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Market Alert: Anti-Cooperation Language Debuts in the US BSL Market

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The Bottom Line™:

- As liability management transactions continue to increase in prevalence, cooperation agreements have become a common defense for creditors seeking to consolidate negotiating power.
- In a recently syndicated loan agreement, a borrower has fought back, imposing language that explicitly prohibits such arrangements.
- In this report, we analyze the proposed language and its consequences.

Overview

Cooperation agreements (also known colloquially as "loyalty pacts" or simply "co-ops") have over the last few years become a popular creditor-side maneuver in liability management transactions (LMTs). Generally speaking, cooperation agreements are intended to establish a unified bloc of creditors (both lenders and bondholders), which are then better positioned to defend against aggressive LMTs, particularly priming transactions (or any other LMT where some level of creditor consent is needed). While in theory dampening "creditor-on-creditor" tendencies, such agreements can also have the opposite effect of emboldening certain parties to engage in a more "rough and tumble" negotiations. This is especially true in the United States, where "tiered co-ops" have become a regular way occurrence, with different groups of creditors party to the co-ops benefitting from different economics.[1]

For borrowers and issuers, cooperation agreements are largely viewed as a double-edged sword. On the one hand, some companies have opted to encourage co-ops as a means of simplifying the negotiation process. On the other, co-ops can have the effect of taking certain types of LMTs off the table, closing off the avenues toward a successful LMT. That said, at least some borrowers have decided that more certainty in this fast-changing environment is preferable to being ganged up on by creditors. Thus, some borrowers (and their sponsors) have begun to inhibit creditors' ability to enter into co-operative agreements before they are even necessary. Such "anti-co-op" language first appeared in the European leveraged loan market[2] but up until now has not been seen within the US market (or at least not in US-law governed agreements). The "up until now" being the operative term here.

[1] See EMEA Special Situations: Unequal opportunities head to Europe via US-style coercive co-ops.
[2] Anti-cooperation language was reportedly proposed during pre-marketing of Stepstone Group's cross-border financing in late 2024, though this language was ultimately flexed out prior to the start of general syndication. See US/EMEA Pipeline: Stepstone prepares to launch ~€1.9bn-equiv. euro/dollar term loan, without proposed co-op consent requirement.

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New anti-co-op language arrives in the US

In a recent sponsored transaction in the US broadly syndicated loan market, anti-cooperation language made its much-anticipated debut within a New York-law governed credit agreement. Unsurprisingly, the provision was well hidden,[3] buried in the counterparts and integration provision. Most of the provision is pure boilerplate, laying out how signatures can be executed and delivered electronically[4] and how the credit agreement and its ancillary documents are integrated (i.e., treated as a whole and superseding any prior agreements or understandings). Then, suddenly, the following:

> "Each Lender hereby represents, agrees and warrants that it has not and, during the term of this Credit Agreement, will not enter into any cooperation agreement, support agreement, lock-up agreement, coordination agreement or other similar voting agreement with respect to the Borrower's indebtedness, securities or equity interests (any such agreement, a "**Cooperation Agreement**")."

The language generally prohibits lenders who are party to the credit agreement from entering into a cooperation agreement. It should be immediately apparent that the provision is extremely vague, defining Cooperation Agreements somewhat circularly as "any cooperation agreement" but also expansively as including "support agreements, lock-up agreements, coordination agreements or other similar voting agreements."[5] While there is an argument that these types of agreements are "terms of art" with some generally understood meaning behind them, the absence of further definitions or descriptions of what these agreements *actually are* could result in arguments over the term "Cooperation Agreement" down the road. Additionally, we note how such Cooperation Agreements can apply not only to the company's debt, but also its equity. But even if the language is overbroad, the intention is unambiguous. The borrower has issued a shot off the bow, indicating that it intends to be firmly in the control regarding any future LMT.

The credit agreement also provides a framework on what might happen to a lender who *does* enter into a cooperation agreement. For one thing, the borrower ostensibly has a breach of contract claim against such lenders, since each lender has in effect agreed to not enter into co-ops. The credit agreement also treats any lender that is party to a Cooperation Agreement as a "Disqualified Lender." Among other consequences, such lenders are generally restricted from acquiring credit agreement debt via assignment or participation and are largely disenfranchised when ascertaining whether requisite lender consent has been obtained for an amendment or waiver. Furthermore, the borrower can elect to "yank" lenders who have become party to a Cooperation Agreement, with such lenders required to exchange their holding for an amount equal to the lesser of the face amount of such debt and the amount that the lender paid to acquire such debt (at the very least, the version here does not require yanked lenders to sell at the market price).

Conclusion

New provisions like these are a bit like cockroaches. Once you've seen one, you can be fairly certain there will be more. The formulation here is certainly rough around the edges and could lead to litigation

[3] Almost as if the drafters didn't want to call attention to it…
[4] Yes, welcome to the internet age.
[5] "Open market purchase" anyone? *See* Serta: Implications of the Fifth Circuit's "Open Market Purchase" Holding in *In re Serta*. Or how about a "settlement payment"? *See* 11 U.S.C. § 741(8) (circularly defining "settlement payment" in the Bankruptcy Code); *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329 (2d Cir. 2011).

someday. One can argue, for example, about what exactly constitutes a Cooperation Agreement since the term is so vaguely defined.[6] It is also questionable whether such a provision would be enforceable in bankruptcy, where a key aspect of modern practice is creditor suffrage and the negotiation of agreements to facilitate reorganization.

In any event, Covenant Review will continue to monitor the market for the presence of anti-cooperation language.

— *Covenant Review*

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[6] See previous footnote.