

FUND FINANCE FRIDAY

Loan Assignments: Common Techniques and Key Considerations

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The past six months have been turbulent in the fund finance world. We have seen lenders in the market deal with significant capital constraints, we have seen a small amount of lenders scale back in the fund finance lending market, deciding to deploy capital elsewhere, and we have also seen a large number of new lenders enter into the fund finance market to take advantage of rising interest rates and quality sponsors in need of liquidity. The past week has brought with it unprecedented times, and it of course remains to be seen how the aftermath of the collapse of Silicon Valley Bank and Signature Bank will play out, and specifically what exactly will happen to the fund finance loans held by those lenders. We know this has been a challenging time for our friends and colleagues at these institutions, and we join the broader fund finance community in offering our support. For further information on the impacts of the SVB/Signature FDIC takeover on fund finance transactions, please refer to the articles we published earlier this week [here](#) and [here](#), noting that this is a fluid and constantly evolving matter.

In light of the above background, we thought it would be helpful to highlight some of the techniques commonly used by market participants when transferring an existing loan, and some key considerations when doing so.

Assignment by Participant Lender

If a *participant* lender wishes to assign its loan, thereby exiting the facility, this can usually be done by way of execution of an assignment and assumption agreement and compliance with the various other conditions to assignment pursuant to the terms of the underlying loan documents.

In the assignment and assumption agreement, the assigning lender sells and assigns to the assignee lender, and the assignee lender purchases and assumes all of the assignor lender's rights and obligations under the loan documents.

It is important to thoroughly review the conditions precedent to assignment, including any consents that may be required. Often times the consent of the borrowers is required unless an event of default has occurred and is continuing at the time of such assignment, or unless such assignment is to an existing lender or an affiliate thereof. The new lender must qualify as an eligible assignee under the terms of the loan agreement, and certain persons are usually prohibited therefrom, such as natural persons, defaulting lenders or subsidiaries of the credit parties.

If a defaulting lender is assigning its rights and obligations, typically the parties to such assignment are also required to make certain additional payments to cover all liabilities of the exiting lender.

Upon the effectiveness of the assignment, the assignee lender becomes a party to the loan agreement, and the assigning lender is released from its obligations and ceases to be a lender thereunder, but it continues to be entitled to the benefits of certain indemnification and other rights such as the payment of fees, to the extent such rights relate to the time prior to the assignment.

The administrative agent (the “agent”) is typically required to maintain a register of loans that identifies the name and address of each lender and the amounts of the lenders’ commitments and loan balances, including copies of all assignment and assumption agreements. After assignment, the administrative agent should update this register with the details of the new lender and related loan.

It’s also worth flagging that, in some instances, the new lender may require certain updates to the loan agreement by way of amendment, and/or reliance letters, which provide consent to the new lender to rely on the existing opinions. These are all items that get considered and negotiated when a new lender joins a facility.

Agent Resignation and Appointment; Lender Assignment

If the agent and the assignor lender are one and the same, the parties may wish to effect the loan assignment by removing the existing agent, replacing it with a successor agent, and assigning the loan. The existing lender would also assign its loan to the new lender in the same way that we have detailed above. The steps that are generally followed under this method are set out below, but it is important to note that each deal is different, and it is necessary to follow the terms and satisfy the conditions of the existing loan documents.

(i) Agent Resignation and Appointment Agreement

Typically the existing agent has a right to resign pursuant to the loan documents, and can do so by way of notice to the parties to such loan agreement, upon receipt of which the majority of lenders will have a right to appoint a successor agent. Similar to a loan assignment, the borrowers usually have consent rights to the successor agent and will therefore need to approve the successor agent, provided that no event of default has occurred and is continuing at the time of such resignation. The parties can document the resignation and appointment by entering into an agent resignation and appointment agreement.

In the LSTA's Model Credit Agreement Provisions, the successor agent must be a bank with an office in a named city, although sometimes this has been negotiated out of the document if parties didn't wish to be limited in this respect. The parties will therefore need to ensure that the successor agent meets the criteria set out in the loan agreement.

If the person serving as agent is a defaulting lender, the loan documents typically permit (subject to applicable law) a majority of the lenders (other than the defaulting lender), upon consultation with the borrowers, to remove such agent and appoint a successor. It's extremely important to obtain legal advice if the parties wish to use this mechanism, since this provision is a little more complex and would be subject to applicable law.

Upon execution of an agent resignation and appointment agreement, the existing agent will be discharged from its duties and obligations as agent under the loan documents, and the successor agent assumes such duties and obligations. The existing agent also assigns and transfers to the successor agent all of its rights as agent granted or assigned to it under the collateral documents (including security agreements and collateral account pledges) and the successor agent accepts all such rights for its benefit and for the benefit of the other secured parties. The existing agent will typically still hold on to certain indemnification and other rights that relate to the period prior to such resignation or removal.

(ii) Assignment and Assumption Agreement

As detailed in "Assignment by Participant Lender" above, the parties would enter into an assignment and assumption agreement, and follow the conditions precedent to assignment. See "Assignment by Participant Lender" for further detail.

(iii) Omnibus Amendment to Loan Documents

The existing credit parties, resigning agent and successor agent would enter into an omnibus amendment to the loan documents, whereby the parties replace all references to the existing agent with the successor agent. It is important to thoroughly review each loan document when preparing the omnibus amendment to ensure compliance with the amendment provisions therein. The notice information will also need to be updated, and the successor agent may have other certain updates that are required to be included in the omnibus amendment.

(iv) Account Control Agreements

The parties will likely need to amend and restate the existing account control agreements, or enter into new ones, as required by the depositary bank in question and the terms of the applicable control agreements. Sometimes depositary banks permit the account control agreement to be amended and restated, but sometimes they require new ones to be entered into.

(v) Lien Searches and UCC Filings

The parties will need to run new lien searches, and ensure those are in order, and similarly file UCC-3 amendment filings. The amendment filings will include the successor agent as the secured party.

(vi) Opinions

It is important to obtain new opinions for the successor agent, since the existing ones will not be addressed thereto and to ensure enforceability and security interest coverage given the amended documents and security filings.

(vii) Certificates and Resolutions

It is also important to obtain new corporate certificates with respect to the credit parties in the transaction and resolutions authorizing the entry into of the transactions contemplated by the omnibus amendment.

(viii) Investor Notices

Depending on the jurisdiction of the credit parties, new investor notices may have to be sent, notifying the relevant investors that the agent and lender have assigned their interests to the successor agent and lender. It is important to consult with local counsel in order to ascertain whether or not such investor notices may be required. If the deal is an SMA and an investor letter is likely already in place, investor notices would typically be sent regardless of the jurisdiction, in order to notify the investor of such assignment and transfer.

(ix) Payoff Letter

Sometimes the departing lender will require a payoff letter, confirming that they are exiting the deal upon receipt of the payoff amount, which amount usually represents all obligations due and owing to it pursuant to the loan documents. This is sometimes baked into the omnibus amendment, rather than a stand-alone document.

The above approach can be enticing for new lenders that are looking to also take on the role of agent, which can be lucrative and also provide more insight and control. This technique is also attractive to new lenders when the existing loan documents generally look acceptable and the parties wish to save on fees and expenses that might otherwise be incurred by terminating the existing facility and entering into and negotiating a new one entirely. This method might also be a more attractive option if there are other lenders in the deal and the new lender/agent does not wish to disturb those existing lenders to the extent possible. As mentioned above, every deal is different and has different nuances that will need to be considered and addressed.

Termination of Existing Facility and Entry into of New Facility

This is perhaps the most common way we see loans being transferred to or refinanced by new lenders. Typically, this method is used when a loan is already set to mature, but the existing lender does not wish to renew. The borrower will probably wish to have the new loan commence on or prior to the maturity of the existing loan.

With this approach, the existing loan is terminated and the existing lender is paid off pursuant to a payoff and termination letter; this closes substantially concurrently with the entry into of a new facility. All of the typical requirements associated with a new deal are entered into, which we won't get into for the purposes of this article; however, it is important to note that the new lender will also need to make sure that UCC-3 termination filings are filed immediately prior to the UCC-1 filings being filed, in order to ensure its priority with respect to the collateral. The existing account control agreements will also need to be terminated and new ones entered into.

The parties to the “new loan” may wish to use the existing loan agreement as precedent for the transaction, since the material issues will likely already have been addressed; however, this depends on the appetite of the new lender, depending on how those existing loan documents were drafted and depending on how old they might be; in some instances, it may make more sense to start with a new lender’s form documents.

Other considerations, such as outstanding letters of credit, will need to be addressed too, depending on how the existing facility was set up. For example, the new lender may be asked to provide a loan to the borrower in order to cash collateralize its existing letter(s) of credit.

Conclusion

The above methods, while used in the fund finance market, are high-level overviews only. It is important to seek guidance from counsel and address the particular nuances of the deal at hand. Cadwalader is happy to assist and discuss any of the above in further detail.