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Structuring Multi-Lender Syndicated Loan Agreements

Crafting Provisions Covering Defaulting Lenders, Amend and Extend, and Pro Rata/Sharing to Address Lender and Borrower Objectives and Risks

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SYNDICATED LOAN AGREEMENTS: MULTI-LENDER ISSUES

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Framework for Discussion

- Syndicated lending has been premised on the idea that all similarly situated lenders should be treated on a *pro rata* basis, receiving their *pro rata* share of any payment, and sharing any disproportionate payment with other syndicate members
- A number of changes to credit documentation that evolved in response to the financial crisis have questioned this premise
- Premise is also affected by increasing convergence of investors in bank and bond markets as there is less sensitivity to pro rata treatment in latter market

Framework for Discussion

- Our discussion today will focus on three areas where this has occurred, and where traditional *pro rata* and sharing concepts no longer apply:
  - Defaulting Lender provisions,
  - "Amend and extend" provisions, and
  - Debt buyback provisions
- We will also focus on the evolution of incremental facilities ("accordions") and how those intersect with provisions allowing partial refinancing of term loans with other lenders and in capital markets.

DEFAULTING LENDER PROVISIONS

Background and Overview

- "Defaulting Lender" provisions were developed and refined in response to the financial market meltdown which led to the insolvency of, or default in funding by, financial institutions
- The Loan Syndication Trading Association, or LSTA as it is commonly known, developed defaulting lender provisions as part of its Model Credit Agreement Provisions, with the most recent version being effective August 1, 2012
- Most financial institutions have adopted the LSTA Model Credit Agreement defaulting lender provisions with some variation as part of their standard form of syndicated loan credit agreement
- The goal should be to balance the interests of the non-Defaulting Lenders and the agent with those of the Borrower

Background and Overview

- **The following slides discuss:**
  - Definition of "Defaulting Lender"
  - Consequences for Defaulting Lenders
  - Implications for Borrower and Non-Defaulting Lenders

Definition of "Defaulting Lender"

The LSTA Definition of "Defaulting Lender" consists of four prongs:

- Failure to make a required payment
- Notification or public statement of intention not to fund
- Failure to confirm intention to comply with funding obligations
- Lender (or affiliate) becoming subject of "Debtor Relief Law" or the appointment of a receiver, etc.

Definition of "Defaulting Lender"

Failure to Make a Required Payment

- **Failure to Fund all or any Portion of any Loan***:* "means, subject to Section [Defaulting Lender cure], any Lender that (a) has failed to (i) fund all or any portion of its Loans within two Business Days of the date such Loans were *required to be funded* hereunder unless such Lender notifies the Administrative Agent and the Borrower in writing that such failure is the result of such Lender's determination that one or more conditions precedent to funding (each of which conditions precedent, together with any applicable default, shall be specifically identified in such writing) has not been satisfied" *(clause (a)(i) of LSTA Defaulting Lender definition)*
  - **Parties may (i) resist exception for circumstance in which Lender notifies Administrative Agent of condition failure and (ii) reduce the number of Business Days**
- **Failure to Make any Other Required Payment:** "… any Lender that (a) has failed to…(ii) pay to the Administrative Agent, any Issuing Bank, any Swingline Lender or any other Lender any other amount required to be paid by it hereunder (including in respect of its participation in Letters of Credit or Swingline Loans) within two Business Days of the date when due" *(clause (a)(ii) of LSTA Defaulting Lender definition)*

Definition of "Defaulting Lender"

Notification or public statement of intention not to fund

"**. . .** any Lender that…(b) has notified the Borrower, the Administrative Agent or any Issuing Bank or Swingline Lender in writing that it does not intend to comply with its funding obligations hereunder, or has made a public statement to that effect (unless such writing or public statement relates to such Lender's obligation to fund a Loan hereunder and states that such position is based on such Lender's determination that a condition precedent to funding (which condition precedent, together with any applicable default, shall be specifically identified in such writing or public statement) cannot be satisfied)" *(clause (b) of LSTA Defaulting Lender definition)*

- **Parties may resist exception for statements based upon purported condition failure**
- **Prong may be expanded to include:**
  - Notices to other Lenders (vs. Borrower, Administrative Agent, Issuing Bank or Swingline Lender only)
  - Notices or public statements that are not in writing
  - Notices or public statements by a Lender of its intention not to fund its obligations under other agreements requiring such Lender to extend credit

Definition of "Defaulting Lender"

Failure to confirm intention to comply with funding obligations

- "… any Lender that…(c) has failed, within three Business Days after written request by the Administrative Agent or the Borrower, to confirm in writing to the Administrative Agent and the Borrower that it will comply with its prospective funding obligations hereunder (provided that such Lender shall cease to be a Defaulting Lender pursuant to this clause (c) upon receipt of such written confirmation by the Administrative Agent and the Borrower)" *(clause (c) of LSTA Defaulting Lender definition)*
  - **Parties may resist proviso permitting automatic cure upon delivery of confirmation to Administrative Agent and Borrower**
  - **Parties may request that the form of the writing be satisfactory (or reasonably satisfactory) to the Administrative Agent and/or the Borrower**

Definition of "Defaulting Lender"

Lender (or affiliate) becoming subject to proceeding under "Debtor Relief Laws"

"… any Lender that…(d) has, or has a direct or indirect parent company that has, (i) become the subject of a proceeding under any Debtor Relief Law, or (ii) had appointed for it a receiver, custodian, conservator, trustee, administrator, assignee for the benefit of creditors or similar Person charged with reorganization or liquidation of its business or assets, including the Federal Deposit Insurance Corporation or any other state or federal regulatory authority acting in such a capacity; provided that a Lender shall not be a Defaulting Lender solely by virtue of the ownership or acquisition of any equity interest in that Lender or any direct or indirect parent company thereof by a Governmental Authority so long as such ownership interest does not result in or provide such Lender with immunity from the jurisdiction of courts within the United States or from the enforcement of judgments or writs of attachment on its assets or permit such Lender (or such Governmental Authority) to reject, repudiate, disavow or disaffirm any contracts or agreements made with such Lender" *(clause (d) of LSTA Defaulting Lender definition)*

Definition of "Defaulting Lender"

Lender (or affiliate) becoming subject to proceeding under "Debtor Relief Law" (cont'd)

- **Includes direct or indirect parent companies of Lenders**
- **Lenders whose equity interests are owned or acquired by a Governmental Authority are not *de facto* Defaulting Lenders**
- **In some cross border transactions, an otherwise solvent lender will not be a *de facto* Defaulting Lender as a result of the precautionary appointment of an administrator under applicable law if such law requires that such appointment not be publicly disclosed**
- **Prong may be expanded to include any Lender who:**
  - has taken any action in furtherance of, or indicated its consent to, approval of or acquiescence in, any insolvency proceeding
  - is generally unable to pay its debts as they become due

Consequences for Defaulting Lenders

- **Waivers and Amendments**
- **Entitlement to Fees**
- **"Yank-A-Bank"**

Consequences for Defaulting Lenders

Waivers and Amendments

- **Loans and Commitments of Defaulting Lenders are generally disregarded in determination of Required Lender votes**
- **Under the LSTA Model Credit Agreement Provisions, "if any Lender becomes a Defaulting Lender…such Defaulting Lender's right to approve or disapprove any amendment, waiver or consent with respect to this Agreement shall be restricted as set forth in the definition of 'Required Lenders'", which provides that "the Total Credit Exposure of any Defaulting Lender shall be disregarded in determining Required Lenders at such time" (*Defaulting Lenders – Defaulting Lender Adjustments – Waivers and Amendments)***
- **Some credit agreements limit Defaulting Lender voting rights beyond the "sacred rights" items to:**
  - increases or extensions of Commitments and
  - amendments, modifications or consents requiring consent of all Lenders or all affected Lenders that *disproportionately and adversely* affect the Defaulting Lender as compared to affected non-Defaulting Lenders

Consequences for Defaulting Lenders

Entitlement to Fees

- LSTA Model Credit Agreement Provisions alter the payment of fees otherwise due a Defaulting Lender.
  - **Commitment Fees:** "No Defaulting Lender shall be entitled to receive any Commitment Fee for any period during which that Lender is a Defaulting Lender (and the Borrower shall not be required to pay any such fee that otherwise would have been required to have been paid to that Defaulting Lender)" (*Defaulting Lenders – Defaulting Lender Adjustments – Certain Fees)*
  - **Facility/Utilization Fees:** "Each Defaulting Lender shall be entitled to receive a Facility Fee [or Utilization Fee] for any period during which that Lender is a Defaulting Lender only to extent allocable to the sum of (1) the outstanding principal amount of the Revolving Loans funded by it, and (2) its Applicable Percentage of the stated amount of Letters of Credit for which it has provided Cash Collateral pursuant to Section [Cash Collateral]" *(Defaulting Lenders – Defaulting Lender Adjustments – Certain Fees)*

Consequences for Defaulting Lenders

Entitlement to Fees (cont'd)

- **Letter of Credit Fees:** "Each Defaulting Lender shall be entitled to receive [L/C Fees] for any period during which that Lender is a Defaulting Lender only to the extent allocable to its Applicable Percentage of the stated amount of Letters of Credit for which it has provided Cash Collateral pursuant to Section [*Cash Collateral*]" (*Defaulting Lenders-Defaulting Lender Adjustments-Certain Fees*)
  - **Some credit agreements do not permit payment of letter of credit fees to Defaulting Lenders under any circumstance**

Consequences for Defaulting Lenders

Entitlement to Fees (cont'd)

- **Application of Fees:** "With respect to any [Facility Fee, Utilization Fee or L/C Fee] not required to be paid to any Defaulting Lender pursuant to clause (A) or (B) above, the Borrower shall (x) pay to each Non-Defaulting Lender that portion of any such fee otherwise payable to such Defaulting Lender with respect to such Defaulting Lender's participation in L/C Obligations or Swingline Loans that has been reallocated to such Non-Defaulting Lender pursuant to clause (iv) below, (y) pay to each Issuing Bank and Swingline Lender, as applicable, the amount of any such fee otherwise payable to such Defaulting Lender to the extent allocable to such Issuing Bank's or Swingline Lender's Fronting Exposure to such Defaulting Lender, and (z) not be required to pay the remaining amount of any such fee." (*Defaulting Lenders-Defaulting Lender Adjustments-Certain Fees*)
  - **Borrower may request elimination of prong requiring application of unpaid fees to Fronting Exposure if such Fronting Exposure has been Cash Collateralized**

Consequences for Defaulting Lenders

"Yank-A-Bank"

- The LSTA Model Credit Agreement Provisions permit the Borrower to force a Defaulting Lender to assign its Loans and Commitments at par to an eligible assignee willing to assume such Loans and Commitments (*Mitigation Obligations; Replacement of Lenders – Replacement of Lenders*)
  - **Some credit agreements also permit the Borrower to terminate the Commitments of, and repay all Loans and other obligations owing to, a Defaulting Lender**

Implications for Other Parties

- **Waterfall Provisions**
- **Reallocation of Fronting Exposure**
- **Cash Collateral**
- **New Letters of Credit and Swingline Loans**

Implications for Other Parties

Waterfall Provisions

- The LSTA Model Credit Agreement provides that payments of principal, interest, fees or other amounts received by the Administrative Agent for the account of any Defaulting Lender will be applied by the Administrative Agent in accordance with a specified waterfall
  - Some credit agreements provide Borrower consent right over application of payments owing to Defaulting Lenders

Implications for Other Parties

Waterfall Provisions (cont'd)

- **LSTA Model Credit Agreement Order of Application**
  - First: to the payment of any amounts owing by the relevant Defaulting Lender to the Administrative Agent
  - Second: to the payment on a pro rata basis of any amounts owing by the relevant Defaulting Lender to any Issuing Bank or Swingline Lender
  - Third: to Cash Collateralize the Issuing Banks' Fronting Exposure with respect to the relevant Defaulting Lender in accordance with Section [*Cash Collateral*]

Implications for Other Parties

Waterfall Provisions (cont'd)

- **LSTA Model Credit Agreement Order of Application (cont'd)**
  - Fourth: as the Borrower may request (so long as no Default or Event of Default exists), to the funding of any Loan in respect of which the relevant Defaulting Lender has failed to fund its portion thereof as required by this Agreement, as determined by the Administrative Agent
    - *Some credit agreements do not include Default "trigger"*
  - Fifth: if so determined by the Administrative Agent and the Borrower, to be held in a deposit account and released pro rata in order to (x) satisfy the relevant Defaulting Lender's potential future funding obligations with respect to Loans under this Agreement and (y) Cash Collateralize the Issuing Banks' future Fronting Exposure with respect to such Defaulting Lender with respect to future Letters of Credit issued under this Agreement, in accordance with Section [*Cash Collateral*]
    - *Some credit agreements do not require application of payments to Cash Collateralize future Fronting Exposure with respect to future Letters of Credit*

Implications for Other Parties

Waterfall Provisions (cont'd)

- **LSTA Model Credit Agreement Order of Application (cont'd)**
  - Sixth: to the payment of any amounts owing to the Lenders, the Issuing Banks or Swingline Lenders as a result of any judgment of a court of competent jurisdiction obtained by any Lender, the Issuing Banks or Swingline Lenders against the relevant Defaulting Lender as a result of such Defaulting Lender's breach of its obligations under this Agreement
  - Seventh: so long as no Default or Event of Default exists, to the payment of any amounts owing to the Borrower as a result of any judgment of a court of competent jurisdiction obtained by the Borrower against the relevant Defaulting Lender as a result of such Defaulting Lender's breach of its obligations under this Agreement
    - *Some credit agreements do not include Default "trigger"*
  - Eighth: to the relevant Defaulting Lender or as otherwise directed by a court of competent jurisdiction

Implications for Other Parties

Waterfall Provisions (cont'd)

- **LSTA Model Credit Agreement Order of Application (cont'd)**
  - Override: If (x) the relevant payment is a payment of the principal amount of any Loans or L/C Disbursements in respect of which the relevant Defaulting Lender has not fully funded its appropriate share, and (y) such Loans were made or the related Letters of Credit were issued at a time when the conditions set forth in Section [*Conditions to All Credit Extensions*] were satisfied or waived, such payment shall be applied solely to pay the Loans of, and L/C Disbursements owed to, all Non-Defaulting Lenders on a pro rata basis prior to being applied to the payment of any Loans of, or L/C Disbursements owed to, such Defaulting Lender until such time as all Loans and funded and unfunded participations in L/C Obligations and Swingline Loans are held by the Lenders pro rata in accordance with the Commitments under the applicable Facility without giving effect to Section [*Defaulting Lender – Reallocation of Participation to Reduce Fronting Exposure*] (*Defaulting Lenders – Defaulting Lender Adjustments – Defaulting Lender Waterfall*)
    - *Parties may request to limit override to payments in respect of Revolving Loans only*

Implications for Other Parties

Reallocation of Fronting Exposure

- The participations of Defaulting Lenders in L/C Obligations and Swingline Loans are typically reallocated among Non-Defaulting Lenders in accordance with their respective pro-rata shares
- LSTA Model Credit Agreement Provisions
  - "all or any part of [a] Defaulting Lender's participation in L/C Obligations and Swingline Loans shall be reallocated among the Non-Defaulting Lenders in accordance with their respective Applicable Percentages (calculated without regard to such Defaulting Lender's Commitment) but only to the extent that (x) the conditions set forth in Section [*Conditions to All Credit Extensions*] are satisfied at the time of such reallocation (and, unless the Borrower shall have otherwise notified the Administrative Agent at such time, the Borrower shall be deemed to have represented and warranted that such conditions are satisfied at such time), and (y) such reallocation does not cause the aggregate Revolving Credit Exposure of any Non-Defaulting Lender to exceed such Non-Defaulting Lender's Revolving Commitment." (*Defaulting Lenders-Defaulting Lender Adjustments-Reallocation of Participations to Reduce Fronting Exposure)*
  - *Borrowers may request automatic reallocation, such that there is no requirement that conditions to borrowing be satisfied*

Implications for Other Parties

- **Cash Collateralization**
  - The Borrower is generally required to Cash Collateralize Fronting Exposure of Non-Defaulting Lenders
  - Under the Model LSTA Credit Agreement Provisions, "if [reallocation] cannot, or can only partially, be effected, the Borrower shall, without prejudice to any right or remedy available to it hereunder or under law, (x) first, prepay Swingline Loans in an amount equal to the Swingline Lenders' Fronting Exposure and (y) second, Cash Collateralize the Issuing Banks' Fronting Exposure in accordance with the procedures set forth in Section [*Cash Collateral*]" (*Defaulting Lenders-Defaulting Lender Adjustments-Cash Collateral, Repayment of Swingline Loans)*
  - Ability to make alternative credit arrangements (e.g., provision of a "backstop" letter of credit") is, as in the LSTA form, often addressed in the Cash Collateralization provisions

Implications for Other Parties

- **Cash Collateralization (cont'd)**
  - Under the Model LSTA Credit Agreement Provisions, "Cash Collateralize" means "to [deposit in a Controlled Account or to] pledge and deposit with or deliver to the Administrative Agent, for the benefit of one or more of the Issuing Banks or Lenders, as collateral for L/C Obligations or obligations of Lenders to fund participations in respect of L/C Obligations, cash or deposit account balances or, if the Administrative Agent and each applicable Issuing Bank shall agree in their sole discretion, other credit support, in each case pursuant to documentation in form and substance satisfactory to the Administrative Agent and each applicable Issuing Bank."
    - *Model LSTA Credit Agreement provisions do not indicate the required amount of Cash Collateral, but Borrowers typically request to specify 100%*
    - *Issuing Bank's right to consent to documentation governing Cash Collateralization may be subject to minimum L/C Obligation threshold*

Implications for Other Parties

- **New Letters of Credit and Swingline Loans**
  - Some credit agreements do not permit the Borrower to increase a Lender's Fronting Exposure while there is a Defaulting Lender as a result of a new extension of credit
  - Under the Model LSTA Credit Agreement provisions, "so long as any Lender is a Defaulting Lender, (i) the Swingline Lender shall not be required to fund any Swingline Loans unless it is satisfied that it will have no Fronting Exposure after giving effect to such Swingline Loan and (ii) no Issuing Bank shall be required to issue, extend, renew or increase any Letter of Credit unless it is satisfied that it will have no Fronting Exposure after giving effect thereto." (*Defaulting Lenders-New Swingline Loans/Letters of Credit)*
    - *From the Borrower's perspective, this is only appropriate after giving effect to reallocation*

AMEND AND EXTEND PROVISIONS, INCREMENTAL FACILITIES AND PARTIAL REFINANCINGS

Background and Overview

- "Amend and Extend" refers to an amendment to extend the tenor of a portion of loans under a credit agreement with only the consent of each extending lender and, if necessary, "Required Lenders," but not 100% of lenders
- The ability to extend tenor without the consent of 100% of lenders depends on the amendment provisions of the credit agreement
- During the financial crisis, some borrowers, confronted with an inability to refinance, found that their credit agreements were drafted in a way that allowed amendments to extend tenor – albeit with increased pricing – without the consent of all lenders

Background and Overview

- This flexibility was generally viewed as beneficial not only to borrowers, but also to lenders as they prevented borrower defaults, while bringing pricing more in line with market
- Even where these amendments were permitted, there were often difficult issues of contractual interpretation, resulting in the development of express mechanics in credit facilities to permit these "amend and extends"

Background and Overview

- **The following slides discuss:**
  - The terms of "amend and extend" provisions and the issues that continue to arise in negotiations
  - What to look for if trying to "amend and extend" under an agreement which lacks the post-financial crisis technology
  - The differences between "amend and extends" and "accordions" or incremental facilities

What Amendments are Permitted?

Pricing

Pricing increases on extended loans – may be by way of interest margins, OID, LIBOR floors, other fees

- Upfront fees are generally paid only to extending lenders, but if those do not include Required Lenders, fees may need to be paid to consenting, but non-extending, lenders as well
- Unlike incremental facilities, there are typically no MFN pricing requirements applicable to original loans when simply exercising amend and extend rights

What Amendments are Permitted?

Tenor and Amortization

Amendment may include reduction in amortization (with term loans), as well as extension of final maturity

- Issue of whether maturity must be at least one year beyond latest existing maturity
- Potential for multiple exercises and multiple final maturity dates – sometimes number is capped
- Need for ultimate outside date for final maturity of extended tranche if capital structure has second lien or subordinated debt

What Amendments are Permitted?

Creation of New Tranches of Debt – Pro Rata Issues

- ***Prepayments/Commitment Reductions* –** can Borrower elect to prepay each tranche separately or must prepayments be pro rata across extended and non-extended tranches? Differences between revolving loans and term loans
- ***Borrowings* –** in the revolving credit context, market expectation is that borrowings will be pro rata across extended and non-extended tranches
- ***Letters of Credit* –** issue of LC termination after original maturity but before extended maturity and how to allocate participation risk
- ***Tranche Voting* –** provide for appropriate tranche voting to take into account extended tranches

What Amendments are Permitted?

Covenants/Collateral

- May not be amended, or amended covenants may not go into effect until after original final maturity date or the non-extended loans receive the benefit of such covenants
- No differences in collateral for extended loans

Other Areas for Discussion

- Ability to convert term loans into revolving loans and vice versa

Process and Conditions

- **Timing of extension – any time or during specified period before maturity?**
  - Specified period is unusual in current market environment
- **Ability to include new lenders in extension**
- **Conditions to effectiveness:**
  - No default and/or reps true
  - Deliverables – resolutions, opinions, reaffirmation of guarantees, etc. – sometimes only on request of agent

Relationship to Amendment and Sharing Provisions

- **Ensure that voting on amend and extend overrides any general voting rules that may conflict**
- **Provide for appropriate tranche voting for new tranches of extended loans**
  - Tranche voting is unusual in the current market environment
- **Ensure that sharing provisions reflect sharing by tranche**
  - Amendment and sharing provisions should reflect possibility of multiple tranches if credit agreement contains amend and extend provisions
  - Amend and extend provisions should also state that the terms provided therein override any contrary provisions in amendment section and in general *pro rata* treatment and sharing sections

Basic Credit Agreement Requirements Needed

Even without detailed provisions spelling out process and terms to "amend and extend," the same result may be accomplished if the credit agreement:

- Provides for extension of tenor with consent of "each affected lender" – not 100% of lenders
- Allows for extended loans to be treated as a new tranche – or else *pro rata* prepayments must be acceptable to Borrower
- If non-*pro rata* prepayment among tranches is required, amendments to *pro rata* and sharing provisions must not require 100% vote, and those provisions must work in certain respects on a tranche-by-tranche basis after completion of "amend and extend"

Differences and Similarities with Incremental Facilities

- Unlike "amend and extends," incremental term loan facilities typically require MFN pricing (at least for an initial period of 12-24 months) to preserve no more than 50 bps spread if incremental pricing exceeds original pricing
- With incremental facilities, new revolving facilities may be a fully separate tranche, without requirement of pro rata borrowing or prepayment across original and incremental revolving tranches
- But same LC issues exist when a new revolver tranche is added by accordion, as when added through an "amend and extend"

Differences and Similarities with Incremental Facilities

- With incremental facilities, same need to ensure that amendment and sharing provisions allow for addition of new tranches as with amend and extends
- Unlike "amend and extends," incremental facilities provide additional credit and additional amount will be capped based on fixed amount or through pro forma compliance with a leverage ratio (i.e. senior secured first lien or total leverage), often to allow borrowing back to closing date leverage
- Unlike "amend and extends," incremental facilities may be available as subordinated and unsecured or second lien facilities, though there is an interplay with pricing

Differences and Similarities with Incremental Facilities

- Because incremental facilities are a frequent source of funding for acquisitions, conditions to funding – at least when the purpose is to consummate an acquisition – must be tightly controlled, with SunGard funds certain principles governing conditionality in acquisition context.

Partial Refinancings

- Designed to give Borrowers flexibility to incur additional debt to partially refinance debt under the credit agreement
- Like accordions, may be incurred under a separate facility or as debt securities, subject to certain conditions (e.g. maturity, intercreditor arrangements)
- Ability to incur refinancing debt that shares equally and ratably in collateral without required lender approval
- Interface with incremental facilities; provides an alternative to accordion use to access different markets to incur optimal debt from Borrower perspective

DEBT BUYBACKS

Background and Overview

- **Traditionally, bank lenders expected to be paid back at par, *pro rata* according to loans and other exposure then outstanding. Traditional *pro rata* provisions in loan agreements:**
  - Stipulated that all similarly situated lenders would receive the identical proportionate repayment and any lender that benefited disproportionately would be obligated to purchase participations in loans held by non-benefiting lenders
  - Frequently required 100% lender approval to modify, making any non-*pro rata* payment impractical

Background and Overview

- During the financial crisis, even good credits were trading at prices well below par, making the option of purchasing (and retiring) their own debt at a discount very attractive to Borrowers and financial sponsors
  - Loan documentation for sponsor transactions increasingly provides for loan buybacks by Borrowers and by financial sponsors on a non-*pro rata* basis
- Purchases may be accomplished through open market purchases or modified Dutch auction

Non-*Pro Rata* Buybacks
Dutch Auction

- An auction structure in which the price offered is set after taking all bids and determining the highest price at which the total offering can be sold
- Permitted to be conducted by the Borrower, its subsidiaries and their "affiliates"

Non-*Pro Rata* Buybacks—Open Market Purchases

- A directly negotiated purchase and sale of loans at an agreed price involving one or more lenders
- Permitted to be conducted by "affiliates" of the Borrower, with customary restrictions discussed below, and increasingly by the Borrower and its subsidiaries

Non-*Pro Rata* Buybacks — Permitted Parties

- Borrower and its subsidiaries
- Affiliates—Sponsors, other investors and affiliates, but generally split into "Non-Debt Fund Affiliates" and "Debt Fund Affiliates"
- Debt Fund Affiliates
  - An affiliate of the sponsor that is engaged in the business of holding loans but (i) does not share investment decision personnel with any equity fund that holds an investment in the Borrower or (ii) has separate fiduciary duties
  - Excluded from most restrictions on conducting buybacks and holding loans

Non-*Pro Rata* Buybacks — Conditions and Restrictions

Condition/ Restriction	Borrower and subs		Non-Debt Fund Affiliate	
	Open Market	Dutch Auction	Open Market	Dutch Auction
No Default or Event of Default	X	X		
No use of the revolver	X	X		
Loans automatically cancelled	X	X		
Term loans only	X	X	X	X
Cap on loans held (usually 20 to 30%)			X	X
Voting restrictions			X	X
Lender meeting/information restrictions			X	X
MNPI Representation		X*		

* Historically existed, but increasingly rare

Non-*Pro Rata* Buybacks — Conditions and Restrictions

- Cap on percentage of term loans – or each tranche - that may be owned by sponsor-affiliated lenders (typically 20-30%) after giving effect to simultaneous cancellations
- Limits on voting rights (affiliated lenders cannot be disproportionately impacted or have material economic terms adversely affected)
- Acquired loans are voted in same proportion as other lenders
- No lender-only information or participation in lender-only meetings
- No amendment fees

Non-*Pro Rata* Buybacks — Conditions and Restrictions

- "No MNPI" rep is rarely seen any more: in a Dutch auction, lenders increasingly willing to forgo Borrower representation to lenders that it is not in possession of any material non-public information when purchasing its own debt—This requirement is becoming less common

Non-*Pro Rata* Buybacks — Documentation Considerations

Generally:

- No increase to EBITDA as a result of any gains associated with cancellation of indebtedness income
- Excess cash flow may be reduced by amounts paid by the Borrower to buy back debt pursuant to open market purchase, or Dutch auction, or Dutch auction only

Reverse Dutch Auctions

The mechanics for making a *pro rata* offer to all lenders, simplified:

- Borrower announces to lenders the target amount of debt it wishes to purchase and a price range
- Lenders must submit offers of amount of loans to be sold and price they are willing to accept by deadline
- Offers to sell are accepted within the specified range starting with the lowest price, and increasing until the target amount of debt is covered, with all selling lenders receiving the last (highest) price (subject to proration if necessary)

Other Circumstances for Non-*Pro Rata* Buy Backs

- Remedy for violations of assignment provisions (e.g., assignment to a disqualified institution)

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Angela L. Fontana is co-head of the US Banking & Finance practice and is resident in the firm's Dallas office. Ms. Fontana's practice consists primarily of financing transactions and debt restructurings. She represents both borrowers and financial institutions, and has been involved in a wide variety of financing transactions in both the United States and abroad. Ms. Fontana's experience includes investment grade lending, commercial paper facilities, letter of credit facilities, cash flow-based lending, asset-based lending, mezzanine financing and workouts and restructurings.

Ms. Fontana has recently represented General Growth Properties, Inc. in its corporate credit facility and financing the spin-off of Rouse Properties, Inc., Generac Power Systems in its credit facilities refinancing and Darling International Inc. in financing its acquisition of Griffin Industries. She also represents a variety of private equity sponsors. Recent acquisition financings include Berkshire Partners and OMERS in the acquisition of Husky Injection Molding Systems, CCMP in the acquisition of Milacron and Ollie's Bargain Outlet, Ontario Teachers Pension Plan Board in the acquisition of Heartland Dental, CVC Capital Partners in the acquisition of Cunningham Lindsay, THL Partners in the refinancing of Intermedix and CTI Foods, Centerbridge Partners, L.P. in the acquisition of P.F. Chang's China Bistro, Advent International Corporation in the acquisition of the coating resins business of Cytec and Charterhouse Capital Partners in its acquisition of Armacell Group.

In 2013, the Texas Diversity Council selected Ms. Fontana as one of 20 "Most Powerful & Influential Women" in Texas. She is regularly recognized as a leading lawyer in Banking & Finance by *Chambers USA* and was selected as a finalist for the *Chambers USA* 'Women in Law' Awards for 2012 and 2013 in the category of Finance. Ms. Fontana is also named a "leading" Practitioner in Banking in *The International Who's Who of Banking Lawyers* 2007-2013; a leading lawyer in Banking & Finance in *Chambers Global,* a recognized lawyer in *The Legal 500 USA*; a leading lawyer for bank lending in US *IFLR 1000*; named in *The Best Lawyers in America* 2009-2013 and is included in the inaugural edition of the *Guide to the World's Leading Women in Business Law*. She was also named a Texas Super Lawyer in 2003-2012 and *D Magazine*'s Best Lawyers in Dallas 2011-2013. Ms. Fontana is on the board of trustees of Dallas Heritage Village and the Iowa Law School Foundation Board of Directors. She is also a member is also a member of the City of University Park Employee Benefits Committee.

Ms. Fontana graduated with distinction from the University of Iowa College of Law in 1989. Ms. Fontana also earned a B.B.A. in 1987 from the University of Iowa College of Business with emphasis on accounting.

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Ann Makich is a partner in the corporate group at Cahill Gordon & Reindel LLP. Her practice is principally focused on leveraged financings for acquisitions, recapitalizations and going-private transactions. Her clients include leading investment banking firms and commercial banks. Ms. Makich has represented underwriters, placement agents and initial purchasers in public and private high-yield and investment grade debt offerings and syndicated bank loans in a wide range of industries, including media and broadcasting, manufacturing and mining. She also has recent experience representing borrowers in syndicated loans. She serves as designated underwriters' counsel for a number of investment-grade issuers with respect to both equity and debt offerings.

Ms. Makich has participated as a speaker for several years at PLI's Leveraged Financing Conference, as well as presenting in PLI's seminar "How To Read Financial Statements 2012". She is recognized as a leading banking and finance lawyer in New York by *Chambers USA*.

Ms. Makich joined Cahill in 1996 following her graduation from Columbia Law School, where she was a Stone Scholar. She graduated from Rice University with a B.A. in Architecture in 1991.

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Marissa Wesely is a partner in the firm's Corporate Department. Ms. Wesely has been involved in a wide range of domestic and international finance transactions, with a current emphasis on leveraged acquisition finance and recapitalization transactions, principally advising corporate borrowers and equity sponsors. Recent representations include: Algeco Scotsman in connection with a global ABL facility as part of its global recapitalization; Affinia Group in the financing of the spin off of its brake business; L-3 Communications in the financing of its spin-off of an independent, publicly-traded government services company; Peabody Energy Corporation in the financing of its acquisition of MacArthur Coal; and Sealed Air Corporation in the financing of its acquisition of Diversey.

Ms. Wesely was named Finance Lawyer of the Year at the Chambers 2013 Women in Law Awards and has been recognized over a number of years as a leading lawyer in banking and finance by Chambers & Partners, The Best Lawyers in America , Euromoney's World's Leading Women in Business Law, and the U.K. publication, "Which Lawyer?" She speaks and writes regularly on issues relating to her practice, including at annual PLI Leveraged Financing and Acquisition Financing Conferences since 2006 and at an LSTA panel on Leveraged Finance Commitment Papers in February 2011. Earlier in her career, Ms. Wesely designed and taught courses in Beijing and Jakarta on international trade and financing for the former Harvard Institute for International Development.

Ms. Wesely is a member of the Boards of Directors of Legal Momentum (The Women's Legal Defense and Education Fund) and The Global Fund for Women, a member of the Board of Trustees of the Wenner-Gren Foundation and a member of the Executive Committee of Direct Women. Ms. Wesely is a 2010 recipient of the Diversity Champion Award from the Association of the Bar of the City of New York. In 2009, she received the Kay Crawford Murray Award from the New York State Bar Association in recognition of her efforts to mentor women and promote diversity in the legal profession.

Ms. Wesely joined Simpson Thacher in 1980 and spent three years in the firm's London office. She graduated from Williams College in 1976, *magna cum laude*, and received her J.D., *cum laude*, from Harvard Law School in 1980.

Appendix 1

"Defaulting Lender" means, subject to Section [*Defaulting Lender Cure*], any Lender that (a) has failed to (i) fund all or any portion of its Loans within two Business Days of the date such Loans were required to be funded hereunder unless such Lender notifies the Administrative Agent and the Borrower in writing that such failure is the result of such Lender's determination that one or more conditions precedent to funding (each of which conditions precedent, together with any applicable default, shall be specifically identified in such writing) has not been satisfied, or (ii) pay to the Administrative Agent, any Issuing Bank, any Swingline Lender or any other Lender any other amount required to be paid by it hereunder (including in respect of its participation in Letters of Credit or Swingline Loans) within two Business Days of the date when due, (b) has notified the Borrower, the Administrative Agent or any Issuing Bank or Swingline Lender in writing that it does not intend to comply with its funding obligations hereunder, or has made a public statement to that effect (unless such writing or public statement relates to such Lender's obligation to fund a Loan hereunder and states that such position is based on such Lender's determination that a condition precedent to funding (which condition precedent, together with any applicable default, shall be specifically identified in such writing or public statement) cannot be satisfied), (c) has failed, within three Business Days after written request by the Administrative Agent or the Borrower, to confirm in writing to the Administrative Agent and the Borrower that it will comply with its prospective funding obligations hereunder (provided that such Lender shall cease to be a Defaulting Lender pursuant to this clause (c) upon receipt of such written confirmation by the Administrative Agent and the Borrower), or (d) has, or has a direct or indirect parent company that has, (i) become the subject of a proceeding under any Debtor Relief Law, or (ii) had appointed for it a receiver, custodian, conservator, trustee, administrator, assignee for the benefit of creditors or similar Person charged with reorganization or liquidation of its business or assets, including the Federal Deposit Insurance Corporation or any other state or federal regulatory authority acting in such a capacity; provided that a Lender shall not be a Defaulting Lender solely by virtue of the ownership or acquisition of any equity interest in that Lender or any direct or indirect parent company thereof by a Governmental Authority so long as such ownership interest does not result in or provide such Lender with immunity from the jurisdiction of courts within the United States or from the enforcement of judgments or writs of attachment on its assets or permit such Lender (or such Governmental Authority) to reject, repudiate, disavow or disaffirm any contracts or agreements made with such Lender. Any determination by the Administrative Agent that a Lender is a Defaulting Lender under any one or more of clauses (a) through (d) above shall be conclusive and binding absent manifest error, and such Lender shall be deemed to be a Defaulting Lender (subject to Section [*Defaulting Lender Cure*]) upon delivery of written notice of such determination to the Borrower, each Issuing Bank, each Swingline Lender and each Lender.

Appendix 2

Sample Traditional Pro Rata Sharing Provision

- *Pro Rata* Treatment
  - Each payment by Borrower of interest in respect of the Loans shall be applied to the amounts of such obligations owing to the Lenders *pro rata* according to the respective amounts then due and owing to the Lenders
  - Each payment on account of principal of the Term Loans shall be allocated among the Term Loan Lenders *pro rata* based on the principal amount of the Term Loans held by the Term Loan Lenders.[1] Each payment by Borrower on account of principal of the Revolving Borrowings shall be made *pro rata* according to the respective outstanding principal amounts of the Revolving Loans then held by the Revolving Lenders
- Insufficient Funds. If at any time insufficient funds are received by and available to the Administrative Agent to pay fully all amounts of principal, Reimbursement Obligations, interest and fees then due hereunder, such funds shall be applied (i) *first*, toward payment of interest and fees then due hereunder, ratably among the parties entitled thereto in accordance with the amounts of interest and fees then due to such parties, and (ii) *second*, toward payment of principal and Reimbursement Obligations then due hereunder, ratably among the parties entitled thereto in accordance with the amounts of principal and Reimbursement Obligations then due to such parties. It is understood that the foregoing does not apply to any adequate protection payments under any federal, state or foreign bankruptcy, insolvency, receivership or similar proceeding, and that the Administrative Agent may, subject to any applicable federal, state or foreign bankruptcy, insolvency, receivership or similar orders, distribute any adequate protection payments it receives on behalf of the Lenders to the Lenders in its sole discretion (i.e., whether to pay the earliest accrued interest, all accrued interest on a *pro rata* basis or otherwise)

Appendix 2 (Cont'd)

- Sharing of Set-Off. If any Lender (and/or the Issuing Bank, which shall be deemed a "Lender" for purposes of this Section [ ](c)) shall, by exercising any right of setoff or counterclaim or otherwise, obtain payment in respect of any principal of or interest on any of its Loans or other Obligations resulting in such Lender's receiving payment of a proportion of the aggregate amount of its Loans and accrued interest thereon or other Obligations greater than its *pro rata* share thereof as provided herein, then the Lender receiving such greater proportion shall (i) notify the Administrative Agent of such fact, and (ii) purchase (for cash at face value) participations in the Loans and such other obligations of the other Lenders, or make such other adjustments as shall be equitable, so that the benefit of all such payments shall be shared by the Lenders ratably in accordance with the aggregate amount of principal of and accrued interest on their respective Loans and other amounts owing them, *provided* that:
  - if any such participations are purchased and all or any portion of the payment giving rise thereto is recovered, such participations shall be rescinded and the purchase price restored to the extent of such recovery, without interest; and
  - the provisions of this paragraph shall not be construed to apply to (x) any payment made by Borrower pursuant to and in accordance with the express terms of this Agreement or (y) any payment obtained by a Lender as consideration for the assignment of or sale of a participation in any of its Loans or participations in LC Disbursements to any assignee or participant, other than to Borrower or any Subsidiary thereof (as to which the provisions of this paragraph shall apply)
- Each Loan Party consents to the foregoing and agrees, to the extent it may effectively do so under applicable Requirements of Law, that any Lender acquiring a participation pursuant to the foregoing arrangements may exercise against such Loan Party rights of setoff and counterclaim with respect to such participation as fully as if such Lender were a direct creditor of such Loan Party in the amount of such participation