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Acquisition Financing in M&A Transactions: Reconciling Deal Terms With Finance Terms and Closing Conditions

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Today's faculty features:

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Acquisition Finance in M&A transactions

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August 31, 2022

Overview

- Purchaser-Seller Issues in Purchase and Sale Agreements
- Loan Commitments and Loan Documentation
- Lender Issues in Purchase and Sale Agreements
- Diligence and Collateral Issues
- Acquisition Financing Documentation Issues

Purchase-Seller Issues

- Will the acquisition be financed?
  - On balance sheet, no financing
    - Most common with strategic purchasers
  - Timing of financing
    - At closing
    - Post-closing – Risk of financeability issues after closing
    - Bridge financings
- Financing contingency
  - Purchaser's obligation to close is contingent on obtaining financing
    - Impairs perceived quality of a bid
    - Most common where assets are difficult to sell
- No financing contingency
  - Obligation to close is not contingent on financing

Purchase-Seller Issues – Brief History of Financing Conditions

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- Pre-2005
  - Strategic buyers (e.g., one operating business acquiring another), relying on cash on their balance sheets, did not require debt financing = no financing out
  - Financial buyers (e.g., a PE fund buying an operating business), using leverage to fund their transactions, typically benefited from the inclusion of a "financing out" in their purchase agreements—which gave them the right to walk-away from closing, usually without consequence, in the event debt financing was not available
- Post-2005
  - As the LBO market boomed (pre-2008), and the competition among buyers increased, sellers began to heavily favor bidders who agreed to proceed without a "financing out"
  - In addition, sellers included reverse termination fees that required the Purchaser to pay a fee if it walked for no reason or failure to obtain financing
  - Financial buyers—who still relied on debt financing—needed a way to remain competitive in such an environment without simply agreeing to backstop the entire purchase price

Purchase-Seller Issues – No Financing Contingency

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- Limitation on Purchaser's liability
  - If the financing cannot be obtained, how much downside risk will Purchaser have?
    - Reverse breakup fee, security deposit/letter of credit
    - Availability of specific performance
  - The risk of a substantial downside if the transaction fails for lack of financing puts significant pressure on certainty of financing
    - ***This is the central financing issue for Purchasers in M&A transactions***
    - ***Solved by a combination of commitment letters and agreements in acquisition documents***
- Certainty of financing is also a major issue for Sellers
  - **Reverse breakup fee is not a perfect remedy for a failure to close because of a financing failure**

Purchase-Seller Issues – Cooperation with Financing

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- Financing cooperation – The Purchaser will require Seller to cooperate with financing efforts
  - Attendance at bank meeting(s)
  - Preparation of materials requested by financing arrangers
  - Financials
  - Representations and Warranties
    - Sellers do not want cooperation to broaden the representations given to Purchaser and provide grounds for an unintended breach of the purchase agreement
  - Accountant consents and comfort letters (for capital markets deals)
- Diligence Q&A will need to accommodate lender questions
- Purchaser will require lender diligence to be completed before Purchaser is committed under the PSA
  - Separate data room versus single data room
- Because obtaining financing is not a condition precedent, Purchasers may try to pin the failure to obtain financing on Seller's failure to cooperate, thus giving Purchaser the right to walk without paying the RTF
  - Typically, a breach of the cooperation covenant will only give Purchasers a termination right if (1) Purchaser fails to obtain financing and (2) such failure is a direct result of Seller's material and willful breach

Purchase-Seller Issues – Timing of Closing

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- Loan syndication process often requires a marketing period of 2 to 4 weeks, sometimes longer
  - Generally longer than the road show for a capital markets deal
  - Even if the transaction is fully committed, the lead lenders usually require this marketing period in order to minimize how much they are likely to hold at closing; however, a successful syndication is not a condition to funding
- "Marketing Period"
  - Pre-2020, it was common for Purchase agreements to provide that the Closing Date cannot occur until the specified marketing period has elapsed
    - "Blackout periods"—the marketing period usually cannot span the couple of weeks before Labor Day and the period around Christmas, when participating syndicate banks and their credit committees may not be available
    - Marketing period can't begin until customary syndication materials are completed
  - The Purchaser-Seller issue arising from this is what happens to the closing timeline if Purchaser's lack of cooperation with lender information requirements delays the marketing period
    - Sellers want predictability on what lenders will require
    - Sellers will often require that the period commence when they assert materials have been delivered
- "Inside Date"
    - Purchaser want certainty of funding; Sellers wanted predictability and certainty of closing
    - The "Marketing Period" condition is seen as a back-door condition for a successful syndication
    - Accordingly, although lenders will still syndicate, in lieu of "marketing periods", the parties will often agree that Closing cannot occur before a date certain—often 30-45 days from signing—the so-called "Inside Date"

Purchase-Seller Issues – Evidence of Financing

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- Seller has an interest in assuring that Purchaser's financing will be completed
  - Debt and equity commitments are sometimes attached to Purchase and Sale Agreement
  - Commitment letters may be required as part of bid process on competitive deals
    - Timing of acceptance of commitment is usually simultaneous with signing PSA
    - Often have iterative versions of debt commitment between bid and signing PSA
  - Covenant by Purchaser not to adversely modify or terminate debt and equity commitment
  - Covenant by Purchaser to meet conditions in debt and equity commitments
    - Best efforts vs commercially reasonable efforts
  - Notice requirement for any adverse financing developments
- Enforcement of commitments
  - Will Purchaser covenant to sue to enforce commitments? Will it be required not to do so by the Lenders? (See "Xerox" provisions below)
- Full Equity Backstop
  - To make their bids more attractive, financial buyers will sometimes sign an equity commitment letter for the full purchase price
  - Even in such situations, financial buyers, who often intend to use leverage to acquire the target despite a 100% equity commitment, will require Seller's cooperation
    - This may weaken the strength of the bid
    - Sellers may argue that there should be no cooperation covenant

Timing Issues for Capital Market Executions – Bridge Commitments

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- Purchaser may want to access the high-yield bond market rather than the syndicated bank loan market to finance an acquisition long term
  - It may prove impossible to match timing of a high-yield offering precisely to the closing of an acquisition
  - Purchaser wants the ability to time the high-yield offering to match favorable market conditions
  - Or the market may turn and make it impossible to fully syndicate high-yield bonds
- Solution: Bridge loan to cover gap until high-yield execution post-acquisition
  - Typically short term – one year or less
  - Covenants often include obligation to do a shelf registration
  - Interest rate somewhat higher than longer term bank debt and rate often ratchets up quarterly
  - Purchaser does not want risk of default if it proves impossible to access high yield market, so often an option to convert to a long-term bank loan at a high interest rate (with additional fees)

Loan Commitments and Loan Documents

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- Commitment letters
  - Committed deals
  - Best efforts deals – Not suitable unless there is a financing contingency in the PSA or a simultaneous sign and close
  - Commitment letter confidentiality provisions permit it to be shared with the Seller
  - "Stapled" commitments
    - A commitment provided by the Seller's bank to facilitate transaction
    - Somewhat out of favor since *Del Monte* case in 2011, due to risk of litigation regarding conflict of interest
- Fee letter
  - Only shared with Seller in a customarily redacted form
- Definitive documentation
  - Other than in connection with a simultaneous sign and close, rarely done until after the PSA is signed, though sometimes done to facilitate rapid closing
  - Commitment letters are subject to completion of definitive loan documentation
  - Term sheets attached to commitment letters often contain numerous conditions precedent to closing
    - A major structural risk that could result in a financing not closing

Loan Commitments - SunGard

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- If there is no financing contingency, how does Purchaser protect itself against the financing not closing because the lender does not come to terms on final documentation, or conditions precedent to funding can't be met?
- "SunGard" provisions mitigate this risk
  - The conditions to closing and funding in the commitment are limited to:
    - Conditions that would permit the Purchaser not to close the purchase under the PSA
    - Solvency
    - A short list of other conditions and limited "specified" representations that are within the Purchaser's control or within its knowledge (due authorization, perfection of liens, OFAC, Know Your Customer, etc.)
    - Critical deal-specific conditions (environmental report, no termination of critical contracts) for which Purchaser can assume some risk
  - "Material adverse effect" condition to closing in loan commitment must match condition in PSA
- Documentation – agree in advance on the precedent document to be used as a starting point for drafting
    - Many Sponsors will insist upon this

SunGard – Example text

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- Notwithstanding anything in this Commitment Letter, the Fee Letter, the Credit Documentation or any other letter agreement or other undertaking concerning the financing of the transactions contemplated hereby to the contrary, (a) **the only representations the making and accuracy of which shall be a condition to the availability and initial funding of the Credit Facilities on the Closing Date**, shall be (i) such of the representations made by the Target with respect to the Target and its subsidiaries or their respective businesses in the Acquisition Agreement as are material to the interests of the Lenders, but only to the extent that you or your applicable affiliates party to the Acquisition Agreement have the right (taking into account any applicable cure provisions) to terminate your (or its) obligations under the Acquisition Agreement or to decline to consummate the Acquisition, as a result of a breach of such representations in the Acquisition Agreement (to such extent, the "Specified Acquisition Agreement Representations") and (ii) the Specified Representations (as defined below), (b) **the terms of the Credit Documentation shall be in a form such that they do not impair the availability of the Credit Facilities on the Closing Date if the conditions set forth on Exhibit D hereto are satisfied** (it being understood and agreed that to the extent any guarantee, lien search, insurance certificate or endorsement or Collateral (including the creation or perfection of any security interest) is not or cannot be provided on the Closing Date (other than, to the extent required under the Term Sheets, (i) the creation and perfection of a lien on Collateral that is of the type where a lien on such Collateral may be perfected solely by the filing of a financing statement under the Uniform Commercial Code ("UCC") and (ii) a pledge of the equity interests of the Borrower and each material, wholly-owned U.S. Subsidiary Guarantor (after giving effect to the Acquisition) with respect to which equity interests a lien may be perfected on the Closing Date by the delivery of a stock or equivalent certificate (together with a stock power or similar instrument of transfer endorsed in blank for the relevant certificate (other than, in the case of the subsidiaries of the Target, with respect to any certificate that has not been made available to you on or prior to the Closing Date, which shall instead be delivered within five business days (or, with respect to foreign subsidiaries, thirty days) following the Closing Date (or such longer period as the Administrative Agent may agree) so long as you have used commercially reasonable efforts to cause the Target to deliver such certificates to you on or prior to the Closing Date)) after your use of commercially reasonable efforts to do so without undue burden or expense, then the provision of such guarantee, lien search, insurance certificate or endorsement or the provision and/or perfection of a security interest in such Collateral shall not constitute a condition precedent to the availability or initial funding of the Credit Facilities on the Closing Date but may instead be delivered and/or perfected within 90 days (or such longer period as the Administrative Agent may reasonably agree after the Closing Date pursuant to arrangements to be mutually agreed by the parties hereto acting reasonably and (c) **the only conditions (express or implied) to the availability of the Credit Facilities on the Closing Date are those expressly set forth on Exhibit D hereto, and such conditions shall be subject in all respects to the provisions of this paragraph**.
- For purposes hereof, "**Specified Representations**" means the representations and warranties of the Loan Parties set forth in the applicable Credit Documentation relating to: organizational existence of the Loan Parties; organizational power and authority (as they relate to due authorization, execution, delivery and performance of the applicable Credit Documentation) of the Loan Parties; due authorization, execution and delivery of the relevant Credit Documentation by the Loan Parties, and enforceability of the relevant Credit Documentation against the Loan Parties; solvency as of the Closing Date (after giving effect to the Transactions) of Holdings and its Subsidiaries on a consolidated basis (in form and scope consistent with the solvency certificate to be delivered pursuant to paragraph 1(b) of Exhibit D hereto); no conflicts of the Credit Documentation (limited to the execution, delivery and performance of the Credit Documentation, incurrence of the indebtedness thereunder on the Closing Date and the granting on the Closing Date of the guarantees and the security interests in respect thereof) with the organizational documents of the Loan Parties; Federal Reserve margin regulations; the Investment Company Act of 1940; use of proceeds of the Credit Facilities not violating OFAC, FCPA or the PATRIOT Act; and the creation, validity and perfection of security interests (subject in all respects to security interests and liens permitted under the Credit Documentation and to the foregoing provisions of this paragraph and the provisions of the second preceding paragraph). This Section 6 and the provisions contained herein shall be referred to as the "Certain Funds Provision".

Loan Commitments – "SunGard" Provisions

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- Limitations on SunGard protections
  - The provision overrides closing/funding conditions in the definitive loan documents and limits the representations and collateral perfection requirements required to close
  - All other covenants and representations apply at closing
  - There could still be an immediate default after closing if a non-SunGard representation was not true when made
  - There could still be an inability to borrow revolving loans post-closing if a representation could not be made
- Care should be taken in drafting the conditions that are required under the SunGard provisions
  - By definition, SunGard only applies when the lender does not want to close
  - Logistics of lien perfection should be addressed

Commitment Letter Leverage

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- Private equity sponsors, especially bigger sponsors, work with a stable of lenders with whom they are comfortable and familiar
- This "repeat business" phenomenon enables sponsors to exert a lot of pressure on their financing sources to get a deal signed and closed quickly
- Sponsors have a steady stream of precedent documents to draw on to minimize documentation risk
- Sponsors also often insist on drafting the loan documents
- Sponsors leverage their relationship with lenders to cut back on lender-required modifications to the PSA
  - Example: lenders often attempt to include a PSA provision stating that lenders may not be sued by any party to enforce rights under the debt commitment letter
- Sponsors sometimes successful in pressing lenders to remove this language, or softening the language to apply only to the Seller
- Strategic buyers may be at a disadvantage with debt financing sources

Lender Issues in PSAs

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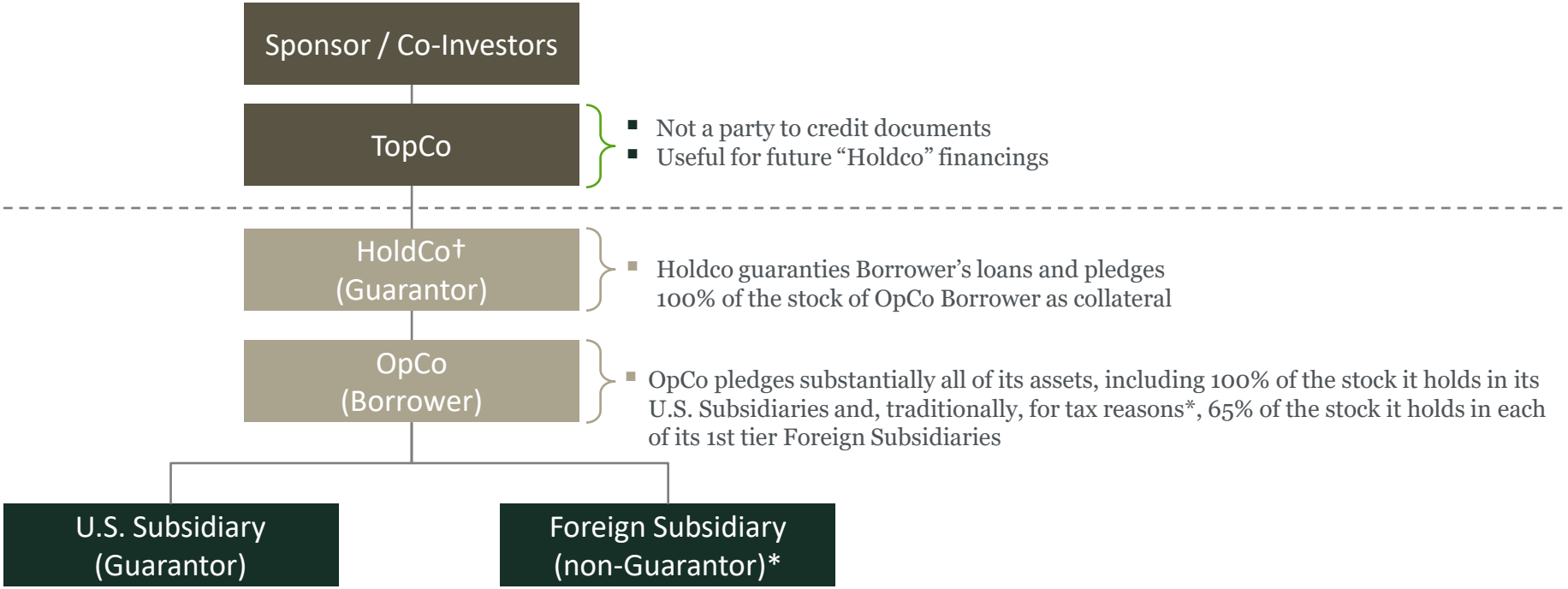
- Lenders want to avoid being pulled into disputes between Purchaser and Seller
- "Xerox" provisions
  - Lenders are third-party beneficiaries of limitations on Seller's remedies for breach (reverse break-up fee, etc.)
  - Express restriction on Seller suing lenders
  - Exclusive venue (New York, as opposed to plaintiff-friendly jurisdiction)
  - Waiver of jury trial
- Lenders often want the Seller to acknowledge that the key provisions of the PSA cannot be amended without lender consent
- Carve-out to "No third-party beneficiaries" provision in PSA to give lenders benefit of the above provisions
- Note that PSA cannot be amended in a manner materially adverse to the Lenders without lender consent

Structuring and Collateral Issues

- Most acquisition financings are secured
- The scope of collateral security is often heavily negotiated
- The smaller the collateral package, the less protected the lenders are in a downside scenario
- Typical LBO Structure:



† There would often be one or more holding companies between the Sponsor and the HoldCo Guarantor – this may be done for tax reasons or to create a "clean" investment vehicle that is separate from the credit (and to provide flexibility for TopCo debt). Management incentive equity is often issued at TopCo.

* Adverse tax consequences have been mitigated as a result of the 2017 Tax Cuts and Jobs Act and related IRS regulations. Accordingly, in some circumstances, U.S. companies may pledge 100% of the stock in Foreign Subsidiaries, and such Foreign Subsidiaries are able to provide credit support, all without adverse tax consequences.

Collateral Issues

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- Example exclusion

. . . notwithstanding anything in this Credit Agreement to the contrary, the term "Collateral" shall not include any (i) "intent-to-use" trademark applications for which a statement of use has not been filed and accepted with the United States Patent and Trademark Office or any intellectual property if the grant of a security interest therein would result in the cancellation or voiding of such intellectual property by the applicable Governmental Authority, (ii) Equity Interests in any CFC owned by any Credit Parties in excess of 65% of the total combined voting power of all Equity Interests in such CFC, (iii) any assets of a CFC, or (iv) any agreement (including agreements relating to intellectual property) to which any Credit Party is a party, only to the extent and for so long as the terms of such agreement or any requirement of Applicable Law (x) validly prohibit the creation by such Credit Party of a security interest in such agreement in favor of the Administrative Agent (after giving effect to Sections 9-406(d), 9-407(a), 9-408(a) or 9-409 of the UCC (or any successor provision or provisions) or any other Applicable Law (including the Bankruptcy Code) or principles of equity) or (y) would result in a termination pursuant to the terms of any such agreement (other than to the extent that any such term would be rendered ineffective pursuant to Section 9-406, 9-407, 9-408 or 9-409 of the UCC (or any successor provision or provisions) of any relevant jurisdiction or any other Applicable Law (including the Bankruptcy Code) or principles of equity), in each case unless and until any required consents are obtained; provided further that Collateral shall include, and the security interest granted in the Collateral shall attach to, any proceeds, substitutions or replacements of any such excluded items referred to herein unless such proceeds, substitutions or replacements would constitute excluded items hereunder.

Due Diligence

- Lenders want to understand specific risks of company
  - Critical contracts
  - Regulatory issues
- Limitations on collateral?
  - Change in control provisions
  - Leases that cannot be perfected
    - These can be a significant component of value for a retailer, for example
    - Substantial value in unperfected collateral can change the dynamic in a bankruptcy
- Timing
  - In a firm commitment, some level of diligence is necessary before commitment
  - Lenders will ask for purchaser's diligence memos
    - Non-reliance

Acquisition Financing Documentation Issues

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- Detailed terms of acquisition financing documentation would require a separate presentation, but a few points to note:
  - "Covenant light" versus full-fledged financial covenants
  - "Accordion" feature to facilitate upsizing
  - Tests for permitted dividends
  - Mis-match between term loan maturity and revolving credit maturity
    - Revolving credit lenders often have shorter maturities
    - In order to get benefit of longer term loan maturity, include "yank-a-bank" provision
      - Any revolving lender who doesn't consent to extend maturity can be replaced with a new lender without refinancing the entire facility
  - Permit sponsor to hold some amount of debt, even if non-voting
  - "Soft call" versus "hard call" protection

Acquisition Financing Documentation Issues—Add-on Acquisitions

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- For acquisitive companies, key credit agreement baskets include:
  - Incremental facilities: permit Borrower to increase the size of the existing Term Loan / Revolving Credit Facility (sometimes called an "accordion") and/or incur a new tranche of Term Loans or, less commonly, a new Revolving Credit Facility, all without the consent of the Required Lenders, subject to compliance with certain conditions precedent
    - Often permit Borrower to incur an unlimited amount of additional debt, subject to leverage tests and/or interest coverage tests, as applicable, plus a dollar basket not subject to such tests
    - Typically incurred under the existing credit agreement on a *pari passu* or junior lien basis with the existing loans (compare: Sidecar Facilities / Incremental Equivalent Debt)
    - May be provided by existing lenders or new lenders
    - Use of proceeds as agreed by incremental lenders so long as not otherwise prohibited by credit agreement—e.g., acquisitions and CapEx
  - Permitted Acquisitions:
    - Typically uncapped so long as target becomes a guarantor or assets are purchased by one
    - Lower-middle market deals may require pro forma compliance with a leverage ratio and/or have an overall cap on consideration
      - Debate is over whether the leverage test is closing date leverage (or sometimes greater than this), pro forma compliance with leverage covenant, or a deleveraging requirement
  - "Limited Conditionality Transactions" (LCT):
    - Applicable in connection with acquisitions (or other transactions) and, if applicable, the incurrence of debt in connection therewith that (1) would not be subject to a "financing out" and (2) would be subject to default blockers, leverage incurrence tests or other similar conditions under the credit agreement
    - Permit a Borrower/Purchaser to consummate such an acquisition if the relevant conditions are satisfied at the time of signing of the definitive documentation for such acquisition, even if not satisfied at the time of closing of the acquisition because of a change in financial condition or otherwise between signing and closing
    - There could still be an immediate default upon closing if the condition to consummating such acquisition is not actually satisfied at closing
    - For example, if leverage is (x) at or below the maximum level permitted at signing and (y) above the maximum level at closing (as a result of a drop in EBITDA or otherwise), an LCT could still be consummated (and the lender would have to fund any additional debt) but there would be a default upon closing

Any questions?

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Matthew Edward Schernecke advises direct lenders, mezzanine investment funds, and venture capital investors in a variety of debt and investment transactions with borrowers of all sizes, types, and structures. He also counsels private equity clients and corporate borrowers on domestic and cross-border acquisition financings, out-of-court restructurings and workouts, bankruptcy matters, ESG and impact investment financings, and real estate financings. Matthew leads transactions spanning diverse industries, including financial services, real estate, retail, life sciences, health care, technology, food and beverage, hospitality, film and music entertainment, media, and telecommunications.

Matthew advises clients of all kinds on the financing aspects of sustainable investments with a broader social impact. He has broad knowledge and experience structuring and negotiating loan documents to embed and track social impact through ESG-oriented covenants and impact investment financing transactions.

Prior to joining Hogan Lovells, Matthew was a partner at another multinational law firm, where he previously served as the New York office local practice group leader for the finance practice and as a leading member of its CARES Act Loan Program Task Force. He has also been sought after by top-tier organizations to speak on market practice during the COVID-19 pandemic, including the Loan Syndications and Trading Association (LSTA) and the American Bar Association (ABA).

Matthew previously served as a law clerk to Federal Magistrate Judge Cheryl L. Pollak of the U.S. District Court for the Eastern District of New York.

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Robby Stein is a partner in Goodwin's Debt Finance and Private Equity groups. His practice focuses primarily on representing private equity sponsors, their portfolio companies, and other public and private companies in connection with acquisition and other debt financings.

Mr. Stein has extensive experience advising middle-market borrowers, early-stage companies, financial institutions, and other market participants in connection with the structuring, negotiation and documentation of a wide range of complex and routine domestic and international debt financing matters, including leveraged buyouts, debt commitments, unitranche, first-lien and second-lien term loans and revolving credit facilities, bridge loans, mezzanine financings, venture-debt financings, fund-level financings, asset-backed loans, working capital facilities, leasing transactions, recapitalizations, debt restructurings and workouts, high-yield transactions and general corporate finance matters, both secured and unsecured, and related intercreditor matters. His work involves a wide array of industries, throughout the U.S. and in international markets, including business services, cannabis, consumer, financial services and fintech, food and healthy living, hospitality, leisure and travel, healthcare, industrials, insurance, manufacturing, restaurants and technology. He has represented clients in transactions ranging in size from several millions of dollars to billions of dollars.

Prior to joining Goodwin, Mr. Stein was most recently partner and co-chair of the Corporate Finance and Lending Practice at Akerman LLP in New York. Prior to his tenure at Akerman, he was a partner at Kirkland & Ellis LLP and an associate at Crowell & Moring LLP. He began his legal career as an associate at Cravath, Swaine & Moore LLP.