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Keeping Secrets

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For a myriad of reasons, it is not uncommon for a lender to exit a syndicated facility at the time of renewal or a facility downsize or if a significant amendment of a different nature is requested. Most administrative agents will want to document the fact that the exiting lender will have its commitment reduced to zero, will not longer have any obligation to lend under the facility, and will not receive any future economic benefit from any borrowings or fees accrued under the facility. This documentation generally consists of either a payoff letter for that lender or the inclusion of a provision in the amendment itself of a payoff nature.

Some argue that a payoff letter is not ideal, as it is yet another document that would need to be negotiated and poses the burden of needing to obtain additional signatures. The inclusion of an acknowledgment in the pertinent amendment that a lender is exiting the facility is perhaps logistically easier, but this approach presents another challenge. One could argue that the exiting lender must consent to the changes to the credit agreement that would reduce its commitment to zero. This would necessitate that the exiting lender sign the amendment to effectuate the acknowledgment of payoff, and the parties may have inadvertently given the exiting lender visibility into the restructured terms. This is particularly impactful when the amendment is drafted with a conformed credit agreement being attached as an annex or where pricing or fees are being adjusted in the amendment and not in a separate fee letter.

The struggle to meet back office requirements and document the removal of a lender must be balanced against giving a competitor visibility insight into the terms that may be relevant in pitching the same sponsor in a subsequent deal. An emerging means to achieve the goal of documenting a clean break while protecting deal terms and removing any doubt that the approval of the exiting lender is needed to effectuate the amendment is the inclusion of a provision in the credit agreement similar to the below:

"Notwithstanding anything to the contrary herein, this Credit Agreement may be amended without the consent of any Lender (but with the consent of the Credit Parties and the Administrative Agent) if, upon giving effect to such amendment, such Lender shall no longer be a party to this Credit Agreement (as so amended), the Commitments of such Lender shall have terminated, such Lender shall have no other commitment or other obligation hereunder (other than any indemnification or reimbursement obligations with respect to circumstances existing on or prior to the date of such amendment, whether now known or unknown and asserted or unasserted, however arising, which such obligations expressly survive as if such Lender remained a Lender under this Credit Agreement) and shall have been paid in full all principal, interest and other amounts owing to it or accrued for its account under this Credit Agreement."

The inclusion of the above provision allows the administrative agent to check the box that the payoff is documented in an amendment via an acknowledgment from the Borrower and avoids an argument that the exiting lender must sign the amendment in question. Thus, the amendment can include a simple payoff acknowledgment signed by the parties other than the exiting lender and the deal terms being carried forward remain a secret.