Syndicated Loan Agreements: Amend and Extend, Borrower and Affiliate Lender Buybacks, Cashless Rolls and Disqualified Institutions

Structuring Provisions to Address Lender and Borrower Objectives and Risks

THURSDAY, NOVEMBER 13, 2014

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today’s faculty features:

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Tess Virmani, Assistant General Counsel, The Loan Syndications and Trading Association, New York

Ted Basta, Senior Vice President of Market Analysis & Data, The Loan Syndications and Trading Association, New York

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Syndicated Loan Agreements
Pro Rata Sharing Provisions, Amend & Extends, Borrower and Affiliated Lender Buybacks, Cashless Rolls, and Disqualified Institutions

Structuring Provisions to Address Lender and Borrower Objectives and Risks

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November 13, 2014
Presentation Overview

- Overview of Current Market Conditions in the Syndicated Loan Market
- *Pro Rata* Sharing Provisions
- Borrower Buybacks and Affiliated Lender Buybacks
- Amend & Extend Transactions
- Disqualified Institutions and DQ Lists
- Refinancings - Cashless Rollovers
Overview of The Corporate Loan Market
Total Corporate Loan Commitments and Outstandings Have Reached a Record $3.4 Trillion Dollars

Source: Shared National Credit Program
Total Leveraged Debt Outstanding (Bonds & Loans) Has Reached a Record $2.4 Trillion Dollars in 2014

Source: S&P Capital IQ LCD
Institutional Loan Lending Activity Took Off in The Mid-2000’s as The Investor Base Shifted Away From Banks

Source: S&P LCD Capital IQ
CLOs Accounted For a Record 68% of Non-Bank Institutional Lending During 3Q14

Mkt Share of Primary Institutional Lending

Source: S&P Capital IQ LCD and Thomson Reuters LPC
Almost 50% of 2014 Institutional Lending Volume Was Used to Finance M&As and LBOs

<table>
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<tr>
<th>Rank</th>
<th>Bank Holding Company</th>
<th>Bookrunner Volume</th>
<th># of Deals</th>
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</table>

Source: S&P Capital IQ and Thomson Reuters LPC
Overview of The Institutional Primary & Secondary Markets
The Primary & Secondary Institutional Loan Markets Are Very Much Inter-Connected

Source: Thomson Reuters LPC
S&P/LSTA Leveraged Loan Index (LLI) Outstandings Have Grown to a Record $800B – Up $270B in Two Years

Source: S&P /LSTA Leverage Loan Index

M ORR I S O N  |  F O E R S T E R
LTM Secondary Trading Volumes Total a Record
$598B 1Q-3Q14 Annualized Volumes Equal $634 B

Source: The LSTA Trade Data Study
Prices in The Secondary Loan Market Traded Down to 20-Month Lows During The Middle of October

Source: LSTA/Thomson Reuters LPC
The Secondary Loan Market Offers Lenders a Diverse Risk-Return Profile Which Allows For Diversification

Discounted Secondary Spreads (3Yr)

Source: S&P/LSTA Leveraged Loan Index

1st Lien
2nd Lien
Large Corp
Middle Mkt
Cov-Heavy
Cov-lite

Source: S&P/LSTA Leveraged Loan Index
PRO RATA SHARING PROVISIONS
A Basic Tenet of Syndicated Lending Is That Lenders Are To Be Treated Ratably

A fundamental principle in credit agreements is that all lenders of a particular tranche are to be treated on a pro rata or “ratable” basis (subject to limited exceptions). Because payments are made through an agent, the pro rata treatment is largely self-operative.

Pro Rata Treatment Provision

“Except to the extent otherwise provided herein: (i) each Borrowing shall be made from the Lenders, each payment of commitment fees shall be made for account of the Lenders, and each termination or reduction of the amount of the Commitments shall be applied to the respective Commitments of the Lenders, pro rata according to the amounts thereof; (ii) each Borrowing shall be allocated pro rata among the Lenders according to the amounts of their respective Commitments (in the case of the making of Loans) or their respective Loans that are to be included in such Borrowing (in the case of conversions and continuations of Loans); (iii) each payment or prepayment of principal of Loans by the Borrower shall be made for account of the Lenders pro rata in accordance with the respective unpaid principal amounts of the Loans held by them; and (iv) each payment of interest on Loans by the Borrower shall be made for account of the Lenders pro rata in accordance with the amounts of interest on such Loans then due and payable to the respective Lenders.” (See “LSTA’s Complete Credit Agreement Guide”)

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Sharing of Payments Provision Is A “Backstop” To Pro Rata Clause

If any Lender 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 hereunder resulting in such Lender receiving payment of a proportion of the aggregate amount of its Loans and accrued interest thereon or other such obligations greater than its pro rata share thereof as provided herein, then the Lender receiving such greater proportion shall (a) notify the Administrative Agent of such fact, and (b) 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:

- (i) 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
- (ii) the provisions of this paragraph shall not be construed to apply to (x) any payment made by the Borrower pursuant to and in accordance with the express terms of this Agreement (including the application of funds arising from the existence of a Defaulting Lender or Disqualified Institution), 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 L/C Disbursements to any assignee or participant, [other than to the Borrower or any Subsidiary thereof (as to which the provisions of this paragraph shall apply), other than to the Borrower or any of its Affiliates (other than pursuant to Section [Successors and Assigns, paragraph (g)], as to which the provision of this paragraph shall apply).

[The Borrower] [Each Loan Party] consents to the foregoing and agrees, to the extent it may effectively do so under applicable law, that any Lender acquiring a participation pursuant to the foregoing arrangements may exercise against [the Borrower] [each Loan Party] rights of setoff and counterclaim with respect to such participation as fully as if such Lender were a direct creditor of [the Borrower] [each Loan Party] in the amount of such participation. (LSTA MCAPs 2014)
There Are Limited Exceptions To The Ratable Rule

- The **sharing clause may be triggered** if a lender receives more than its *pro rata* share of any principal or interest payment.

- A lender who receives a payment in excess of what it is entitled to must share the proceeds of its excess nonratable payment with the other lenders by purchasing participations or assignments in their loans or by making other adjustments that are equitable, so that the benefit of all such payments are shared by the lenders ratably.

- There are **limited exceptions** to the *pro rata* rule, for example:
  - Buybacks (but all lenders must be given the opportunity to participate in buyback)
  - Amend & extend transactions (but lenders of a particular class must be given an equal opportunity to participate on a *pro rata* basis and on same terms as each other lender of that class)
BUYBACKS
Buybacks More Prevalent When.....

Source: S&P/LSTA Leveraged Loan Index
Borrower May Seek To Buyback Their Loans Which Trade Below Par

- Borrower buybacks emerged in 2008, when many loans traded well below par in the secondary market, and, therefore, borrowers sought to take advantage of their loans’ discounted market prices and delever. However, credit agreements did not provide for such buybacks, and thus credit agreements began to include buyback provisions.

- Although loan prices have recovered and the median trade price has been above par for most of 2014, borrowers like the flexibility of buyback provisions and still seek to include them in their credit agreements.

- The LSTA memorialised buyback provisions in the LSTA Model Credit Agreements in 2014.
Different Rules Apply To Borrower and Affiliated Lender Buybacks

- There are different types of buybacks:
  - Borrower buybacks
  - Affiliated lender buybacks

- **Borrower buybacks**: Any Lender may assign its term loans on a non-pro rata basis to the Borrower in accordance with reverse Dutch Auction procedures under an offer made available to all lenders on a pro rata basis subject to certain limitations:

- **Affiliated lender buybacks**: Sponsors / sponsor affiliates are typically permitted to buyback loans through non pro rata open market purchases because the sponsor will use its own funds or use funds from agreed permitted restricted payments.
Borrower May Buyback Loans Pursuant To Dutch Auction

Borrower Buyback Limitations

- **No Excluded Information**: borrower represents that neither it, nor its affiliates, has any Excluded Information that has not been disclosed to the term lenders (“Excluded Information” means any non-public information with respect to the Borrower or its Subsidiaries or any of their respective securities to the extent such information could have a material effect upon, or otherwise be material to, an assigning Term Lender’s decision to assign Term Loans or a purchasing Term Lender’s decision to purchase Term Loans”).

- **Acquired loans to be extinguished**: the purchased term loans will be extinguished immediately, and the borrower shall have no rights as a term lender under the credit agreement by virtue of such assignment.

- **No proceeds of revolvers used**: the borrower cannot use the proceeds of any revolving loans to fund the buybacks.

- **No default or event of default**: no default or event of default shall have occurred and be continuing before or immediately after giving effect to such assignment.
LSTA MCAPs Include Basic Borrower Buyback Auction Procedures

- **Notice Procedures**
  - Auction notice to contain maximum amount of loans borrower is willing to purchase.
  - Range of discounts to par at which borrower would be willing to purchase term loans

- **Reply Procedures**
  - Each lender wishing to participate in the Dutch auction shall give the auction manager a notice which specifies a discount to par (reply price) within the discount range.
  - Principal amount of terms loans that such lender is willing to offer for sale at the reply price.
  - Lender must execute and deliver an assignment agreement.

- **Proration Procedures**
  - Based on reply prices/amounts the auction manager will calculate the lowest purchase price (applicable threshold price) within the discount range that will allow the borrower to complete the Dutch Auction by purchasing the full auction amount.
  - The borrower shall purchase by assignment loans from each lender whose bid is within the discount range and contains a reply price that is equal to or less than the applicable threshold price (qualifying bid). **All term loans included in qualifying bids received at a reply price lower than the applicable threshold price will be purchased at a price equal to the applicable reply price and are not subject to proration.**
Affiliate Buybacks May Be Done Through Non Pro Rata Open Market Purchases

There are two categories of Affiliated Lender: Debt Fund Affiliate and Non-Debt Fund Affiliate. Both categories may buyback loans done through open market purchases but different rules apply to them.

“Debt Fund Affiliate” means an Affiliated Lender that is a bona fide debt fund or an investment vehicle that is primarily engaged in making, purchasing, holding or otherwise investing in commercial loans, bonds and similar extensions of credit in the ordinary course of business and with respect to which none of the Borrower [or the Sponsor] or any Affiliate of the Borrower [or the Sponsor] makes investment decisions or has the power, directly or indirectly, to direct or cause the direction of such Affiliated Lender’s investment decisions.

“Non-Debt Fund Affiliate” means an Affiliated Lender that is not a Debt Fund Affiliate.
Non-Debt Fund Affiliates May Buyback Debt But Are Subject To Restrictions

A lender may assign its term loans on a non-pro rata basis to an Affiliated Lender through open-market purchases subject to certain limitations:

- **Assignments to Non-Debt Fund Affiliates:**
  - Non-Debt Fund Affiliate must identify itself as an Affiliated Lender
  - **No lender-only information:** Non-Debt Fund Affiliate has no right to receive information given to the other lenders by agent, to attend meetings, or to access platforms established for lenders
  - **Cap:** Aggregate principal amount of term loans held by Non-Debt Fund Affiliates may not exceed agreed percentage in the credit agreement
  - **No Vote on Plan of Reorganisation:** Non-Debt Fund Affiliate cannot vote on plan of reorganisation, except to the extent such plan adversely affects it more than other lenders
  - **Voting:** Non-Debt Fund Affiliate’s vote will effectively not be counted on amendments, except for matters requiring a unanimous vote or an all-affected lender vote that adversely affects the Non Debt Fund Affiliate more adversely than other lenders
Restrictions on Non-Debt Fund Affiliates Do Not Apply to Debt Fund Affiliates

- Debt Fund Affiliates are thought to act independently of the sponsor and thus are not subject to the same buyback restrictions as Non-Debt Fund Affiliates.

- On Required Lender votes, the portion of any loans held by Debt Fund Affiliates in the aggregate in excess of 49.9% of the amount of loans required to be held by lenders for such lenders to constitute Required Lenders shall be disregarded in determining Required Lenders. That is, a majority of the consenting lenders in a Required Lender vote must not be Debt Fund Affiliates.
AMEND & EXTENDS
Amend-to-Extend Volume

Source: S&P LCD Capital IQ
What Is An Amend and Extend (A&E)?

- After the financial crisis, borrowers took advantage of A&Es to extend the maturity of their loans in exchange for a fee and/or better pricing.
- Although these transactions are not as common as they once were, credit agreements now incorporate A&E mechanics that allow borrowers to complete an A&E at a future date without obtaining lender approval other than the extending lenders.
- The market has coalesced around the drafting of these A&E mechanics and those market standard provisions been added to the 2014 MCAPs.
The Extended Term Loans Are Required To Meet Certain *Pro Rata* Requirements

- Under the 2014 MCAPs, **all lenders of a particular class must be given an equal opportunity to participate on a *pro rata* basis and on the same terms and conditions as each other Lender of that class.**
- The terms of the extended loans should not be more favorable than the existing, non-extending loans.
- The provisions of the 2014 MCAPs require that the extended term loans:
  - Are subject to customary maturity and weighted average life limitations;
  - Rank *pari passu* with the existing term loans; and
  - Must receive no better than *pro rata* treatment in connection with prepayments.
Borrower May Request An A&E By Written Notice To Agent

- The borrower may request at any time, and from time to time, an extension of the maturity of any class of loans and commitments by written notice to the agent. Notice to specify:
  - amount of the applicable loans and/or commitments to be extended;
  - date on which the extension shall be effective; and
  - identify the relevant class of revolving credit commitments and/or term loans to which the extension relates.

- The procedures of the A&E shall be established by, or reasonably acceptable to, the agent and the borrower.

- If the A&E is oversubscribed, then the applicable loans and/or commitments of lenders of the applicable class shall be extended 
  \textit{ratably} up to the maximum amount specified in the extension notice.
A&Es Are Subject To Certain Conditions Precedent

“(i) No Default or Event of Default shall have occurred and be continuing immediately prior to and immediately after giving effect to such Extension,
(ii) the representations and warranties set forth [in the credit agreement and other loan documents] shall be deemed to be made and shall be true and correct in all material respects on and as of the effective date of such Extension,
(iii) the Issuing Bank and Swingline Lender shall have consented to any Extension of the Revolving Credit Commitments, to the extent that such Extension provides for the issuance or extension of Letters of Credit or making of Swingline Loans at any time during the extended period, and
(iv) the terms of such Extended Revolving Credit Commitments and Extended Term Loans shall comply with the [terms of this section].”
The 2014 MCAPs Provide Certain Terms Applicable To Any A&E

- The final maturity date of any extended commitment and/or loan shall be no earlier than the respective existing maturity date,
- There shall be no scheduled amortization of the loans or reductions of commitments and the average life to maturity of the extended loans shall be no shorter than the remaining average life to maturity of the existing term loans,
- The extended loans and/or commitments will rank *pari passu* with the existing loans and commitments and the borrower and guarantors shall be the same,
- The economics applicable to the extended loans and/or commitments shall be determined by the borrower and the applicable extending lenders,
The extended term loans may participate on a *pro rata* or less than (but not greater than) *pro rata* basis in voluntary or mandatory prepayments with the other term loans and borrowing and prepayment of extended revolving loans or reductions of extended commitments, and participation in letters of credit and swingline loans, shall be on a *pro rata* basis with the other revolving loans or commitments (other than upon the maturity of the non-extended loans and commitments), and

The terms of the extended commitments or loans, as applicable, shall be substantially identical to the terms set forth in the credit agreement (except as set forth in these clauses).
An Extension Amendment Does Not Need The Consent Of Any Other Lender

- The borrower, agent and each extending lender shall deliver to the agent an extension amendment (and any other reasonable documentation) to evidence the extension.

- The extension amendment may, without the consent of any other lender, effect such amendments to the credit agreement and other loan documents as may be necessary or appropriate, in the reasonable opinion of the agent and the borrower, to implement the terms of any such extension.

- The agent is responsible for notifying each lender that the amendment is effective.
DISQUALIFIED INSTITUTIONS
2014 LSTA MCAPs Include A Disqualified Institution Structure

- **Health Warning!** LSTA DQ Structure should be viewed as a “package deal”.
- **DQ List:** The DQ List includes the names of the institutions which the borrower does not want to own its loans and be in the syndicate.
- LSTA MCAPs define “**Disqualified Institution**” as follows:
  - “**Disqualified Institution**” means, on any date, (a) any Person designated by the Borrower as a “Disqualified Institution” by written notice delivered to the Administrative Agent on or prior to the date hereof and (b) any other Person that is a Competitor of the Borrower or any of its Subsidiaries, which Person has been designated by the Borrower as a “Disqualified Institution” by written notice to [the Administrative Agent and the Lenders (including by posting such notice to the Platform) not less than [__] Business Day[s] prior to such date]; provided that “Disqualified Institutions” shall exclude any Person that the Borrower has designated as no longer being a “Disqualified Institution” by written notice delivered to the Administrative Agent from time to time.

- A drafting note suggests that “Competitor” should be defined with specificity in reference to the borrower and its business.
DQ List May Be Updated With Names of Borrower’s Competitors

- **Updating:** DQ List is created on or before the date of the credit agreement, and the names of borrower’s competitors may also be added after CA date. The LSTA form does not provide a definition of “Competitor”; instead, a drafting note suggests that the term be defined with specificity in reference to the particular borrower and its business.

- **Transparency:** LSTA DQ Structure assumes that the DQ list will be posted to the public side of a platform so that lenders may easily access and review it before they trade (the agent should also give the DQ List to a lender upon request).

- The “Confidentiality Provision” also expressly provides that the **DQ List may be disclosed to any assignee or participant, or prospective assignee or participant.** This is important because the assignee confirms in the Assignment Agreement that it meets all the requirements to be an assignee under the Successors and Assign provision of the CA and thus is also confirming that it is not a Disqualified Institution.

- **No Pop-ups:** Assignees should not need to finalise AA.
DQ List Applies To Both Assignments and Participations

- **The DQ List applies to assignments and participations.**
- **But the DQ List has no retroactive effect.** Thus trades entered into with a party that is added to DQ list post-trade date (i.e., a competitor of the borrower) may be settled.

“For the avoidance of doubt, with respect to any assignee that becomes a Disqualified Institution after the applicable Trade Date (including as a result of the delivery of a notice pursuant to, and/or the expiration of the notice period referred to in, the definition of “Disqualified Institution”), (x) such assignee shall not retroactively be disqualified from becoming a Lender and (y) the execution by the Borrower of an Assignment and Assumption with respect to such assignee will not by itself result in such assignee no longer being considered a Disqualified Institution. **Any assignment in violation of this clause (h)(i) shall not be void,** but the other provisions of this clause (h) shall apply.”
Borrower May “Yank” A Disqualified Institution and Prepay Their Loans

- **Borrower’s remedies:** If an assignment or participation is made to a Disqualified Institution, borrower may “yank” the DI or require the DI to assign its loans to an Eligible Assignee. The LSTA form leaves it to the parties to decide whether the borrower should prepay or purchase the term loans at par, the price paid by the DI, or market price.

“If any assignment or participation is made to any Disqualified Institution without the Borrower’s prior written consent… or if any Person becomes a Disqualified Institution after the applicable Trade Date, the Borrower may… terminate any Revolving Credit Commitment of such Disqualified Institution and repay all obligations of the Borrower owing to such Disqualified Institution in connection with such Revolving Credit Commitment, (B) in the case of outstanding Term Loans held by Disqualified Institutions, purchase or prepay such Term Loan by paying the [lowest] [lesser] of (x) the principal amount thereof [and][,] (y) the amount that such Disqualified Institution paid to acquire such Term Loans [and (z) the [market price] of such Term Loans], in each case plus accrued interest, accrued fees and all other amounts (other than principal amounts) payable to it hereunder and/or (C) require such Disqualified Institution to assign, without recourse… all of its interest, rights and obligations under this Agreement to one or more Eligible Assignees…”
Agent Has No Duty To Monitor Or Enforce Compliance With A DQ List

“The Administrative Agent shall not be responsible or have any liability for, or have any duty to ascertain, inquire into, monitor or enforce, compliance with the provisions hereof relating to Disqualified Institutions. Without limiting the generality of the foregoing, the Administrative Agent shall not (x) be obligated to ascertain, monitor or inquire as to whether any Lender or Participant or prospective Lender or Participant is a Disqualified Institution or (y) have any liability with respect to or arising out of any assignment or participation of Loans, or disclosure of confidential information, to any Disqualified Institution.”
LSTA’s DQ Structure Is Finely Balanced – a Package Deal

- LSTA’s DQ Structure works when each element of the paradigm is present.
- If the DQ List is to apply not only to assignments but also to participations, then it must be posted so lenders may easily review it.
- If the agent has no responsibility for monitoring the list, then parties must be able freely and regularly to access it and share it with prospective assignees.
- If the list is capable of being updated for competitors post-closing, then there must be a notice period before the updated DQ List takes effect.
- **Parties are urged to remember that the elements of the LSTA’s DQ Structure are carefully intertwined; changing one aspect without regard for the whole can impact its effectiveness.**
CASHLESS ROLLS
Re-Fi Activity

Institutional Loan Issuance: New Money
Institutional Loan Issuance: Refinancing

Billions

2011  2012  2013  2014 (through 3Q)

Source: Thomson Reuters LPC
Cashless Rolls Have Become Common

- Particularly in 2013, the market saw an overwhelming number of repricings given the ultra low interest rate environment.
- Existing lenders, for a variety of reasons, often request to “roll” their loan into the new loan on a cashless basis.
- In response, the “cashless roll” mechanism was developed to address that request - a lender just applies its principal amount in the new facility to the existing loan rather than receiving a cash payment.
- Cashless rolls are useful where existing loans would otherwise be repaid in cash at par with proceeds of new or amended term loans.
Cashless Rolls Are Expressly Permitted In The 2014 MCAPs

2014 MCAPs contain a new “Cashless Settlement” provision explicitly permitting cashless rollovers in a refinancing or other loan modification.

“Notwithstanding anything to the contrary contained in this Agreement, any Lender may exchange, continue or rollover all or a portion of its Loans in connection with any refinancing, extension, loan modification or similar transaction permitted by the terms of this Agreement, pursuant to a cashless settlement mechanism approved by the Borrower, the Administrative Agent and such Lender.”
LSTA Published a Form Cashless Roll Letter

- These refinancings are often documented in a separate letter agreement.
  - LSTA published its Form of Cashless Roll Letter together with the August 2014 MCAPs.
- The LSTA form letter provides for the exchange mechanism where the Borrower offers, and the Lenders agree, to exchange the existing loans for the right to receive the new term loans on a cashless basis.
  - Agent retains the right to allocate the new loans to existing lenders in its discretion.
  - Limitation on agent’s liability
Appendix
Technical and Fundamentals Drive Performance in the Secondary Loan Market
QE3 Ended in October 2014, But The Fed Has Turned Dovish Yet Again on Interest Rates

Source: The Federal Reserve and Yahoo Finance
Return Volatility Has Spiked Across Asset Classes

Cross-Asset Returns

12-Mo. Lagging Return Volatility

Source: S&P/LSTA Leveraged Loan Index & S&P Capital IQ
Prices in The Secondary Loan Market Traded Down to 20-Month Lows During The Middle of October

Source: LSTA/Thomson Reuters LPC
Changes in Both Supply and Demand Create Technical Imbalances Which Affect Secondary Market Performance

![Graph showing changes in LLI Outstandings and Visible Demand (CLO Issue & Loan Fund Flows) with Avg. Bid over time from Jan-14 to Oct-14.]

Source: S&P Capital IQ LCD and Thomson Reuters LPC
Borrower Fundamentals Look Well Positioned

Source: S&P/LSTA LLI and S&P Capital IQ LCD
The Current Credit Outlook is Said to Remain Benign

- LTM $Defaults / Outstanding
- LTM # of Defaults/ Total Issuers

![Graph showing credit outlook]

Source: S&P Capital IQ LCD & Moody’s Investor Services

Senior Secured Loan Recoveries Through Last 3 Default Cycles

- Avg.
- 12/89 - 12/92
- 9/99 - 2/04
- 1/09 - 8/10