CADWALADER

FUND FINANCE FRIDAY

Loan Market Update

May 27, 2022 | Issue No. 177

By Leah Edelboim
Special Counsel | Fund Finance

Lots of news out of the loan market. SOFR remains a focus, we have new forms from the LSTA, and what has been deemed an “existential threat” to the syndicated loan market has reared its head once again. Here’s the rundown.

<u>LSTA Forms</u>

The Loan Syndications and Trading Association (the “LSTA”) has let members know that it has made updates to its Form of Revolving Credit Facility (which includes Term SOFR) and its Form of Credit Agreement and Investment Grade Term Loan and Revolver.

The LSTA continues to revise and refine the large suite of documents available to its members. The LSTA Form of Credit Agreement establishes a baseline for where the market is as it relates to the rights and obligations of the parties to a financing transaction. Parties can often agree that they will go with the “LSTA standard” for portions of their credit agreement.

As to the revised agreement, the changes cover several topics but, significantly, there are updated provisions that pertain to using Term SOFR as the benchmark. This is important to many market players because while some banks have developed their own language for their Term SOFR agreements, many other banks and their counsel are relying heavily on the model language produced by the LSTA. Other changes relate to erroneous payment provisions and DQ provisions. The LSTA plans to circulate these revised agreements early next month.

We also note that about a month ago, the LSTA provided revised guidance regarding U.S. sanctions issues in lending transactions, which have been helpful in shaping those provisions in credit agreements, particularly as they relate to the U.S. sanctions that concern matters pertaining to certain natural persons and business entities in Russia. We understand that the LSTA is working on further revisions to the guidance to address the situation if a lender is sanctioned.

<u>SOFR, So Good</u>

The Alternative Reference Rates Committee ("ARRC") has now endorsed the use of 12-month Term SOFR. While we mostly see 1-month and 3-month tenors (though 6 months is an option in most deals), it has been an open question as to whether ARRC would approve of 12-month SOFR for syndicated loans. We now have confirmation that 12-month SOFR is indeed in scope for business loans.

Litigation Update − Are Loans Securities?

The question of whether syndicated loans constitute securities under federal and state securities laws has come up at various points for decades. We have been following the latest cases for some time. In this latest case, a federal district court in New York considered the question where a litigation trust that came out of the Millennium bankruptcy case sued agent banks that underwrote a $1.75 billion loan to the debtor and alleged that the agent banks violated state securities laws when they originated these loans. The U.S. District Court for the Southern District of New York issued a decision holding that the syndicated loan at issue was not a security. The plaintiff has appealed the decision to the Second Circuit Court of Appeals. Briefing is ongoing and then the Second Circuit will hear oral argument and is expected to issue an opinion on the subject thereafter.

The LSTA has cautioned that finding these loans to be securities could pose an “existential threat” to the agency business and the loan market as a whole. The LSTA has filed an *amicus* brief with the Court explaining its position. We could also see federal regulators be asked to weigh in. We will be following this.