

Welcome



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The presentation will begin shortly.



COVID-19: Lender Considerations & Emerging Market Trends - Amendments to Credit Facilities

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Agenda

- Introduction / General Market Overview
- Lender Considerations for Existing Credit Agreements
- Emerging Market Trends for Amendments and Consents In Response to COVID-19

Introduction

- Companies across a broad range of industries have been scrambling to address their liquidity needs and develop business plans to manage through the challenges posed by the COVID-19 pandemic. Those efforts have included:
 - Applying for relief under federal economic relief programs such as the Coronavirus Aid, Relief, and Economic Security Acts (“CARES Act”) which become law on March 27, 2020
 - Drawing down on existing lines of credit and seeking to modify terms of existing credit facilities to both permit the incurrence of new debt under the CARES Act and provide related relief to address a decline in financial performance
 - Seeking new credit facilities to enhance liquidity

General Market Overview

- Current market remains marked by uncertainty, both with respect to the long term financial impact of the COVID-19 pandemic will have on borrowers ability to perform as well as the interpretation and enforcement of the CARES Act and related relief programs
- Increased demand for borrowings has led to lenders being selective when committing capital, creating newly found leverage for lenders in negotiating terms including:
 - Inclusion of anti cash-hoarding covenants
 - Increases in pricing and LIBOR floors
- Borrower requests for support from their lenders under existing credit facilities has led to significant amendment activity in the market. Initial experience indicates that the focus of these amendments (“COVID Amendments”) has been on:
 - Accommodating borrower requests for relief
 - Addressing deficiencies in existing documents such as the lack of LIBOR floors or expanding lender discretion with respect to the implementation of reserves
- Increase in the volume of COVID Amendments has provided greater clarity into the types of relief being sought by borrowers as well as lender appetite for accommodating requested relief

LIBOR Floors

- LIBOR floors have become a hot topic following the Federal Reserve's move to reduce the federal funds rate to near zero
 - Lender perspective... a renewed focus on the importance of LIBOR floors for lenders.
 - Borrower perspective... increases in pricing are contrary to borrower needs
- Pre-COVID-19, overwhelming market practice was to set a LIBOR floor of zero percent
- Emerging market view:
 - New commitments, emerging trend is to establish LIBOR between 0.75% and 1.00%
 - Amendments to existing facilities, lenders have been content setting LIBOR floors at zero

Availability Reserves

- CARES Act permits employer's to defer payment of the employer's portion of the Social Security payroll tax on wages paid between March 27, 2020 and December 31, 2020. 50% of deferred taxes must be paid by no later than December 31, 2021 with the remaining balance due by December 31, 2022.
- Considerations for implementing availability reserves for deferred tax obligations:
 - Uncertainty regarding tax deferral eligibility
 - CARES Act provides that deferral is not available to employers who have received loan forgiveness under the Paycheck Protection Program ("PPP") but since loan forgiveness is determined at a later date there has been confusion among employers about whether to defer payment of taxes. Lenders have likewise been considering whether to implement availability reserves to account for potential tax liability and/or whether to expressly prohibit deferral to the extent a borrower has obtained a PPP loan.
 - In response, the IRS recently released further guidance regarding the tax deferral provisions. Under the new guidance, employers who have obtained a PPP loan are permitted to defer eligible taxes up to the date they receive notice of any loan forgiveness. Payroll taxes that become due after such date are not eligible for deferral.

Availability Reserves (continued)

- Non-payment of deferred taxes
 - Given the CARES Act provisions governing repayment of deferred taxes in two installments, lenders have expressed concern regarding the impact of a borrowers failure to repay 50% of the balance due on December 31, 2021. The CARES Act does not expressly address the impact of non-payment although the IRS has suggested that non-payment will be handled in a matter consistent with pre-COVID-19 practice and result in interest and penalties becoming due as well as potential criminal and civil liability.
- Emerging Market Trends / Considerations
 - The recently released IRS guidance has alleviated the most pressing concern – eligibility for deferral. Because the first 50% payment of deferred amounts does not become due until the end of the 2021 calendar year, lender practice regarding implementation of reserves has yet to evolve.
 - Lender considerations: (i) review lender right to implement reserves to ensure potential risk is covered; (ii) monitor compliance by borrowers with the tax deferral provisions (including both as to payment of taxes which become due after notice of loan forgiveness and payment of 50% of deferred amounts as and when due and implement reserves as appropriate for such obligations.

Availability Reserves (continued)

- CARES Act expands an existing Medicare accelerated payment program (“MAPP”) pursuant to which eligible healthcare providers may request up to a six month advanced lump sum or periodic payment. Such accelerated / advance payment amounts must be repaid, commencing 120 calendar days after payment is issued. All amounts advanced under MAPP are required to be repaid within 210 days after issuance (or, in the case of certain hospitals, up to one year after issuance).
 - Considerations for implementing availability reserves for amounts advanced under MAPP:
 - Unlike PPP loans, amounts advanced under MAPP are not subject to forgiveness. In addition, to the extent not paid in full within 210 days, interest will accrue on the outstanding balance at the prevailing rate set by the Treasury, currently 10.25% per annum.
 - Emerging Market Trends / Considerations
 - As with reserves for deferred tax obligations, lender practice regarding implementation of reserves for MAPP advance payments has yet to evolve.
 - Lender considerations: (i) review loan documents to confirm lender has the right to implement reserves for amounts advanced under MAPP; (ii) require reporting of amounts advanced under MAPP, as well as compliance with repayment provisions. As with pre-COVID-19 practice, implementation of reserves should be considered to the same extent as other payment obligations to Medicaid / Medicare.

Incurrence of CARES Act Debt

- Given the favorable economic terms and debt forgiveness provisions of the CARES Act, Lenders have generally been amenable to amending existing credit facilities to permit the incurrence of indebtedness pursuant to the CARES Act – Title I (“CARES Debt”).
- Amendments permitting the incurrence of CARES Debt commonly address the following:
 - Cap on CARES Debt: the majority of lenders seem to be implementing debt caps, but not all.
 - Common conditions to incurrence of CARES Debt required by lenders include:
 - no Event of Default shall have occurred and be continuing at the time of incurrence thereof
 - have a maturity date not less than two (2) years after the date of incurrence of the CARES Debt
 - interest capped at one percent (1%) per annum
 - no amortization prior to maturity
 - be on customary terms for loans made under the CARES Act - Title I
 - Subordination of CARES Debt: many credit agreements require new debt for borrowed money to be subordinated to the obligations owing to the senior lender. Market trend seems to favor waiving this requirement as a condition to incurrence.
 - Restrictions on Prepayment: Market trend is a complete prohibition on prepayments prior to maturity; but we have seen some lenders agree to waive this prohibition with respect to amount of CARES Debt that is not forgiven.
 - Modification of Terms: Lenders are generally restricting amendments to CARES Debt documents. Some lenders are opting for a complete prohibition on amendments without senior lender consent while others are only prohibiting amendments to the extent “materially adverse to the Loan Parties (taken as a whole) or the Lenders”.

Financial Covenants

- Relief under financial covenant compliance is among the more popular concessions being sought by borrowers
- Commonly requested changes to financial covenants, as well as related issues for lenders considering such requests, include:
 - Exclusion of CARES debt from leverage ratio calculation
 - Exclusion of principal payments on CARES debt and related interest expense from calculation of Fixed Charges
 - Minimum EBITDA: inclusion of addbacks to EBITDA to offset impact of pandemic, such as:
 - for lost revenues related to natural disaster or pandemic (including COVID-19), regardless of inclusion in calculation of net income
 - business interruption insurance proceeds
 - Calculation of covenants without giving effect to periods impacted by COVID-19
 - Financial covenant holiday for two+ quarters (with Agent discretion to extend)
 - Exclusion of any forgiveness of debt income relating to the forgiveness of CARES debt from the determination of net income
 - Liquidity Calculations: in deals with incurrence tests and triggers based on liquidity or availability that includes a cash component, exclude CARES debt proceeds from such cash amounts
 - Relaxation of limitations on equity cure provisions, such as:
 - caps on number of times exercised
 - amount permitted to be invested (“over-cures”)

Financial Covenants

- Market Trends / Considerations:
 - Leverage: lenders have shown willingness to exclude CARES debt, but only until determined to be unforgivable. Alternative approaches include (a) absolute exclusion of CARES debt regardless of whether forgiven and (b) inclusion of CARES debt until it is forgiven
 - Lender consideration: review leverage ratio terms to determine if cash netted from debt in the calculation; in such case, proceeds of CARES debt should be excluded from the amounts netted
 - Fixed Charges: lenders have shown willingness to exclude CARES debt and (in some cases related interest expense), but only to the extent not determined to be unforgivable
 - Note that the impact of the pandemic on EBITDA may not be apparent until Q2 2020 financials have been delivered given the timing of the pandemic shut-downs in the US in the latter half of Q1 2020

Amendments to Reporting Requirements

- In amendments which permit the incurrence of CARES debt, additional reporting requirements are being added:
 - CARES debt loan documentation reporting:
 - Completed application
 - Copies of legal documents relating to CARES debt, together with any amendments, modifications, waivers, supplements or consents with respect thereto
 - Copies of all other material documents, applications and correspondence with the applicable lender or any Governmental Authority relating to CARES debt, including with respect to loan forgiveness
 - Good faith estimate of amount of debt eligible for forgiveness based on planned use of proceeds
 - Notice requirements:
 - Occurrence of any default under CARES debt
 - Any debt forgiveness determination under CARES debt, together with officer's certification as to the amount of debt forgiven pursuant to the provisions of the CARES Act - Title I

Forgiveness of CARES Debt; Use of CARES Debt Proceeds

- In amendments permitting the incurrence of CARES debt, lenders are adding specific terms to address compliance with debt forgiveness requirements under CARES Act, as well as the use of including:
 - Covenants requiring borrowers to submit necessary applications / documentation for CARES debt forgiveness
 - Borrowers required to seek forgiveness of maximum allowed amounts
 - Timing for submission of forgiveness application:
 - As and when due pursuant to the terms of the CARES Act
 - Promptly and not later than thirty (30) days after the seven-week anniversary of the initial incurrence of CARES debt
- Use of CARES debt proceeds: lender concerns being addressed in recent amendments include:
 - CARES debt proceeds permitted to be used solely for purposes expressly permitted by the CARES Act – Title I.
 - Expressly prohibit prepayment of other debt with proceeds of CARES debt
 - Require the proceeds of the CARES debt to be deposited in a Deposit Account that is not subject to the cash dominion of Agent or any other secured party.
 - Require that the Deposit Account with CARES debt be closed in some period of time after distribution of PPP Loan proceeds
 - Require a lien on PPP loan proceeds?

General Considerations / Other Borrower Amendment Requests:

- MAE / MAC: consider adjusting MAE rep (if any) and/or definition of MAE to exclude impact of COVID-19
- Events of Default: to the extent not covered by existing enumerated default, lenders have taken following approaches:
 - Cross-default if any event of default occurs under CARES debt
 - Cross-default only to the extent the CARES debt becomes due prior to its scheduled
- Anti cash-hoarding covenants
- Waiver and amendment of mandatory prepayment clauses with respect to proceeds of equity, debt and other prepayments
- Equity affiliation rules for PPP Loan eligibility and other recent SBA guidance on eligibility
- Review for existing events of default and provide waiver to the extent appropriate
- Include non-reliance provision with respect to the CARES Act or any loan issued by the Small Business Association or any related matter





Q & A