

July 27, 2010

Commercial Credit Agreements

Could the Provisions Regarding Increased Costs and Capital Adequacy Be Triggered by Dodd-Frank?

SUMMARY

The Dodd-Frank Wall Street Reform and Consumer Protection Act signed into law by President Obama on July 21, 2010 (“Dodd-Frank” or the “Act”) may have consequences for borrowers and lenders under the terms of their credit documentation. Certain provisions customarily included in commercial credit agreements permit each lender to calculate amounts necessary to compensate the lender for any increased costs or reductions in the lender’s return on capital occasioned by changes in law or regulations, including capital adequacy requirements, and to charge those costs to the borrower. These provisions typically have not been utilized in other circumstances where they might have been argued to apply, but the pressure imposed by Dodd-Frank on bank earnings may result in a greater incentive for banks to seek to pass on costs to their customers.

We believe that agents and borrowers would be well advised to review proactively their existing credit agreements to determine whether some of the costs associated with Dodd-Frank may be argued to be assessable under a particular credit agreement. The provisions can and do vary considerably in their language and scope. Although these provisions originally were directed to changes in law affecting the cost of lending by reference to the eurodollar interbank market, the language in a number of credit agreements is not so limited. It could be read to permit any of the lenders under a syndicated credit facility to assert a claim for increased costs or reduced returns arising from the Act as a change in law.

KEY SECTIONS OF THE ACT

The Act has two areas of particular relevance to this analysis:

- The “Collins Amendment,” which subjects most bank holding companies, savings and loan holding companies and systemically important nonbank financial companies to the same leverage and risk-based capital requirements that historically have applied to insured depository institutions. One of the

principal implications of this provision is that certain securities issued by holding companies no longer qualify as Tier 1 capital, subject to a phase-out period.

- Changes to the calculation and amount of federal deposit insurance premiums, largely set forth in sections 331 through 333 of the Act, resulting in changes to the amount and calculation of premiums payable to the Federal Deposit Insurance Corporation ("FDIC"), including the assessment of premiums based on the average total consolidated total assets less the average tangible equity of the insured depository institution rather than on the amount of domestic deposits.

THE CAPITAL ADEQUACY PROVISIONS

The provisions in commercial credit agreements that are the focus of this memorandum typically permit a lender (and sometimes a participant) to serve the borrower with a notice regarding a "Change in Law" that results in a reduced rate of return or increased costs of capital to such lender (or participant) and to collect the amount of such increase or reduction from the borrower under the terms of the credit agreement.¹

These provisions can usually be found in a commercial credit agreement in a section entitled "Capital Adequacy," "Capital Requirements," "Additional Costs," "Increased Costs," "Change in Law," "Reduced Return" or "Reduction of Return" or some variant thereof. It is also prudent to check the "Taxes,"² "Yield Protection," "Lender Expenses," and "Indemnity" provisions of the credit agreement and of any ancillary documents (particularly any pledges or guarantees by subsidiaries) because these provisions may sometimes be drafted so broadly as to pick up increased costs. Below are a few examples of what these provisions look like taken from operative credit agreements, with some of the key differences and issues italicized and highlighted in bold:

Example 1:

"if a Lender reasonably determines that as a result of any ***Change in Law***, (i) there is an increase in the ***cost to such Lender of making, funding or maintaining the loans to the Borrower or*** (ii) there is an ***increase in the amount of capital*** required or expected to be maintained by ***such Lender or by any entity controlling such Lender and such increase is as a consequence of such Lender's Commitment***, loans, credits or other obligations under this

¹ These provisions when they first appeared in credit agreements were limited to changes in law that increased the floating rate component of LIBOR or Eurodollar rates so as to permit lenders to charge through to the borrower increased costs and reductions in the anticipated return on capital occasioned by changes in law during the interest period "locked in" under the credit agreement for LIBOR or Eurodollar rate loans (just as changes in "prime" or "base" rates payable by the borrower could be adjusted at the borrower's expense). The difference was that the base rate was changed by the agent as to all loans collectively while these provisions were drafted to pick up changes in law affecting LIBOR or Eurodollar rates for any lender. Over the years, these provisions have been modified and redrafted more broadly. We give a few examples of these provisions in this memorandum but there are many other variations in effect in the market.

² There are provisions in most commercial credit agreements, analogous to the increased cost and capital adequacy provisions, which permit lenders to charge the borrower for increases in the rate or applicability of withholding taxes but those provisions are not the focus here.

Agreement, then upon demand of such Lender, the Borrower shall pay to the Agent for the account of such Lender, such additional amounts as are **sufficient to compensate such Lender for such increased costs.**"

Example 2:

"if any **Change in Law shall impose**, modify or deem applicable any reserve, special deposit or similar requirement against assets of, deposits with or for the account of or credit extended by any Lender, **the result of which is to increase the cost to such Lender of making or maintaining any Commitment or LIBOR Loan hereunder or to reduce the amount of any sum received or receivable by such Lender hereunder**, then the Borrower will pay to such Lender such additional amount as will compensate such Lender for such additional costs or reduction."

Example 3:

"In the event any **Change in Law** (a) subjects a **Lender** to any Indemnified Tax; (b) imposes, modifies or makes applicable any reserve, special deposit, compulsory loan, **FDIC insurance, fees, premiums or other charges** or requirements against assets held by, or deposits or other liabilities in or for the account of, or advances or loans by, or other credit extended by, or any other acquisition of funds by any office **of such Lender** (other than any reserve or other requirement already reflected in the definition of Adjusted Eurodollar Rate or Adjusted EURIBOR Rate); **or** (c) imposes **any other condition on or affecting such Lender** or its applicable lending office or its obligations hereunder or the London or European interbank market, **and the result is to increase the cost to such Lender of agreeing to make, making or maintaining its Commitments or Loans hereunder** or to reduce any amount received or receivable with respect thereto, in each case **by an amount or amounts that such Lender deems to be material** individually or in the aggregate, then the Borrower shall pay to such Lender such additional amount or amounts (in the form of an increased rate of, or a different method of calculating, interest or otherwise as such Lender in its sole discretion shall determine) as may be **necessary to compensate such Lender on an after tax basis for any such increase in cost or reduction in receipts hereunder.**"

Example 4:

"If, after the date hereof, any Lender that is not a Defaulting Lender determines that (i) the adoption of or change in any law, rule, regulation or guideline regarding **capital requirements for banks or bank holding companies**, or any change in the interpretation or application thereof by any Governmental Authority charged with the administration thereof, or (ii) **compliance by such Lender or its parent bank holding company** with any guideline, request or directive of any such entity regarding capital adequacy (whether or not having the force of law), **has the effect of reducing the return on such Lender's or such holding company's capital as a consequence of such Lender's Revolver Commitments hereunder to a level below that which such Lender or such holding company could have achieved but for such adoption, change, or compliance** (taking into consideration such Lender's or such holding company's then existing policies with respect to capital adequacy and assuming the full utilization of such entity's capital) by any amount deemed by such Lender to be material, **then such Lender may notify the applicable Administrative Borrower and applicable Agent thereof within 30 days of the date upon which such Lender first became aware of such adoption, change or compliance.** Following receipt of such notice, Borrower agrees to pay such Lender on demand the amount of such reduction of return of capital **as and when such reduction is determined, payable within 30 days after**

presentation by such Lender of a statement in the amount and setting forth in reasonable detail such Lender's calculation thereof and the assumptions upon which such calculation was based (which statement shall be deemed true and correct absent manifest error). ***In determining such amount, such Lender may use any reasonable averaging and attribution methods.***"

Some credit agreements have a relatively short contractual timeframe that limit the amount that can be claimed under these provisions (e.g., amounts incurred in the 60, 90, or 180 days immediately preceding a notice from the lender). Occasionally, as in Example 4 above, a credit agreement will provide that lenders must provide notice of an intent to assess costs within a specified timeframe following the date the lender "first" learned of any change in law triggering the applicability of the provisions. Most credit agreements limit the amounts that can be recovered under these provisions to the costs or reductions attributable to the particular loan or require a detailed calculation and good faith certification of the amounts asserted to be due. And finally, a small minority of credit agreements limit a lender's ability to make a claim for increased costs or loss of return unless the lender does so for all of its borrowers.³ Accordingly, a close look at the particular provisions is necessary in order to draw any conclusions regarding the extent to which any costs or capital requirements of Dodd-Frank may be assessed, or as a business matter, would be assessed, in a given situation.

WHAT IS COVERED?

The basic predicate is that there has been a change in law that has increased costs or reduced the rate of return on capital for a lender or, in some instances, for the holding company of a lender.⁴ There are many variations (and generations) of the standard capital adequacy provisions in the market, however, and some of the differences among credit agreements can be material. Some of the more general issues raised by some of the differences in language are discussed below but the analysis on any particular

³ Examples of these types of provisions from actual agreements would read as follows:

In making such determination [that the increase is material], such Lender shall treat Borrower the same as all similarly situated borrowers, as determined by such Lender in its reasonable discretion.

Each Lender agrees that it will not claim, and that it shall not be entitled to claim, from the Borrower the payment of any of the amounts referred to in this section (i) if it is not generally claiming similar compensation from its other similar customers in similar circumstances and (ii) unless the relevant introduction or change affects all banks and other financial institutions substantially similar to such Lender having regard to the size, business activities and regulatory capital of such banks and other financial institutions, but excluding differences based solely on the residency of Persons controlling such banks or other financial institutions.

⁴ The Act is likely to be a "Change in Law" as defined under most credit agreements. Most definitions of "Change in Law" are broadly drafted to pick up laws, administrative and judicial interpretations and rules and regulations of governmental, quasi-governmental, regulatory and self-regulatory bodies, but even narrower definitions should be sufficient for purposes of the Act. In addition, although not part of Dodd-Frank, the proposed provisions of Basel III are anticipated to raise risk-based and leverage capital requirements generally and could have a compounding effect on the likelihood that claims will be made under the capital adequacy provisions of credit agreements.

issue will depend on a number of factors including the language of the specific credit agreement at issue and other legally cognizable indicators of the intent of the parties.

- ***When does the change in law occur?*** There is no impact on the Tier 1 capital ratio under the Collins Amendment until 2013, and the impact is then phased in over three years. The change in FDIC assessments presumably requires implementing regulations.
- ***Who must the change in law affect and whose increased costs are assessable?*** The Collins Amendment affects the holding companies of insured depository institutions and the FDIC insurance premium changes only apply to insured depository institutions.
 - ***Only lenders:*** Some credit agreements limit changes in law to those affecting “Lenders” or affecting the “Lender’s costs” or the return on capital for “such Lender.” In these circumstances, it could prove difficult for lenders to have even a colorable claim as the result of the Collins Amendment because most loans are made by insured depository institutions and not their parent bank holding company or non-bank affiliates.
 - ***Holding companies:*** There are a number of provisions in the market that expressly include changes in law affecting or imposing costs on parent companies or other entities controlling a lender. While the Collins Amendment may qualify as a change in law under these provisions, it could prove difficult to establish any increased cost or reduced return on capital since the amendment applies to the holding company those requirements already in effect with respect to such holding company’s subsidiary insured depository institution.
 - ***Participants and assignees:*** Some credit agreements permit not only lenders but also participants to submit a claim for increased costs or reduced returns. A few credit agreements expressly restrict the provision to lenders as of the date of any change in law. Since participants and assignees are usually non-bank investors, these provisions should have limited application.
- ***Who decides to make a claim?*** There could be a difference between those credit agreements that leave it to each lender to make the determination as to whether there is a change in law that triggers the application of the provision (e.g., Example 1 above which provides “if a Lender reasonably determines that as a result of any Change in Law”; see, also, Example 4) and those credit agreements that require that the change in law have the stated effect as a condition precedent to a lender’s ability to make a claim under the provisions (e.g., Example 2 above which provides “if any Change in Law shall impose, modify or deem applicable”; see also Example 3).
- ***What must the change in law affect and what costs can be said to be costs of the loans?*** Some formulations of these provisions might be read not to cover costs or capital requirements under Dodd-Frank, at least for costs that are not costs of making or maintaining loans but rather costs of doing business generally, e.g., generally applicable regulatory requirements or increases resulting from the status of the lender as an insured depository institution required to pay for FDIC insurance for its depositors rather than from the making or maintaining of particular loans. Most credit agreements have limitations that could be read to preclude the recovery of costs from the borrower unless the increase in costs can be demonstrated to result from making or maintaining the loan in question to the borrower and of any compensation for a reduction in the return on capital to amounts traceable to the loans made to the borrower.⁵ Although the Act now assesses FDIC premiums on consolidated assets less tangible capital, rather than on the historical domestic deposit liability base, it could prove difficult to argue that these premiums are costs of making or maintaining loans rather than costs of maintaining federal deposit insurance or to trace premiums assessed on general assets to any particular loan.

⁵ Some formulations only permit the recovery of costs or compensation from the borrower to the extent that the change in law results in an increase in the cost of making or maintaining LIBOR or Eurodollar loans (as opposed to prime or base rate loans), evidencing the original intent of covering the cost of matching funds in the LIBOR or Eurodollar market.

- ***Is there an express contractual or implied legal duty to mitigate and from what point in time is the increase in costs or the decrease in rate of return measured?*** Although some credit agreements provide that the lenders can recover for amounts incurred during a specified period of time (e.g., 30, 60, 90, 180 or 365 days) preceding a notice whenever that notice is given, other credit agreements restrict the lenders' recovery to amounts incurred within a specified time period after the lender in question first becomes aware of the change in law that gives rise to the claim.⁶
- ***Is there an "MFN" clause?*** Occasionally, as set forth in footnote 2 above, a credit agreement has language purporting to limit a lender's ability to claim increased costs selectively against borrowers and has provided a borrower with the equivalent of "most favored nation" status such that a lender may only require payment from the borrower if the lender does so ratably from all of its borrowers generally.
- ***How will the cost assessable under a particular credit agreement be calculated and can lenders make the calculations within the parameters provided under most credit agreements?*** The basis for calculating the costs to be assessed against a particular borrower is usually not stated, or is prescribed only in generic terms. Frequently, the amounts are to be calculated in the lender's determination, reasonable discretion or good faith judgment and no other direction is provided. Other times, the provisions are entirely silent on how to calculate or determine the amount of any increase in cost or reduction in receipts with respect to the specific loans made to the borrower by the claiming lender. Most agreements, however, require that the costs assessable against a borrower be costs or reductions in return related to the making or maintaining of a particular loan. The effort to trace the general regulatory requirements of the Act or any increase in FDIC premiums to a particular loan could prove to be problematic. There could be additional issues under provisions where, as a condition to assessment, the amount of any costs or reductions are required to be material either by the express terms of the agreement (e.g., Example 3) or as a matter of contract law and interpretation. The amounts attributable to any particular loan may or may not be deemed to be material either in the context of the loan or to the lender's business.
- ***Amendment considerations.*** In evaluating the provisions under syndicated credit facilities, borrowers and agents also may wish to consider the provisions relating to amendments and waivers under the document. Amendments to reflect agreement on how to treat the Act under the credit agreement should be a matter of obtaining the consent of the required or majority lenders in the syndicate and not the consent of every lender. Some credit agreements, however, include the waiver of payment of any amount (not just principal and scheduled interest) due to a lender among the "sacred rights" that require each affected lender's consent for waiver.

In addition to the documentary limitations, there are strategic and marketing considerations (for example, making a claim could put a lender at a competitive disadvantage (unless lenders generally do so)) that might affect whether a lender is likely to make a claim even if there were grounds to do so under a particular credit agreement. The variations in the language and scope of credit agreements could affect the calculus for all lenders under a particular agreement. The lenders under the same credit agreement are likely to include more than one type of institution that could result in differences in position among the lenders themselves under the same credit agreement. The Act has a different effect upon the types of institutions that are actively in the bank lending and syndication market such that the interests of the

⁶ See Example 4 above for a 30-day window that runs from the date the lender first became aware of the change in law. Another formulation would be: "provided that Borrower shall not be required to compensate a Lender pursuant to this Section for any reductions in return resulting from a law, rule, regulation or guideline made applicable to such Lender more than 30 days prior to the date that such Lender notifies Borrower of such law, rule, regulation or guideline giving rise to such reductions and of such Lender's intention to claim compensation therefor."

SULLIVAN & CROMWELL LLP

lenders in any particular syndicate may differ and, in certain instances, may differ materially. Below is a summary of the effect of the two provisions identified above on the types of lenders that frequently are part of syndicated loans under commercial credit agreements:

Possible Claim	FDIC Assessment	Capital
U.S. Bank	Yes	Yes
Non-U.S. Bank	No	Uncertain
Systemically Significant Non-bank	No	Yes
Other Non-bank	No	No

Finally, borrowers, agents and the principal lenders in certain instances may agree that no amount should be assessable as the result of the Act or may agree on what amounts, if any, might be due under the provisions of a particular credit agreement, in which event it may be in their joint interest to amend the provisions now, before any claim is made by an individual lender. There are amendments short of waiver that could mitigate the ability of a single lender to hold out⁷ and potentially trigger a payment default under the credit agreement such as, for example, changing the due date for amounts claimed under the provisions, changing the payment waterfall to address the priority of any amounts claimed or implementing a rule that amounts may not be claimed by assignees who join the credit after the date of the amendment.

If the provisions are invoked, credit documentation usually affords the borrower with a limited time in which to pay the amounts claimed (usually within 10, 20 or 30 days after receipt of notice from a lender) or risk a default under the credit agreement as a whole. Because the failure to pay the amount claimed could qualify as a payment default (which usually is an immediate event of default under the credit agreement and which in some credit agreements may not be waivable without the consent of the affected lender), it may be prudent to have considered and analyzed the particular agreement provisions at issue and considered whether it is worthwhile or feasible to amend the provisions before any demand for payment is made or becomes due. Although a fair number of credit agreements permit the borrower to replace the notificant lender under the so-called “yank a bank” provisions, that remedy may not be effective on a practical level in the current financing environment or for a change in law such as the Act which is a systemic change that affects many of the available sources of financing.

⁷ The institutional investors that are usually identified as hold-outs however are also the least likely to be in a position to recover costs under Dodd-Frank since they usually are not bank or financial holding companies nor do they have FDIC insurance.

CONCLUSION

Each lender and borrower will need to review the provisions in relevant agreements to determine the extent to which the costs imposed by the Act may be recoverable by the lenders from the borrower under each credit agreement. Each lender would be well advised to consult counsel to consider whether it can make a claim under the applicable provisions and then calculate the amount of increased costs or the reduction in the rate of return on capital occasioned by the Act and attributable to each loan if it elects to make a claim. Each borrower would be well advised to discuss strategy with counsel and with the agent or other relationship banks and be prepared to respond quickly with any defenses or contest of any claim made because the time period within which payment is required under the documents is usually limited.

* * *

SULLIVAN & CROMWELL LLP

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance and corporate transactions, significant litigation and corporate investigations, and complex regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 700 lawyers on four continents, with four offices in the U.S., including its headquarters in New York, three offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future related publications from Jennifer Rish (+1-212-558-3715; rishj@sullcrom.com) or Alison Alifano (+1-212-558-4896; alifanoa@sullcrom.com) in our New York office.

CONTACTS

New York

Arthur S. Adler	+1-212-558-3960	adlera@sullcrom.com
H. Rodgin Cohen	+1-212-558-3534	cohenhr@sullcrom.com
Robert W. Downes	+1-212-558-4312	downesr@sullcrom.com
Mitchell S. Eitel	+1-212-558-4960	eitelm@sullcrom.com
John E. Estes	+1-212-558-4349	estesj@sullcrom.com
Erik D. Lindauer	+1-212-558-3548	lindauere@sullcrom.com
S. Neal McKnight	+1-212-558-3316	mcknight@sullcrom.com
Rebecca J. Simmons	+1-212-558-3175	simmonsr@sullcrom.com
Alan J. Sinsheimer	+1-212-558-3738	sinsheimera@sullcrom.com
Benjamin R. Weber	+1-212-558-3159	weberb@sullcrom.com
Mark J. Welshimer	+1-212-558-3669	welshimerm@sullcrom.com
Michael M. Wiseman	+1-212-558-3846	wisemanm@sullcrom.com

Washington, D.C.

William F. Kroener III	+1-202-956-7095	kroenerw@sullcrom.com
Dennis C. Sullivan	+1-202-956-7554	sullivand@sullcrom.com

Los Angeles

Patrick S. Brown	+1-310-712-6603	brownp@sullcrom.com
Stanley F. Farrar	+1-310-712-6610	farrars@sullcrom.com
Hydee R. Feldstein	+1-310-712-6690	feldsteinh@sullcrom.com

SULLIVAN & CROMWELL LLP

Palo Alto

Sarah P. Payne	+1-650-461-5669	paynesa@sullcrom.com
John L. Savva	+1-650-461-5610	savvaj@sullcrom.com

London

Craig D. Jones	+44-20-7959-8488	jonescra@sullcrom.com
Jamieson J. Logie	+44-20-7959-8420	logiej@sullcrom.com

Paris

William D. Torchiana	+33-1-7304-5890	torchianaw@sullcrom.com
Richard Vilanova	+33-1-7304-5860	vilanovar@sullcrom.com

Frankfurt

Wolfgang Feuring	+49-69-4272-5511	feuringw@sullcrom.com
Konstantin Technau	+49-69-4272-5521	technauk@sullcrom.com

Melbourne

Robert Chu	+61-3-9635-1506	chur@sullcrom.com
------------	-----------------	--

Sydney

Waldo D. Jones, Jr.	+61-2-8227-6702	jonesw@sullcrom.com
---------------------	-----------------	--

Tokyo

Izumi Akai	+81-3-3213-6145	akaii@sullcrom.com
Garth W. Bray	+81-3-3213-6172	brayg@sullcrom.com

Hong Kong

William Y. Chua	+852-2826-8632	chuaw@sullcrom.com
Chun Wei	+852-2826-8666	weic@sullcrom.com

Beijing

William Y. Chua	+86-10-5923-5901	chuaw@sullcrom.com
-----------------	------------------	--
