

Presenting a live 90-minute webinar with interactive Q&A

Structuring Mortgage Loan Participation Agreements: Strategies for Lead Lenders and Participants

Drafting Key Provisions, Conducting Lender Due Diligence, Managing Risk; "True Sale" and Perfection

THURSDAY, JULY 6, 2017

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Today's faculty features:

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Mortgage Loan Participation: Agreements

Structuring Strategies for Lead Lenders and Participants

July 6, 2017

Speakers



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Our Program

- **1. Overview of loan participations (Alison Manzer)**
- A. Market trends in Mortgage Finance
- B. What is a "participating interest?" -.
- C. What are the key characteristics of a participating mortgage
- D. Benefits of Participation in Mortgage Lending
- **2. Key participation agreement provisions and how they differ from Syndications (Jim Schulwolf)**
- A. Sale, Funding Mechanics and Settlements
- B. Default by Participant or Lead
- C. Voting Rights
- D. Notices and Repurchase Rights
- E. Seller reps and warranties
- F. Borrower Default
- G. Servicing, Standard of Care, Exculpatory Provisions and Reliance, and Regulatory Concerns
- H. Managing Mortgage Investment
- **3. Specific considerations for True Sale (Jim Schulwolf)**
- Documenting a "true sale" of the underlying loan

Our Program (continued)

4. Lender due diligence (Alison Manzer)

- A. Understanding and reducing the selling counterparty risks
- B. Considering the participation structure and lender right risks
- C. How much do you review of the deal and how much do you rely on representations
- D. Mortgage issues and problems

5. FDIC FIL492015 (Jim Schulwolf)

- A. Advisory on Effective Risk Management Practices for Purchased Loans and Purchased Loan

Overview of Mortgage Loan Participations

1A. Market Trends

- Unique characteristics of participation affect risk and market requirements:
 - Seller remains lender of record and services the loan
 - Buyer faces both underlying obligor and participation seller

1A. Market Trends

Participation as a Solution to Settlement Issues

- Settlement backlogs of leveraged loan secondary trading
- Implications of delayed resettlement
 - Liquidity risk
 - Market risk
 - Delayed compensation
- Liquidity management requirements would affect loan trading:
 - Minimum percentage of NAV be invested in “three-day liquid assets”
 - i.e. assets convertible to cash in 3 business days at a price that does not materially affect the value of the asset immediately prior to sale

1A. Market Trends

Mitigants to delayed settlement:

- Liquidity facilities
- T+3 settlement facilities
- LSTA proposed changes to delayed compensation
- Buy-in / Sell-out mechanism

Participation

- Fall-back for assignments
- Primary transfer settlement option

1A. Market Trends

Other Market Trends Affecting Participation in Loans by Participation Are:

- Growing participation in the market by smaller shops with less backroom capacity
- Tighter regulations regarding counter-parties forcing participating lenders into relationships with known and larger originators – allows more reliance
- Closing gaps in the terms for syndicated deals and participations makes the choice more natural
- Growing appetite for investments is not always accompanied by administrative capability making participation attractive
- More foreign investment drives choices to participation for regulatory and management reasons

1B. What is a Participation Interest

What is a “participating interest”?

- Sale of an undivided interest in the rights of the selling lender; usually an economic interest only
- Participant is not a direct creditor of the borrower
- Participant does not get the benefit of protections such as yield or gross up based on their status
- No common law rights such as set-off
- Exposure to status of the selling lender
- Reliance issues for expert work such as opinions
- Usually limited right to assign
- No rights to direct enforcement or other actions
- Limited rights to vote and agree on amendments

1B. Defining a Participation

Structures for Participations

- Club Format – usually purely economic
- Assignment and Assumption – with Notice and Acknowledgement
- Indirect Participation – or a Participation in a Participation
- Co-lending – only one level Remote
- Syndication – with intervening agency issues

1C. Key Characteristics

- Transfer is done using a participation agreement with certificates issued
- Participation agreement governs as between the selling lender and participant but does not affect the credit agreement – participant acts through the selling lender only
- Participant interest is an economic interest through the selling lender
- Payments are seldom direct – they come through the selling lender
- The lender rights, even if lender status specific, are only those of the selling lender, indirect for participant
- Outright sale with only relationship as to agency or trustee as agreed in the participation agreement
- No borrower relationship; can be anonymous, no obligations
- No registration issues; no direct mortgage responsibility
- Deals with mortgage title issues
- Allows participation despite regulatory restrictions

1D. Benefits of Participation

FOR SELLING LENDER

- Diversifying risk while retaining client relation and administration control
- Leveraging income by reducing capital out and gaining fees
- Reducing capital weight / lending limits
- Building client relationships by accessing larger loans
- Collecting fees for arranging and administering loan
- Not recorded as liability on balance sheet to the extent sold
- Control by selling lender is usually greater than other syndicate structures

1D. Benefits of Participating

FOR PARTICIPANTS

- Access to deal flow
- Access to lead lender's capabilities
- Stay within credit limits
- Confidentiality (identity of participants not known to Borrower)
- No consent of Borrower required
- Lower administrative costs
- Lower due diligence and loan closing costs
- Less administrative burden
- Eliminates mortgage title holding issues
- Increased ability to access mortgage returns

1D. Benefits of Participating

FOR BORROWER

- Borrower only has to deal with Lead
- Lower costs by reducing registration costs
- Real estate based covenants easier to deal with
- Consistency of lender approach

2. Key Differences Between Participation and Syndication

- Participation
 - A lender makes a loan to the borrower(s) and then sells “undivided interests” in the loan to participants
 - The participants have no interest in the collateral other than receiving their *pro-rata* share should the lender liquidate
 - Advances are made by the lender and the participants “settle up”
 - There is no privity between the participants and the borrower(s)
 - No holding of title interests

2. Key Differences Between Participation and Syndication

- Syndication
 - Each lender extends credit to the borrower(s) under one loan facility, with an agent acting on behalf of the co-lenders
 - Typically, an agent holds the collateral for the loan and an agent for the co-lenders (often the same) administers the loan for the co-lenders
 - Advances may be made directly by the co-lenders or through the agent
 - The co-lenders are in privity with the borrower(s)
 - Need for agency roles

2A. Sale, Funding Mechanics, and Settlement

- **Sale**

- Undivided interest in all loans, fees and claims
- Not an independent loan from participant to borrower

- **Funding Mechanics**

- At closing, Participant pays its proportionate share of outstanding loan amount
- If additional loans (e.g. a revolving loan) must establish funding mechanics
 - Lead notifies participant in writing
 - Specifies date and amount
 - Participant pays on funding date
 - Lead should determine whether conditions precedent to funding have been satisfied, but this can be negotiated

2A. Sale, Funding Mechanics, and Settlement

(continued)

Funding Mechanics (continued)

- Repayments come to Lead and are typically remitted “promptly” to Participant
 - Typically on day of receipt or next business day depending upon when received by Lead
- If an Event of Default, payments distributed under typical waterfall with Lead’s collection costs and expenses first, then fees, interest, principal, increased costs/break funding payments to Lead and Participant
- Settlements
 - Lead and Participant can agree to periodic settlements
 - Lender communicates amounts to be paid by or to Participant
 - Payments reimbursed if dishonored after distribution to Participant
 - If disgorgement results in return of money to Borrower, Lead and Participant contribute their pro rata share

2B. Default by Participant or Lead

Default by Participant

- Participant fails to make its proportionate share of advance
- Lead can make advance and subordinate Participant
- Lead can recover from Participant
 - Initially at Overnight Fed Funds date
 - After a designated period (often 3 business days), at underlying loan rate
- Any voting rights are suspended during default

2B. Default by Participant or Lead (continued)

Default by Lead

- Breach by Lead of its obligations under participation agreement
- Participant can withhold payment of advances
- Participant can recover any amount owed by Lead
 - Initially at Overnight Federal Funds Rate
 - After a designated period (typically 3 business days), at the underlying loan rate

2C. Voting Rights

Which decisions can be made solely by the Lead and which require the consent of the Participant?

- “Full” Participation
 - Participant consent required for any actions related to the loan, including amendments, waivers, consents, etc/
- “Silent” Participation
 - Lender can take all actions without consent of Participant

2C. Voting Rights (continued)

Middleground is more typical and typically incorporates “sacred rights” commonly seen in syndications

- Increasing principal amount of loan
- Extending maturity date
- Reducing interest rate

Middleground may also include

- Release of collateral
- Release of guarantor
- Waiver of payment or financial covenant defaults
- Decision to accelerate or exercise remedies

Lead maintains as much day-to-day freedom as it can

2D. Notices and Repurchase Rights

Notices

- Lead should provide all information received in connection with loan
 - Not always done, which can create issues (and potentially liability issues) in a workout
- Can run through and be transmitted by Lead, or can be sent directly to Participant
- Consider use of electronic platforms (which are typically used in syndicated deals)
 - Are they sufficient in all cases?
 - Do they satisfy the Participant's regulatory and internal policy requirements?
- Who bears the risk if the notice is delivered (or not delivered), goes to the wrong party, or not read, etc.?

2D. Notices and Repurchase Rights (continued)

Repurchase Rights

- Lead typically can repurchase the participation upon the happening of one or more triggering events
 - Participant doesn't agree to a requested amendment, consent, or waiver within an agreed period of time
 - Similar to “yank-a-bank” provisions in syndicated deals
 - Participant defaults
- Repurchase is typically at par
 - Fees and costs, negotiable but not included if there's a Participant default

2E. Representations and Warranties

Representations by Lead are very limited

- Ownership, organization, authority, no violation, and outstanding loan amount
- Reps as to legality, enforceability, collectability and priority are explicitly disclaimed

Participant representations are typically broader

- Organization, authority, enforceability, no consent, no violation
- Also include purchase for own account, no intention to sell, compliance with laws (including legal lending limits), ability to bear economic risks

2F. Borrower Default

- When an Event of Default occurs, Participant will typically not know about it independently
- Lead provides notice to Participant within agreed time period
 - Typically within 3-10 business days after the Event of Default becomes known to Lead
 - After expiration of notice and cure period
 - When does Lead know about the Event of Default?
 - Typically when a responsible officer becomes aware of the Event of Default
 - Failure to give notice should not derogate from Lead's rights or Participant's obligations

2F. Borrower Default (continued)

Who decides on taking post-default actions?

- Lead wants maximum flexibility
- Depending upon Participant's leverage, Participant may have
 - Full vote
 - No vote at all
 - Right to be consulted before action
 - Right to be consulted as to possible actions
- Should Participant be consulted?
 - May have internal policy or regulatory implications
- Mortgage remedies and how they effect

2G. Servicing, Standard of Care, Exculpatory Provisions and Reliance, and Regulatory Concerns

- Lead has exclusive responsibility for servicing loan
 - No direct interaction between Participant and Borrower
- Lead's books and records reflect participation
- Standard of Care
 - Same as Lead's own loans
 - Lead has very limited liability to Participant
 - No liability for
 - Exercise of reasonable discretion consistent with its own loans
 - Good faith errors of judgment
 - Reasonable discretion pursuant to loan documents
 - Liability for
 - Gross negligence or wilful misconduct
 - Lead default

2G. Servicing, Standard of Care, Exculpatory Provisions and Reliance, and Regulatory Concerns (continued)

- May rely on counsel and other professional advisors with same standards of liability and exculpation for their actions
- No fiduciary relationships between Lead and Participant
- Exculpatory provisions and Reliance
 - Very broad in favor of lead
 - No responsibility as to collectability, due execution, validity, or enforceability of loan documents, or as to Borrower reps, warranties or covenants
 - Participation issued without recourse, representation or warranty
 - Participant responsible for its own underwriting and credit analysis – cannot rely on that of Lead
 - No assumption by Lead of any responsibilities to Participant
 - Express exoneration of Lead by Participant

2G. Servicing, Standard of Care, Exculpatory Provisions and Reliance, and Regulatory Concerns (continued)

- No warranties about financial status of Borrower or value of collateral
- Generally enforced but may in some cases be strictly construed against Lead

Regulatory issues

- If regulatory issues are required to be considered, and information and materials are required to be obtained and provided, those regulatory issues will generally require ongoing monitoring
- The nature of the reports which are required so regulatory issues can be monitored need to be made clear by a Participant and appropriate arrangements need to be made to obtain, and provide on a timely basis, the reports required by the Participant

2G. Servicing, Standard of Care, Exculpatory Provisions and Reliance, and Regulatory Concerns (continued)

- Timing for the provision of reports needs to take into account the specific requirements of each Participant
- Credit assessment and ongoing credit review is important for each Participant. These requirements should be identified, and appropriate content and timing for delivery of these requirements should be scheduled and agreed to
- Participants must advise the Lead when changes occur as to information and materials which they require for regulatory purposes

Mortgage Rights and Remedies in the Context of a Syndicate

2H. Managing Mortgage Investments in a Syndicate

- The issues that are unique to mortgage lending
- Timing differences for mortgage remedies – how that affects the lender consent process
- Protective Advances by a syndicate for real estate (mortgages)

3A. True Sale of Loan Participations

True sale issues reflect bankruptcy risk in participations:

- Is the participated loan an asset of the seller than can be available to satisfy claims of its creditors following bankruptcy?

Applicable US insolvency regimes

- Bankruptcy Code Chapter 11 (11 U.S.C. 365(f) & (h))
- FIRREA
- Orderly Liquidation Authority
- Others may apply – e.g. state insurance receivership laws

3A. True Sale of Loan Participations

“True Participation” indicia:

- Participation “without recourse” to seller;
- Same term as the underlying asset;
- No commingling of proceeds;
- Seller must turn over collections on underlying asset;
- Intent to effect a sale and not an extension of credit.
- Accounting treatment

Difference between LSTA vs. LMA documents

Circumstances when a “true sale” opinion may be needed

- Rating agency requirements applicable to buyer
- Regulatory capital requirements
- Accounting sale – FAS 166

3A. True Sale of Loan Participations

Alternatives to true sale for obtaining proceeds of participated loan from insolvent seller under US law:

- Bankruptcy Code section 741: “Securities contract”
- Bankruptcy Code section 541(b)(1):
 - Loan participant considered beneficial owner of grantor’s rights in the underlying loan
 - Characterization is supported by automatic perfection of “payment intangibles” under UCC section 9-309

4. Lender Due Diligence Underwriting

Know Your Policy

The loan participation policy must establish prudent underwriting standards for loan participations.

Established appropriate due diligence

- Can be done in-house or through a qualified third party that is not affiliated with the loan
- May NOT rely on originating lender's due diligence

Examiners will evaluate:

- The FI's parameters for review
- How often the parameters are analyzed
- How well the originator adheres to its own policies

Real Estate Specific Requirements

- Usual requirements – reviews, LTV and more
- Title issues and support
- Environmental

4A. Lender Due Diligence – Counterparty Risk

- Understanding the Reason why Participations are sold and the Issues to Be Identified as a Result
- How to Ensure that Regulatory Requirements are Suitably met by the Duties and Responsibilities of the Agent
- How to Balance Risk Among the Participants and Selling Lender
- Understanding the Need for Due Diligence as to the Selling Lender, Agent, Co-Lenders, and the Borrower in the Structure
- Regulatory requirements and the ability to rely on the selling lender
- Credit review and the ability to rely on the selling lender
- Real estate and mortgage considerations
- Management experience matters
- Environmental exposure

4B.Lender Due Diligence – Structure and Lender Rights – Participation within a Syndicate

- Participants are reliant on both the selling lender and any syndication agent
- The exculpatory clauses of the credit agreement will impact both the selling agent and indirectly the participant
- Exculpatory clauses were originally designed to reduce the risk to the agent with regard to responsibilities syndicate lenders and the undertaking of its duties and to reduce cost of the agency role accordingly.
- Exculpatory clauses are increasingly draconian as drafting has resulted in agents being protected from liability for essentially all of the duties
- The impact of real estate and mortgage security must be considered
- The issue of mortgage “dabbling” and reliance
- Realization issues and rights

4. Lender Due Diligence – Structure - Securities Law Issues

- The broad range and reach of Securities Law, and its application to debt financing, requires consideration at the stage of initiation of the transaction and formation of the syndicate, different syndicate members maybe subjected to different securities law requirements and the extent and nature of these requirements need to be identified under appropriate information obtained on a timely basis.
- Issues specific to the Borrower group and transaction such as increased exposure to regulatory issues based upon product, industry, environmental concerns need to be identified.
- The specific requirements of syndicate participants' check list understood, and deliveries organized to ensure regulatory compliance by the Borrower group and receipt of the required regulatory based information by the syndicate.
- Real estate specific concerns.

4. Lender Due Diligence – Structure and Lender Rights

- Selling lenders and Agents want to have little or no duties or responsibility lenders
- Access to the Borrower group is restricted while regulatory and internal policy requirements dictate the need for timely accurate information and assessments.
- The selling lender frequently has an existing, rapidly growing, relationship with the Borrower group which the balance of the syndicate group does not have. Participant is not in a position to use judgement to assess the materials and information which is provided to them either as to the extent, content, or accuracy.

4.4 Lender Due Diligence – How Much Do You Review the Deal

Collect and Review...

- Reports and audited financials
- Management assessment
- Loan / Underwriting Policies and Practices
- Repossession Policies and Procedures
- Loan Modification and Nonaccrual Policy
- Charge-off Policy
- Collateral Insurance Policy
- Sample Reporting Package
- Know Your “Debt”
- Understanding revenue sources and protection
- Environmental review
- Access, flood, expropriation

4. Lender Due Diligence – Review or Representations

Typically Limited -

- Accuracy of loan documents
- Payments made to date
- No outstanding default

- Typically selling lender will require representation from Participants that they have done own credit analysis regarding Borrower, effectiveness of loan documents, adequacy of collateral, priority and perfection of security interest.

- The mortgage diligence package

4. Lender Due Diligence - Credit Monitoring

- Increasingly lenders, particularly regulated financial institutions, are required to undertake credit monitoring beyond the simple identification of the occurrence of a default.
- The differences in required reporting can be significant and will need to be reconciled, participant has no say.
- The nature of the ongoing credit monitoring packages need to be determined, where mark-to-market requirements exist these must be identified and the basis for determining mark-to-market negotiated.
- Credit monitoring ties into the representations and warranties, the requirements for ongoing credit monitoring should be taken into account when setting the financial and other representations, warranties and covenants.

4. Lender Due Diligence - Regulatory Issues

- Regulatory requirements for any money laundering and anti-terrorist financing, Patriot Act (etc.) requirements must be identified early, check list prepared, information obtained, and the basis for information direct or indirect identified.
- Participant is removed from the “detail” but still responsible – no “out” for being remote
- Participant needs to ensure timely information deliveries to satisfy regulatory reporting
- The acceptability of the remote information flow against regulatory filing and monitoring requirements needs to be determined; usually ok if strong agent, selling lender in same sector – otherwise maybe not

4. Lender Due Diligence - Board Policy Components

- Underwriting standards for participated loans
- Limits on the aggregate amount purchased
 - from any single originating lender
 - of any loan type
 - loans to any single borrower or group of associated borrowers
- Risk Assessment and Strategic Planning
- Risk Measurement, Monitoring and Control
- Due Diligence

4D. Mortgage Issues and Problems

- Insurance – scope and protections
- Environmental issues
- Realization process and restrictions
- Flood risk
- Access issues
- Expropriation risk and rights

5. Advisory on Effective Risk Management Practices for Purchased Loans and Purchased Loan Participations FDIC FIL-49-2015

Key Concept: “It’s on you”

- Some FI’s are relying on lead or originating institutions and third parties to perform risk management functions when purchasing loans and loan participations, including out-of-territory loans, loans to industries or loan types unfamiliar to the buyer, unsecured loans, or loans underwritten using proprietary models.
- FDIC expects lenders to exercise sound judgment when buying loans and loan participations

5. Advisory on Effective Risk Management Practices for Purchased Loans and Purchased Loan Participations FDIC FIL-49-2015

- Buyers should underwrite and administer loan and loan participation purchases as if the loans were originated by the purchasing institution. This includes understanding the loan type, the obligor's market and industry, and the credit models relied on to make credit decisions.

5. Recommended Practices

Establish policies and procedures

- Define acceptable loan types
- Establish concentration limits
 - Aggregate purchased loans
 - Out-of-territory loans
 - Loans from one lead

5. Recommended Practices

Independent credit analysis

- Act as if it is the originator
- Be sure it has the requisite expertise
- Obtain information from lead/seller
- Determine Board's cost appetite
 - Do not outsource this to a third party
- If you rely on a third-party credit valuation model, you must review it to be sure it is sufficient

5. Recommended Practices

Profit analysis

- Conduct profitability analysis
 - May require additional costs (e.g. loan review personnel)
 - Assess rate of return relative to risk taken

5. Recommended Practices

Participation Agreements

- Must be in writing
- Should contain standard provisions
 - Roles and responsibilities
 - Requirements for obtaining timely information and reports, including ongoing credit information
 - Remedies
 - Voting rights
 - Dispute resolution procedures
- Must assess and understand the key terms
- Understand limitations on your institution
 - Not making additional advance
 - What if lead's credit rating goes down?
- Seek counsel to review agreements prior to finalizing

5. Recommended Practices

Assess ability to sell, transfer or assign interests

- Should not limit ability to transfer if necessary for safety and soundness or to comply with regulatory requirements

Due Diligence

- Perform extensive due diligence and monitoring of out-of-territory participation or participations in unfamiliar industries
- Monitor changing economic conditions
- Perform prior to entering a third-party relationship
 - Determine whether third-party has the financial capacity to meet its obligations to you
 - Check its reputation and compliance history
- FDIC doesn't endorse models, etc., so cannot rely on claims to the contrary

5. Recommended Practices

Internal Functions

- Report purchased interests in accordance with GAAP
- Incorporate into audit and loan review program
- Obtain needed Board and Committee approvals, before entering into third-party arrangements
- Reports to Board must adequately cover activity, performance, and risk of purchased participations
- Ensure continuing compliance with Bank Secrecy Act and Anti-Money Laundering requirements

Speakers



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