

## FUND FINANCE FRIDAY

### Revlon: It's Worth a Double Take (Part II: Borrower Considerations)

July 23, 2021 | Issue No. 136



**By Leah Edelboim**  
Special Counsel | Fund Finance



**By Holly Loftis**  
Special Counsel | Fund Finance

In last week's edition of *FFF*, we discussed the *Revlon* case involving an erroneous payment by an administrative agent to the syndicate lenders, which is currently up on appeal before the Second Circuit Court of Appeals. To catch up on the case, click [here](#). We outlined the district court's decision in that case, which has been quite unsettling for administrative agents in the syndicated loan market, and discussed how administrative agents have responded: since the ruling came down, it has become market standard for administrative agents to include protective provisions in their credit agreements outlining exactly what would happen and what rights the administrative agent would have in the event it makes an erroneous payment to a lender. And, as the provisions seek to protect the administrative agent, last week we detailed some of the reactions we are seeing from syndicate lenders to the new protective provisions.

But the lenders aren't the only other parties to the credit agreement and aren't the only ones with something to say about the new provisions. In this week's installment, we'll detail some of the feedback we are seeing from borrowers.

#### **LSTA Erroneous Payment Provisions**

As we discussed last week, in response to the district court's ruling, in March of this year, the Loan Syndications and Trading Association (the "LSTA") published model language for loan agreements in order to protect an administrative agent in a syndicated lending transaction where such agent makes an erroneous payment (*i.e.*, an unintended payment) to one or more lenders in the syndicate. On June 16, 2021, the LSTA issued revised erroneous payment provisions with a blackline showing how the language has evolved from the original suggested language. We have seen a variety of comments from the borrower side. Here are several examples.

## Borrower Concerns

- *Borrower obligations.* While erroneous payments provisions are intended to address the relationship between an administrative agent and a lender who has received an erroneous payment, some borrowers have sought to clarify this by adding in text stating that under no circumstances will the borrower or any other credit party have any obligations (payment or otherwise) with respect to an erroneous payment transmitted to a lender.
- *Clawback of borrowings.* Given the broad rights afforded to the administrative agent under the erroneous payment provisions to clawback erroneous payments, some borrowers have sought to add clarifying language that in no event shall the funding of a borrowing or any other payment to a credit party be deemed an erroneous payment, with the exception of certain enumerated potential errors.
- *Source of funds for erroneous payment.* We have seen comments from the borrower side intended to address the theoretical possibility that an administrative agent take payments made by the borrower and erroneously pay them out disproportionately to one or more lenders (we note this is not consistent with the facts of the *Revlon* case, where the administrative agent wired out its own funds erroneously). The borrowers have stated they are concerned that under those circumstances the payment it made would not discharge and satisfy its obligations. To that end, borrower's counsel has added clarifying language that under this fact pattern, the borrower's payment will be applied in satisfaction of its debt.
- *Limiting Assignability Consistent with Existing Assignability Provisions.* In the event that an erroneous payment is not recovered by the administrative agent from the applicable lender in the prescribed time, the new provisions typically provide that the applicable lender will be deemed to have assigned its loans (but not its commitments) with respect to which the erroneous payment was made to the administrative agent. To that end, the administrative agent then has the right to sell any loans acquired pursuant to this mechanism in accordance with the assignment provisions of the credit agreement. As with any assignment, borrower's counsel has sought to limit the assignment of loans such that loans under these circumstances cannot be assigned to parties that would not otherwise be eligible to become a lender under the facility (*i.e.*, competitors, etc.).
- *Availability of Commitments.* While the erroneous payments provisions specifically state that an administrative agent's exercise of its rights under the erroneous payment provisions shall not reduce the commitments of a lender and its commitments are to remain available in accordance with the terms of the credit agreement, we have seen additional clarifying language from borrower's counsel to provide extra comfort that notwithstanding any situation with an erroneous payment, the commitments remain available to the borrower.
- *Wholesale Deletion.* Finally, counsel on the borrower side may try to delete erroneous payment provisions entirely. We are not aware of any administrative agent accepting this approach.

## Looking Ahead

We will continue to follow all developments in the *Revlon* case and keep you updated on the appeal pending before the Second Circuit.