed upon replacement: "the Lender and the Borrower shall seek jointly to agree upon an alternative rate of interest to LIBOR that gives consideration to the then prevailing market conventions..."**
  - **Fallback to prime rate/base rate or lender discretion**

CURRENT APPROACHES ON NEW TRANSACTIONS AND AMENDMENTS (CONTINUED)

- **Borrower's Perspective:**
  - **Address applicable margin distortions if new index rate is substantially different**
  - **Seat at the table**

PROBLEMATIC TRANSACTIONS

- **Syndicated Loans:**
  - Examine amendment provisions before fixing LIBOR replacement
  - Often require unanimous consent of affected lenders
- **Securitized Loans:**
  - $1.8 trillion in securitizations based on LIBOR pricing
  - Many will run off before 2021
  - Others may be impossible to amend since they are often bundles of consumer financings
- **Swaps on long duration term facilities**
  - $160 trillion notional value interest rate derivatives contracts
  - ISDA is working on solutions

QUESTIONS?

Syndicated Credit Review

Syndicated credit transactions, generally:

- **Credit facility (revolving loans, term loans, swing line loans, letters of credit, etc.) issued under a**
- **Single loan agreement,**
- **Documented and administered by an administrative agent, which facility is made to a borrower by**
- **Multiple lenders sharing pro rata on a pari passu basis.**

Syndicated Credit Review is a process by which a lender that is not the administrative agent reviews loan documentation for compliance with:

- **Credit approval,**
- **Policies and procedures, and**
- **Bank regulations.**

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Unique Interests of Syndicate Member

- Generally, but not always, syndicate members are aligned with lender that is the administrative agent.
- Commitments clearly defined.
- Draw stoppers for events of default, representations and warranties not being true.
- Remedies available in the event of credit deterioration.
- Obligations (including swaps and bank products) secured, when contemplated.
- Administration of the credit is operationally feasible for the agent and lenders.

Required Lenders

Many key determinations in a syndicated credit agreement are made by the "Required Lenders," not necessarily the administrative agent. For example:

- Waivers of events of default.
- Certain amendments.
- Direction of acceleration of the loan and exercise of remedies.
- Application of default interest.
- Appointment of successor administrative agent.

Required Lenders

- **Syndicate members should determine that "Required Lenders" means Lenders holding least 51% of the obligations.**
- **Club deal—single lender veto concern. Syndicate member will want to incorporate protective language so that a single lender does not have de facto control of "Required Lender" matters. For example:**

  "Required Lenders": At any time, Lenders, other than Defaulting Lenders, holding at least 51% of the aggregate unpaid principal amount of the Loans, excluding Loans held by Defaulting Lenders, or, if no Loans are at the time outstanding hereunder, Lenders, other than Defaulting Lenders, whose Total Percentages aggregate at least 51% (with Total Percentages being computed without reference to the Revolving Commitment Amounts and Term Loan Commitment Amounts); provided, that if at any date of determination, there are (i) two or fewer Lenders, "Required Lenders" shall constitute 100% of the Lenders other than Defaulting Lenders, or (ii) three Lenders and one Lender holds more than 51% of the aggregate unpaid principal amount of the Loans, "Required Lenders" shall constitute such Lender and at least one of the other two Lenders.

- **Defaulting Lenders should be excluded from "Required Lenders".**

Amendments and Waivers

- **Amendments and waivers must be in writing signed by the borrower and the required lenders (or the administrative agent at the direction of the required/majority lenders).**

  "Except as otherwise expressly set forth in this Agreement, no amendment or waiver of any provision of this Agreement or any other Loan Document, and no consent to any departure by the Borrower therefrom, shall be effective unless in writing executed by the Borrower and the Required Lenders, and acknowledged by the Administrative Agent, or by the Borrower and the Administrative Agent with the consent of the Required Lenders . . ."

- **The amendments provision should include certain "reserved" matters.**

Amendments and Waivers – Reserved Matters

For certain reserved matters, an amendment or waiver requires the written consent of each Lender that is directly and adversely affected. For example:

- **postpone any date scheduled for any payment of interest or principal or any fees**
- **extend or increase any commitment of any Lender without the written consent of such Lender [not "all Lenders"]**
- **reduce the interest rate or principal amount of any loan**
- **change pro rata sharing of payments**
- **waive any condition to funding**
- **change provision requiring expiration date of any L/C to occur after maturity**
- **change any provision of the "reserved matters" or the percentage in the definition of "Required Lenders"**

Amendments and Waivers – Accordion/Increase Options

- **An increase option permits amendments to the credit agreement to increase the overall commitment by increasing an existing lender's commitment or by adding a new lender.**
- **Syndicate member needs to confirm that the consent of the syndicate member is required to increase its consent.**

  "Notwithstanding anything herein to the contrary, no Lender shall have any obligation to agree to increase its Commitment, or to provide a Commitment, pursuant to this Section and any election to do so shall be in the sole discretion of such Lender."
- **Syndicate member that is not increasing wants to know that it is not going to be treated differently than the new lender/increasing lender.**

Funding Provisions – Events of Default

- **Syndicate member should be aware of circumstances where it may be obligated to fund an advance if a default has occurred.**
- **General policy is that the occurrence and continuance of a default is a draw stopper.**
- **Note that "Required Lenders" can waive events of default.**

> ***"Conditions to All Advances. The obligation of any Lender to make an Advance is subject to the following conditions:***
>
> ***(a) the representations and warranties of the Borrower set forth in this Agreement and in any other Loan Document shall be true and correct in all material respects (or, in the case of any such representation or warranty already qualified by materiality, in all respects) on and as of the date of such Advance (or, in the case of any such representation or warranty expressly stated to have been made as of a specific date, as of such specific date); and***
>
> ***(b) no Default shall have occurred and be continuing or would result from such Advance or from the application of proceeds thereof."***

Funding Provisions – Fronting Risk

- **Any syndicate member with fronting exposure (i.e. L/C issuer or swingline lender) must ensure that each lender has unconditional obligation to fund participating interests to backstop the syndicate member's fronting exposure.**

> ***"Each Lender hereby absolutely, unconditionally and irrevocably agrees, upon receipt of notice as provided above in this paragraph, to pay to the Administrative Agent, for account of the Swingline Lender, such Lender's Applicable Percentage of such Swingline Loan or Loans. Each Lender acknowledges and agrees that its obligation to acquire and fund participations in Swingline Loans pursuant to this paragraph is absolute, unconditional and irrevocable and shall not be affected by any circumstance whatsoever, including the occurrence and continuance of a Default or reduction or termination of the Commitments, and that each such payment shall be made without any offset, abatement, withholding or reduction whatsoever."***

Events of Default – Acceleration and Remedies

- **Grace and cure periods:**
  - **No cure period for principal payments and negative covenants.**
  - **Right to cure financial covenant defaults may apply, subject to negotiated limitations.**
- **Automatic acceleration for bankruptcy defaults.**
- **Required Lenders should be permitted to direct acceleration and exercise of remedies.**

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Events of Default – Default Interest

- **Application of default interest should be triggered upon an event of default and determination of administrative agent or required lenders.**
- **Automatically triggered on a bankruptcy default.**
- **Applies to all amounts outstanding or only overdue amounts.**
- **Compare, for example:**

> ***If any amount payable by the Borrower under this Agreement or any other Loan Document (including principal of any Loan, interest, fees and other amount) is not paid when due, whether at stated maturity, by acceleration or otherwise, such amount shall thereafter bear interest at a rate per annum equal to the applicable Default Rate. Upon the request of the Required Lenders, while any Event of Default exists, the Borrower shall pay interest on the principal amount of all Loans outstanding hereunder at a rate per annum equal to the applicable Default Rate.***

with

> ***Notwithstanding the foregoing, if any principal of or interest on any Loan or any Fees or other amount payable by the Borrower hereunder is not paid when due, whether at stated maturity, upon acceleration or otherwise, such overdue amount shall bear interest, after as well as before judgment, at a rate per annum equal to (i) in the case of overdue principal of any Loan, 2% plus the rate otherwise applicable to such Loan as provided in the preceding clauses of this Section 2.13 or (ii) in the case of any other overdue amount, 2% plus the rate applicable to ABR Loans as provided in clause (a) of this Section 2.13; provided, that this clause (c) shall not apply to any Event of Default that has been waived by the Lenders pursuant to Section 9.08.***

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Events of Default – Exit Strategy

Assignments and Participations—syndicate member should confirm the scope of, the following:

- **Borrower and administrative agent consent rights over assignments,**
- **"Eligible Assignee" concept, and**
- **Competitor exclusion for assignments.**

Market Expectations - Expenses and Indemnification

- **Borrower should be obligated to pay the costs of the administrative agent in connection with the credit and to pay all costs of the lenders in connection with enforcement of remedies.**
- **Syndicate member should confirm that Borrower has an obligation to indemnify, subject to carve out for gross negligence or willful misconduct as determined by a court of competent jurisdiction by final and nonappealable judgment.**
- **Administrative agent exculpation clause should include carve out for gross negligence or willful misconduct as determined by a court of competent jurisdiction by final and nonappealable judgment.**

Market Expectations – Negative Covenants

- Indebtedness
- Liens
- Fundamental Changes
- Dispositions
- Restricted Payments
- Investments
- Transactions with Affiliates
- Changes in Nature of Business
- Restriction on Use of Proceeds
- Financial Covenants

Market Expectations – Sanctions and Anti-corruption Laws

Representations and Warranties that:

- **Borrower and its related parties are not sanctioned persons.**
- **Borrower is in compliance with FCPA.**
- **Borrower has implemented policies and procedures to comply with sanctions and anti-corruption laws.**

> ***None of the Borrower, any of its Subsidiaries or any director, officer, of the Borrower or any of its Subsidiaries is an individual or entity ("person") that is, or is owned or controlled by persons that are: (i) the [subject/target] of any sanctions administered or enforced by the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC"), the U.S. Department of State, the United Nations Security Council, the European Union, Her Majesty's Treasury, or other relevant sanctions authority (collectively, "Sanctions"), or (ii) located, organized or resident in a country or territory that is, or whose government is, the subject of Sanctions (including, currently, Crimea, Cuba, Iran, North Korea, Sudan and Syria).***
>
> ***The Borrower, its Subsidiaries and their respective directors, officers and employees and, to the knowledge of the Borrower, the agents of the Borrower and its Subsidiaries, are in compliance with all applicable Sanctions and with the Foreign Corrupt Practices Act of 1977, as amended, and the rules and regulations thereunder (the "FCPA") and any other applicable anti-corruption law, in all material respects. The Borrower and its Subsidiaries have instituted and maintain policies and procedures designed to ensure continued compliance with applicable Sanctions, the FCPA and any other applicable anti-corruption laws.***

Market Expectations – Sanctions and Anti-corruption Laws

- **Affirmative covenant regarding implementation of policies and procedures to comply with sanctions and anti-corruption laws.**

  "The Borrower will maintain in effect policies and procedures designed to promote compliance by the Borrower, its Subsidiaries, and their respective directors, officers, employees, and agents with applicable Sanctions and with the FCPA and any other applicable anti-corruption laws."

DORSEY always ahead

Market Expectations – Sanctions and Anti-corruption Laws

- **Use of proceeds covenant prohibiting use of proceeds in violation of sanctions and anti-corruption laws.**

  "The Borrower will not request any Loan or Letter of Credit, and will not use, and the Borrower will ensure that its Subsidiaries and its or their respective directors, officers, employees and agents shall not use, the proceeds of any Loan or Letter of Credit in furtherance of an offer, payment, promise to pay, or authorization of the payment or giving of money, or anything else of value, to any Person in violation of any Anti-Corruption Laws. The Borrower will not, directly or indirectly, use the proceeds of the Loans or any Letter of Credit, or lend, contribute or otherwise make available such proceeds to any subsidiary, joint venture partner or other Person, (i) to fund any activities or business of or with any Person, or in any country or territory, that, at the time of such funding, is, or whose government is, the subject of Sanctions, or (ii) in any other manner that would result in a violation of Sanctions by any Person (including any Person participating in the Loans, whether as underwriter, advisor, investor, or otherwise)."

DORSEY always ahead

Market Expectations – Beneficial Ownership Certification

- **Beneficial Ownership Regulation, 31 C.F.R. § 1010.230.**
- **Syndicate member should confirm there is a closing condition requiring:**

  "At least five days prior to the Closing Date, if the Borrower qualifies as a "legal entity customer" under the Beneficial Ownership Regulation, the Borrower must deliver a Beneficial Ownership Certification in relation to Borrower."

  "Beneficial Ownership Certification" means a certification regarding beneficial ownership as required by the Beneficial Ownership Regulation.

- **Syndicate member should confirm there is an ongoing reporting requirement for:**

  "any change in the information provided in any Beneficial Ownership Certification that would result in a change to the list of beneficial owners identified in parts (c) or (d) of such certification;"

QUESTIONS?