CADWALADER

FUND FINANCE FRIDAY

Loan Market Round-Up

November 5, 2021 | Issue No. 151

By Leah Edelboim
Special Counsel | Fund Finance

This was a busy week in the loan market. LIBOR transition is accelerating daily, we have a new form of credit agreement 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.

1. The Shift to SOFR Is in Full Swing

Over the past few weeks, we have seen banks originating and refinancing loans based on SOFR at an accelerating pace. There were a number of big loans in the leveraged space that skipped right over LIBOR and went SOFR first in the month of October.

The Alternative Reference Rates Committee (ARRC) held a symposium last week − the sixth in a series covering the transition from LIBOR to SOFR. Acting Comptroller of the Currency Michael Hsu spoke about the transition away from LIBOR. Banks and borrowers also weighed in on how they are doing with their efforts to keep pace with the guidance that there be no new LIBOR loans issued after December 31 of this year. As a reminder, market participants are supposed to stop originating LIBOR-based loans by the end of this year although existing credit agreements may continue to use LIBOR as the relevant benchmark, so there will still be draws on LIBOR-based loans into 2022.

Various banks chimed in on their status in the transition. Some banks have clear stop-sell dates on LIBOR-based loans that have already come and gone this year. Others are a bit slower in the transition. Despite the guidance on the end of origination, many banks take the position that they didn’t fully embrace the SOFR transition until the ARRC endorsed Term SOFR in late July. Given that was only a few short months ago, the pace of SOFR-based loan issuances is actually seen by some as quite impressive.

We are seeing a number of SOFR-first term sheets and SOFR-first deals, so it’s safe to say that SOFR has arrived in fund finance.

2. LSTA Has a New Form

This week the Loan Syndications and Trading Association (the "LSTA") circulated to its members its new Form of Revolving Credit Facility, which refreshed the comprehensive Form of Revolving Credit Facility that was first issued in 2017. Prior to that time, the LSTA had "Model Credit Agreement Provisions," a library of standard provisions for a credit agreement, but it had not previously offered its members a full-form credit agreement.

The LSTA form 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 the LIBOR transition and include hardwired fallback language. This is important to many market players because while some banks have developed their own language for the transition, many other banks and their counsel are relying heavily on the model language produced by the LSTA.

Other significant changes relate to the letter of credit-related provisions. Additional changes include updates to the ERISA and Bail-In provisions, as well as standard language pertaining to U.S. QFC Stay Rules.

Cadwalader finance partners Chris McDermott and Jeff Nagle served as external counsel to the LSTA on this project.

3. 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. The question has come up again in a case before a federal district court in New York. In this latest case to ask this question, 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 banks sought to dismiss the case on the basis that, among other things, the loans are not securities. The District Court granted a motion to dismiss in 2020, and the plaintiff subsequently filed other motion practice that exhausted their remedies in that court. They have now taken the case, including the state (and, by extension, federal) securities laws questions to the Second Circuit Court of Appeals.

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 filed an amicus brief in the district court and may potentially get involved in the appeal. We could also see federal regulators being asked to weigh in. We will be following this.