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Fund Finance Friday

You're Out!

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The Loan Syndications and Trading Association (LSTA) set forth the following model provision (the so-called "yank-a-bank" provision and usually captioned "Replacement Lenders" in loan agreements) in the wake of the 2008 financial crisis:

> <u>Replacement of Lenders</u>. If any Lender requests compensation under Section [*Increased Costs*], or if the Borrower is required to pay any Indemnified Taxes or additional amounts to any Lender or any Governmental Authority for the account of any Lender pursuant to Section [*Taxes*] and, in each case, such Lender has declined or is unable to designate a different lending office in accordance with Section 3(a), or if any Lender is a Defaulting Lender or a Non-Consenting Lender, then the Borrower may, at its sole expense and effort, upon notice to such Lender and the Administrative Agent, require such Lender to assign and delegate, without recourse (in accordance with and subject to the restrictions contained in, and consents required by, Section [*Successors and Assigns*]), all of its interests, rights (other than its existing rights to payments pursuant to Section [*Increased Cost*] or Section [*Taxes*]) and obligations under this Agreement and the related Loan Documents to an Eligible Assignee that shall assume such obligations (which assignee may be another Lender, if a Lender accepts such assignment); <u>provided</u> that (i) the Borrower shall have paid to the Administrative Agent the assignment fee (if any) specified in Section [*Successors and Assigns*]; (ii) such Lender shall have received payment of an amount equal to the outstanding principal of its Loans and participations in L/C Disbursements, accrued interest thereon, accrued fees and all other amounts payable to it hereunder and under the other Loan Documents (including any amounts under Section [*Breakfunding*]) from the assignee (to the extent of such outstanding principal and accrued interest and fees) or the Borrower (in the case of all other amounts); (iii) in the case of any such assignment resulting from a claim for compensation under Section [*Increased Costs*] or payments required to be made pursuant to Section [*Taxes*], such assignment will result in a reduction in such compensation or payments thereafter; (iv) such assignment does not conflict with applicable law; and (v) in the case of any assignment resulting from a Lender becoming a Non-Consenting Lender, the applicable assignee shall have consented to the applicable amendment, waiver or consent. A Lender shall not be required to make any such assignment or delegation if, prior thereto, as a result of a waiver by such Lender or otherwise, the circumstances entitling the Borrower to require such assignment and delegation cease to apply.

The yank-a-bank provision, among other things, generally allows a borrower to replace a lender that has declined to consent to a proposed amendment, waiver or other modification to the credit terms. This can be a powerful tool for a borrower in those cases where all but a small number of lenders are amenable to a modification that is viewed as being beneficial (or acceptable) to both the borrower and the lenders. If the yank-a-bank provision allows non-consenting lenders to be "yanked," an amendment that needs unanimous approval cannot be held up by a small group of lenders trying to extract a higher amendment fee or some other concession in exchange for consent.

If a borrower exercises its right to replace a lender with a more compliant institution, the borrower is generally responsible for finding a replacement lender and for paying any transfer fees or other expenses relating to the substitution. The new lender takes an assignment (and not merely a participation) of loans and commitments from the lender being replaced, and the replaced lender is entitled to the full amount of its principal, interest and any related breakfunding costs and fees as of the date of assignment. It is also noteworthy that the replacement lender must also qualify as an eligible assignee under the loan agreement's assignment provisions because the transfer of the non-consenting lender's interest in the loan to the replacement lender is effected by an assignment.

In the COVID-19 environment, requests for amendments, waivers and modifications are rampant. This inevitably leads to questions from a lender: What if I cannot get credit approval for the requested amendment, waiver or modification? Will this ruin my rapport with the borrower or, better yet, cause the borrower to look for another credit provider at the expense of my role as a lender?

The answer to these ominous questions often starts with whether a yank-a-bank provision exists in the loan agreement and under what circumstances a borrower can utilize it. In some cases, the aggregate percentage of the lenders that may be so replaced is limited (5% is the often-used limit), and typically replacement is allowed only for issues where a lender refuses to agree to an amendment, waiver or other modification that requires the unanimous consent of lenders and “required lenders” (typically more than 50% of lenders by commitment) have, in fact, consented.

A borrower’s use of the yank-a-bank provision to remove a lender will inevitably change the relationship between lender and borrower. Accordingly, the yank-a-bank provision is seldom deployed in practice in subscription facilities. (This is likely impacted by the fact that so many subscription facilities are bilateral in nature.) Nonetheless, the threat of the provision’s use remains in a borrower’s toolbox as a sledgehammer, but, if used, its effect can likely never be taken back to restore the relationship with the lender on the receiving end of this tool’s strike.