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## Need an Expedited Closing? Let’s Talk About It.

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The growing need for quick capital in today’s fluid investing market has led to a recent trend of requests for expedited closings with aggressive timelines and inflexible targeted closing dates. While banks certainly strive to accommodate sponsor requests, depending on the details of the deal, some timelines are more achievable than others. This article aims to highlight several reasons why some closings may require more time and provide general strategies that funds and banks can adopt to help any expedited closing request go more smoothly. So what are we seeing in terms of causation for delays and possible solutions?

**1) Structure Complexity** – Growing liquidity needs from sponsors during a continuous slowdown in fundraising have resulted in the complex structuring of credit facilities to increase capacity and accommodate sponsor requests. NAV lines, hybrids, term tranches, rated note feeders, and equity commitments, once rare mechanics for the typical subscription facility, have recently become widely accepted solutions to address sponsor needs. Despite all the excitement for adding bespoke mechanics, this leads to additional negotiations over the draft documents, as well as heightened bank scrutiny related to due diligence requirements and credit approvals. Avoiding structural complexity is not the solution as this is often needed to achieve the desired borrowing base or facility in general. However, to help minimize the time it takes to close a NAV or hybrid deal, ironing out the collateral as early as possible is necessary, e.g. knowing where the collateral accounts are held, whether there are additional accounts for distributions, how the distributions flow, etc. While a term tranche may be new to a sponsor, it may not be new to the lender’s counsel and sponsor’s counsel. Oftentimes counsels can agree on a precedent to use that will help minimize the number of turns on a document. Understanding that a rated note feeder will be in the structure is extremely important to know early on as the constituent documents may not address the bankruptcy concerns of lenders.

**2) Term Sheet Ambiguity** – Over the last five years there has been a significant increase in the number of lenders in the fund finance space, leading to greater competition amongst lenders to win deals. Lenders are more likely to move forward with ambiguous terms in a term sheet with the expectation of negotiating those terms once the deal moves into the drafting stage. The term sheet is often intended to be a slimmed-down version of the terms that will be included in the loan documents, leaving knowledge qualifiers and carveouts to be addressed in the loan documents. When it comes time to paper the facility, these ambiguities in the term sheet often lead to additional negotiations over interpretation. While it is not necessary to negotiate every term in the term sheet, both lender and sponsor need to be of the same understanding moving into the definitive documentation whether the term sheet exclusion events, covenants and events of default are examples or an exhaustive list. Clear communication here is key.

**3) Growing Lender Regulatory Scrutiny** – Banks have evolving internal policies influenced by reputational concerns, updates in law and regulatory interpretations, that impact, *inter alia*, sanctions, anti-money laundering and anti-corruption laws and multi-jurisdictional concerns. Changes in law are not always the cause for updates in their policies which evoke some frustrations with existing sponsors that are sensitive to changes in previously agreed-upon language. Prolonged negotiations often arise as both sides work within the limits of their own policies to come to a compromise. Forecasting that regulatory provisions will need to be updated to align with updated policies regarding the same will be helpful in setting expectations. With a tight timeline, beginning the negotiation of these provisions in the term sheet may make the difference between closing on time or not. Regulatory updates can be addressed in the term sheet stage by including a schedule of the provisions that will be included in the definitive documentation. Knowing earlier on in the process what is a must-have for either side is extremely helpful in trying to achieve a compromise on a very sensitive subject.

**4) Syndication** – Banks looking to reduce hold sizes and sponsors looking to access additional capital have led to a busy syndication environment. While often mutually beneficial for lenders and sponsors, additional lenders means having more time to review and comment on the documents, and once in agreed form (between the sponsor and the agent), the waiting game over credit approvals, know-your-customer ("KYC") diligence, and general input on the transaction mechanics. Newer lenders are coming into the space, which means educating these lenders on fund structures, cascading pledges, market positions, etc. We often see lots of questions or comments around legacy language that was agreed to in the precedent(s). While a deal form may be new to an incoming lender, the sponsor is usually not looking to renegotiate much. It takes time to work through these negotiated points to get the incoming lender comfortable. For large syndicated deals, the KYC process for each lender is time-consuming. While it is typical for the agent bank to provide lenders with cutoff dates for KYC requests and comments on the transaction documents, these deadlines are often overlooked as last-minute approval requests tend to come up. Sponsors can help the KYC process along by providing requested documents as soon as possible after being requested, providing as much detail around beneficial ownership and providing completed forms. When a lender is requesting information that the sponsor does not feel comfortable with providing, it is helpful for the parties to discuss directly to figure out how to address the underlying concern the KYC request is trying to address and coming up with a solution to satisfy the request. Setting a hard deadline on comments to the loan documents can be extremely helpful with keeping a transaction in line with a targeted closing date. The agent and its counsel can be extremely helpful by answering any questions the lenders have and addressing comments or concerns before the sponsors are even aware, cutting down on turns of the draft.

**5) Investor Diligence/Borrowing Base** – Often underestimated during the origination process when considering timing is the bank's review and diligence of each investor. Each subscription agreement and side letter, if any, must be reviewed in order to diligence the bank's collateral and establish borrowing base eligibility. The bank requires time to perform KYC analysis on each investor. Side letters can be lengthy and fraught with provisions that adversely impact the bank's collateral and/or run afoul of the bank's internal policy. If the investor is needed as a borrowing base investor to achieve the desired borrowing base capacity for a sponsor, negotiations may be necessary with the investor and its counsel to protect the bank's position with respect to its collateral. If a side letter provision is problematic and it is able to be picked up by other investors through the most-favored-nation election process, even an excluded investor can cause delays. If a sponsor is looking to close the subscription facility immediately after an investor closing, this puts a lot of pressure on all sides – sponsor's counsel must provide the documents in complete form (e.g. with all signatures accounted for and relevant attachments included), lenders must perform KYC quickly and lenders' counsel must review and provide an investor due diligence summary to the lenders as quickly as possible.

**6) Bank Approvals** – As the business line works through evolving structures, bespoke accommodations and creative solutions, bank approvals have grown into their own challenge and always need to be considered when working with a strict closing timeline. Credit teams need to approve the business terms, which sometimes requires a little education on the impact of non-standard credit agreement terms, oftentimes leading to more rounds of questions. One of the hardest hurdles for credit teams is a non-bankable LPA. LPAs are often delivered to banks either after the agreement has already been executed or after it has been put in front of investors, which sponsors are then hesitant to revise. Providing an LPA draft to the lender and being open for comments reduces the need to mitigate problematic provisions in the facility documentation (if possible), provide accommodations or take the time to go out to investors and seek the necessary consent to amend the LPA. An LPA with the standard subscription-based facility provisions helps the bank obtain their approvals under a predictable timeline. If doing a NAV or hybrid deal, having the correct mechanics to expressly permit such facility is necessary as banks do not like to rely on broad authorities provided in the LPA.

Unfortunately, several of the potential issues preventing an expedited closing cannot be resolved with simple solutions. Some of the complexities mentioned above just take time to work through, but when all parties work collaboratively and work in sync to a targeted timeline, the result is much more achievable.