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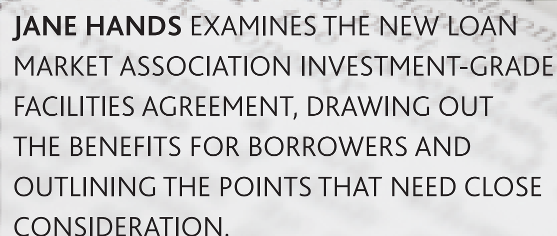

JANE HANDS EXAMINES THE NEW LOAN MARKET ASSOCIATION INVESTMENT-GRADE FACILITIES AGREEMENT, DRAWING OUT THE BENEFITS FOR BORROWERS AND OUTLINING THE POINTS THAT NEED CLOSE CONSIDERATION.

Executive summary

- The Loan Market Association revised its recommended forms of facility agreement for investment-grade borrowers in April. Good news for borrowers includes tax gross up protection and a yank-the-bank provision, but most of all an explicit confidentiality undertaking.

The most important change the Loan Market Association (LMA) made to its investment-grade agreement was to include an express confidentiality undertaking given by the finance parties. This is a welcome development, although there are points of detail that borrowers may wish to question, some of which are outlined here. The other changes are largely of a technical or drafting nature. However, substantive points of interest to borrowers may include the following:

TAX Historically, borrowers have benefited from a provision protecting them against the need to gross up a lender following its purchase of a loan participation. Under clause 24.2(f), a borrower only has to gross up a new lender if, at the date of transfer, the old lender would have been entitled to a grossed up payment if no transfer had taken place. This provision is based on market acceptance of the view that borrowers should not suffer greater tax costs as a result of transfers. The protection is generally most useful in relation to transfers to treaty lenders, who may have to be grossed up until they receive clearance to be paid without withholding tax.

During its negotiations on the changes with the ACT (which was assisted by law firm Slaughter and May), the LMA sought to remove the protection for borrowers from greater tax costs; indeed, the LMA leveraged facilities agreement now reflects this position. However, the ACT objected to this proposal, on the grounds that it was not in line with market practice, and as a result, the protection for investment-grade borrowers remains.

It is important to note that the protection has been disapplied for transfers during the course of primary syndication. Borrowers may wish to discuss this point, particularly where primary syndication may not close quickly and there is a risk of transfers during that period to lenders that may need to be grossed up.

NEGATIVE PLEDGE The exceptions to the negative pledge have been extended. It is now clear that set-off and close-out netting arrangements in hedging deals are permitted for the purpose of:

- hedging any risk to which the company is exposed in its ordinary course of trading; or
- the company's interest rate or currency management operations in the ordinary course of business and for non-speculative purposes.

Collateral provided by way of credit support for hedging is excluded from this permission.

In addition, the standard permission for retention of title arrangements in the leveraged agreement is now included in the investment-grade agreement.

NON-BANK LENDERS In response to more non-bank lenders participating in syndicates – a topic discussed below – the LMA has introduced a provision for lenders wishing to receive public information only. Borrowers may wish to consider how they could be affected by a lender's appointment of a third party to receive all communications on its behalf.

The main concern here is the potential impact on voting and requests for amendments and waivers. Borrowers may want to ensure they are protected against the risk posed by lenders which are liable not to respond to requests, for example by a "snooze and lose" provision.

In this context, another change made to the investment-grade agreement may be helpful to borrowers. The LMA has included a "yank the bank" provision, which allows the borrower to replace a

lender which claims under the gross up provision or the tax or increased costs indemnities. Investment-grade borrowers may wish to consider extending this provision (as in the leveraged agreement) to allow them to replace a lender that does not consent to a decision where the requisite majority has voted in favour.

CONFIDENTIALITY The most important change made to the LMA documentation over the last six months has been the inclusion of an express confidentiality undertaking.

For borrowers, the confidentiality of much of the information provided to their lending syndicates is paramount. Previous versions of the LMA documentation did not contain an express confidentiality undertaking, on the grounds that it was implied. However, as it is not clear that the common law duty of confidentiality owed by a bank to its customer extends to non-banks, and the scope of an implied duty is uncertain, the LMA agreed to the ACT's proposal that an express confidentiality undertaking should be included.

The LMA focus on the topic of confidentiality gained added momentum due to the immense growth in the number of non-bank lenders in syndicates in the years leading up to the credit crunch. This in turn focused attention on the protection of inside information provided by the market abuse and insider dealing regimes.

Many lenders rely on information barriers to segregate staff who work on the "private side" of the barrier, such as those engaged in loan arrangement, agency and trading, from those on the "public side", who trade in regulated investments. Other lenders, however, without information barriers in place, need to be public side only so as not to restrict their trading in regulated investments. In the light of increasing sensitivity about the potential for market abuse, the LMA and other trade associations have published a number of papers in the last few years on the inside information issues for lenders.

While in general the new confidentiality undertaking is a welcome development for borrowers, there are some concerns, as outlined below.

DURATION The confidentiality undertaking falls away 12 months after either the finance party's sale of its participation or the date of final repayment (whichever is earlier).

Although the market is familiar with a 12-month period, as it has featured in LMA documentation for some time now, borrowers may be concerned that it may not be long enough to protect some of their confidential information. Sensitive long-term business plans and projections, for example, may need protection for a much longer period than would be covered where a lender sells down its participation within a few weeks of closing.

The ACT has expressed the view that this period is liable to be too short from a borrower's perspective, and the LMA acknowledge by the use of square brackets that it is subject to negotiation. A point worth making when negotiating the length of this period is that the implied duty of confidentiality on which borrowers had to rely previously did not have an end date.

CARVE-OUTS The list of circumstances in which disclosure of confidential information is permitted is much longer than that familiar to the market. Many of these changes are modernising, catering for future as well as past developments in the markets. For example, disclosure is permitted to providers of settlement services for the trading of loan participations.

But other changes of this type may not be more questionable. For example, disclosure has traditionally been permitted to secondary market purchasers, sub-participants and credit derivative counterparties, on condition that a confidentiality undertaking is provided. However, this class now extends to investors and financiers in such transactions, on condition that either a confidentiality undertaking is provided or the recipient is subject to other confidentiality obligations.

In another new, albeit optional, category of permitted disclosure, lenders would be able to disclose confidential information to a rating agency to enable it to carry out its normal rating activities in relation to the finance documents and/or the obligors. Borrowers will want to insist on the inclusion of the optional provision that requires the rating agency to be informed that the information is confidential and may be price-sensitive.

Another example arises from a new provision setting out terms protecting the borrower where a lender creates security over its rights under a finance document. In these circumstances, confidential information can be disclosed to the chargee. The protection offered is that the chargee must be informed that the information is confidential and possibly price-sensitive, unless it is impracticable to inform the chargee, in the opinion of the lender.

A further new category permits any disclosure required for the purposes of litigation. The finance party must notify the recipient that the information is confidential and may be price-sensitive, unless in its opinion this is impracticable. Borrowers may want to restrict this category to proceedings concerning the finance documents, and require the recipient to be notified as to the confidentiality of the information in all circumstances.

THE BIG PICTURE In general, the recent changes to the investment-grade agreement are beneficial to borrowers. But further changes may be anticipated, following a separate review of the agreement which the LMA and the ACT are planning in the light of the experience gleaned during the financial crisis.

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