

Issues for Administrative Agent to Consider

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In a typical syndicated credit facility, one of the lenders (or an affiliate of a lender) acts as administrative agent (the “Administrative Agent”) for the lender group.² There are several reasons for a lender to seek the role of Administrative Agent—agency fees, reflection in various league tables and a deeper relationship with the borrower and/or sponsor that such a role requires. Fund financing credit facilities are typically senior secured facilities, so the role of the Administrative Agent also typically relates to pledged collateral.³ In each case, the role of Administrative Agent includes responsibilities that may give rise to potential liability and of which lenders should be aware. While market-standard documentation, including the Loan Syndications and Trading Association (“LSTA”)’s form agency provisions, address these areas, lenders should understand the purpose of these provisions and the potential risks in order to avoid inadvertently lessening the protections provided by this language through negotiation.

Most banks that regularly participate in the fund finance market as Administrative Agent work from a set of form or template documents that contain provisions developed by the particular institution and designed to address the various issues discussed below. However, there are many situations where a lender may need to work with unfamiliar documents or provisions, and in these situations, the lender and its counsel may need to revise or insert agency language. This

may occur when: (i) lenders that have traditionally participated in the market as syndicate members take on the Administrative Agent role; (ii) borrowers require the lender to use precedent documents that are based on another bank’s form; or (iii) a bilateral facility with no agent is being converted into a syndicated facility in order to accommodate additional lenders. In addition, many syndicated credit facility markets are seeing an increase in participation by nonbank lenders, such as hedge funds and other similar institutional investors, as well as banks that have not traditionally been active in the space. Newer market participants may be more aggressive in trying to negotiate away many of the Administrative Agent protections provided by market-standard agency language. This article will identify typical agency provisions, primarily in the context of LSTA form provisions, while also considering the fund financing market generally, and discuss the issues addressed by such provisions.

Role of the Administrative Agent and Typical Provisions

Generally speaking, the role of the Administrative Agent is in many respects essentially for convenience and efficiency. More specifically, it provides borrowers with a single point of contact for the day-to-day operation of the credit facility and for borrowing and repaying loans under the

facility. The role of Administrative Agent also provides for the creation and perfection of security interests in favor of a single entity for the benefit of the other lenders. While providing convenience for borrowers, the Administrative Agent acts as an agent of the lender's party to the credit facility, and many of the agency provisions are meant to define this role and the authority of the Administrative Agent to act on behalf of the lenders (including any limitations with respect thereto).

Typical provisions relating to the Administrative Agent's role include, but are not limited to, the following:

- **Appointment/Authority; Delegation of Duties.** The lenders formally appoint the Administrative Agent in order to establish the necessary authority for the Administrative Agent to act on behalf of the lenders and to exercise the powers expressly set forth in the credit agreement and other loan documents.⁴ The lenders recognize that the Administrative Agent has no duties not expressly set forth in the loan documentation and that the Administrative Agent is not acting in a fiduciary capacity or for any third parties.⁵ They also recognize the Administrative Agent's right to appoint sub-agents and to delegate its duties (and typically limit liability to the care taken in the selection of such sub-agents).⁶

- **Exculpation.** In addition to specifying the capacity in which the Administrative Agent acts, a typical Administrative Agent provision includes broad exculpatory language:

- a. Limiting the Administrative Agent's obligations and outlining duties, obligations and responsibilities that the Administrative Agent does not have (unless expressly set forth in the credit agreement), including:
 - i. Any fiduciary or implied duties;

- ii. Any duty to take actions not expressly set forth in the credit agreement as directed by the requisite lenders, and note that the Administrative Agent is excused from taking actions even upon the direction of the requisite lenders in certain circumstances, such as actions that may be contrary to law (e.g., delivering a default notice to a bankrupt borrower without court consent if such action may violate an automatic stay); or
- iii. Any duty of disclosure not expressly set forth in the credit agreement;⁷

- b. Stating that the Administrative Agent has no liability in the absence of its own gross negligence or willful misconduct;
- c. Stating that the Administrative Agent is not deemed to have knowledge of a default unless notified in writing; and
- d. Stating that the Administrative Agent has no duty to ascertain, inquire, monitor or enforce (unless expressly set forth in the credit agreement).⁸

- **Reliance; Non-Reliance.** The Administrative Agent is entitled to rely on notices, reports, etc. reasonably believed to be genuine, and the Administrative Agent may consult with and rely upon the advice of legal counsel and other experts. Each lender also acknowledges that it makes its own credit decision without reliance upon the Administrative Agent.⁹
- **Individual Capacity.** The parties recognize that the Administrative Agent is entitled to act as a lender, and in any other capacity, as though it were not the Administrative Agent.¹⁰
- **Indemnification.** The lenders indemnify the Administrative Agent (typically pro rata based upon their exposure under the credit

facility), to the extent any borrower indemnity is insufficient.

- **Collateral Matters.** The circumstances under which security interests and/or collateral may be released or subordinated by the Administrative Agent, the release of any guarantor by the Administrative Agent and the sharing of collateral among the lenders are typically specified. The ability of the Administrative Agent to file proofs of claim and/or credit bid may also be specifically set forth in the credit agreement.¹¹
- **Resignation; Removal.** The Administrative Agent typically has the right to resign, although in practice this may be difficult to accomplish, unless another syndicate member is prepared to assume the role. A successor Administrative Agent may be required to be a commercial bank, but the increased participation of nonbank lenders may impact the inclusion of this requirement. There may or may not be a removal right with respect to the Administrative Agent, and any such right would typically be event-driven.¹²

Negotiated Provisions

The provisions related to the role of the Administrative Agent in syndicated credit facilities generally fall within the categories mentioned above and, as such, are not generally controversial. However, there are some provisions that are occasionally the subject of comment from parties to the credit agreement, and care should be taken when negotiating these provisions, especially when the Administrative Agent is not working from its form documents. Three such provisions are:

- **Exculpation.** As mentioned above, a typical provision relieves the Administrative Agent from liability absent gross negligence or willful misconduct on its part. This provision provides substantial protection for the

Administrative Agent—failure to show gross negligence or willful misconduct on the part of the agent was the basis for the dismissal of claims against the agent in a 2018 case before the New York Supreme Court, where the agent acted at the direction of “Required Lenders.”¹³ As a result, in considering changes to this provision, individuals negotiating on behalf of the Administrative Agent need to be aware that many banks have specific language requirements relating to exculpation and modifications to such language may require appropriate internal approvals.

- **Resignation/Removal.** The Administrative Agent typically has the right to resign, but the mechanics around replacement of the Administrative Agent sometimes vary (primarily with respect to the consent and/or consultation rights of the borrowers in the selection of a replacement Administrative Agent by the required lenders). In addition, while the right of the required lenders to remove the Administrative Agent is often limited to the situation where the person serving as the Administrative Agent is a defaulting lender, the concept of a minimum holding by the person serving as the Administrative Agent may be proposed (i.e., if such person holds less than a specified percentage of the overall commitment, they may be replaced).¹⁴
- **Applicable Standard for Administrative Agent Actions.** Borrowers often have a preference to just deal with the Administrative Agent and may propose changes to provide the Administrative Agent with greater discretion to act for the lender group (instead of requiring consent of the lenders or required lenders). While such changes may make administration of the credit facility more efficient, there is a great deal of protection to be gained by the Administrative Agent from acting at the

direction of the required lenders and/or all lenders. Even where the Administrative Agent may take actions on its own, consideration should be taken to include provisions permitting the Administrative Agent to seek direction or authority from the lender group upon request (e.g., when releasing collateral that may otherwise be within the defined discretion of the Administrative Agent).

Additional Considerations

Typical contractual provisions related to an Administrative Agent's role in a syndicated credit facility for a fund finance transaction are described above, but there are other potential issues presented by different structures that could impact the provisions relating to the Administrative Agent and/or whether a bank should be willing to take on such a role.¹⁵ One recent no-action letter issued by the US Securities and Exchange Commission ("SEC") highlights the potential complexity around the seemingly straightforward role of Administrative Agent for a particular set of facts. The SEC took the position that, in certain circumstances, an Administrative Agent could have "custody" of the assets of the syndicate

members and would be required to comply with the applicable provisions of the Investment Advisers Act of 1940.¹⁶ While a detailed discussion of this no-action letter is beyond the scope of this article, this example illustrates the need to carefully consider the role of the Administrative Agent and the related loan documentation provisions described above.

Conclusion

Even though there is LSTA form language as well as typical market provisions relating to the Administrative Agent's role in syndicated credit facilities, the changing landscape of market participants and potential issues relating to the rights and obligations of an Administrative Agent have resulted in an increased awareness of the importance of these provisions. Consequently, prospective Administrative Agents and lenders will want to carefully consider these provisions and seek guidance from counsel when negotiating such language or when taking on such a role.

Endnotes

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² The same lender may, along with one or more other members of the lender group, also act in other capacities— e.g., arranger, manager and/or bookrunner— but such roles do not typically have any rights, powers or responsibilities pursuant to the transaction documents and are therefore outside the scope of this article.

³ This role may also be labeled as the "Collateral Agent," and in certain circumstances, may be performed by an entity that is not the Administrative Agent.

⁴ See <https://www.mayerbrown.com/en/perspectives-events/publications/2015/03/limitations-on-lender-assignments-to-competitors-i> for an example of a specified duty of an Administrative Agent and a general discussion of issues related thereto.

⁵ One of the exceptions with respect to third parties is the maintenance by the Administrative Agent of a participant register, if applicable, which it does as an agent of the borrower.

⁶ Note that under New York law an agent may not be able to delegate its duties without the specific authority from the principal.

⁷ But see <https://www.mayerbrown.com/en/perspectives-events/publications/2010/10/renewed-concerns-over-administrative-agent-liability> for a discussion of

circumstances where an Administrative Agent with “peculiar knowledge” of a borrower may have a duty to disclose under the “special facts” doctrine. See also *Harbinger Capital Partners Master Fund I, Ltd. vs. Wachovia*, 27 Misc 3d 1236(A), for a discussion of these exceptions.

⁸ See *Stanfield Offshore Leveraged Assets, Ltd., et al., vs. Metropolitan Life Insurance Company, et al.*, 64 A.D.3d 472, dismissing a claim alleging administrative agent liability and citing broad exculpatory language in credit agreement.

⁹ See *ibid.*, which also cited language in credit agreement regarding non-reliance in dismissing a claim.

¹⁰ This provision avoids any general duty of loyalty and/or non-competition the Administrative Agent might otherwise owe to the lenders.

¹¹ The Administrative Agent may be able to file proofs of claim and credit bid without specific language, pursuant to its ability to exercise remedies.

¹² E.g., if the Administrative Agent is a defaulting lender under the credit facility.

¹³ See *Eaton Vance Management v. Wilmington Savings Fund Society*, 2018 NY Slip Op 30727(U), dismissing a claim alleging administrative agent liability and citing exculpatory language in credit agreement and failure to show breach by agent of applicable standard.

¹⁴ This is not often seen in widely syndicated credit facilities, but is more prevalent in “club” transactions involving a small group of lenders.

¹⁵ One example is a structure with both first and second lien debtholders, which may present conflict between the two debtor groups that may require two separate administrative agents to properly address such conflicts.

¹⁶ See <https://www.mayerbrown.com/en/perspectives-events/publications/2018/12/sec-grants-conditional-noaction-relief-from-the-cu> for a discussion of this no-action letter. While this no-action letter was not applicable to a traditional financial institution acting as administrative agent, it highlights that entities new to the role of administrative agent should consult with counsel before agreeing to act in such capacity.

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