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Amendments: What's the Protocol

Chaucer's Retraction

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What does it mean to **AMEND**?

According to Merriam Webster, it means:

- To put right
- To change or modify for the better

It comes from the Old French *amender* which means to “correct, set right, make better, improve,” and from the Latin *emendare* which means “to correct, free from fault.”

Common Types of Amendment Requests in Today's Market:

- Event Driven
 - An event that is specific to an issuer (e.g., an acquisition, a sale, a change in an issuer's finances)
 - An event that impacts a certain industry segment (e.g., accounting rule change)
- Related to an Issuer's other Credit Facilities
 - Typically requesting a loosening of financial covenants to match those in the issuer's bank facility
- Related to a New Deal for an Issuer
 - Typically, a request to amend the terms of an existing deal so they are consistent with the terms of a new deal for an issuer that is being marketed
- Troubled Issuer
 - These typically involve requests to significantly change the underlying agreement and often morph into workouts

Ultimately, the type of amendment requests that will be made are often driven by where we are in the business cycle.

Polling Question Number One

What has been the basis for the majority of amendment requests that your institution or firm has participated in so far in 2018?

- 1) event driven requests
- 2) to match loosening of terms in a bank facility
- 3) to match proposed loosening of terms in a concurrent new private placement transaction
- 4) troubled credits

Common Issues relating to Amendment Requests

- Process for Investors
 - Proper resources
 - Time commitment
- Managing Group Dynamics
 - Steering Committee
 - Agent Communication
 - Issuer Communication
- Reaching a Conclusion
 - When to vote
 - Dealing with holdouts when 100% approval is required

Polling Question Number Two

Does your institution use a separate internal workout team when responding to an amendment request from a significantly troubled credit?

- 1) No
- 2) Yes for legal, but not on the business side
- 3) Yes for business, but not on the legal side
- 4) Yes on both the legal and business side

Common Issues relating to Amendment Requests

- Amendment or Workout?
 - Ultimate objective
 - Level of work involved
- Change of Counsel
 - New perspective
 - Sending a message

**Amendments:
Are there antitrust issues?**

Hypothetical

- In 2013, XYZ Corporation, a privately held company:
 - Entered into a new 5-year \$100,000,000 revolving credit facility and
 - Issued \$75,000,000 of its 10-year fixed rate notes in a private placement transaction.

The covenant packages in the two transactions were very similar.

- During the next five years, XYZ Corporation does an excellent job of running its business, and its credit profile improves. In 2018, XYZ Corporation is set to refinance its revolving credit facility. As a result of its better credit profile, XYZ Corporation is able to negotiate a “lighter” package of covenants. XYZ likes this new covenant “lite” package and would like to amend the covenants in its existing private placement to match its new bank covenants.

- XYZ Corporation contacts Will Doo, the agent from its existing private placement, and asks if it is possible to get the private placement covenants amended. Initially, Will tells XYZ Corporation that there is no real basis for the request.
- XYZ Corporation mentions that it is in the process of purchasing a large piece of equipment and will require financing for it. A light bulb goes off in Will's head, and he suggests that XYZ Corporation enter into a new private placement for the acquisition cost of the equipment and propose that the new transaction use the same covenants that are in the new bank credit facility.
- Moreover, Will suggests that, in connection with the marketing of the new private placement, XYZ Corporation contact the existing noteholders and propose amending their covenant package.

- When Will contacts the existing noteholders about the amendments, he is not shy in telling them that their chances of being able to buy into the new transaction are highly dependent on how favorably they react to XYZ Corporation's proposed amendment request.
- Many of the noteholders do not want to give up the strong covenant package they presently have . . . but, since XYZ Corporation's credit profile has significantly improved, they also don't want to miss out on being able to purchase more of XYZ Corporation's debt.
- The noteholders schedule a conference call to discuss among themselves how to respond to Will's request.

Are there any antitrust issues here?

- For Will Doo and XYZ Corporation?
- For the noteholders?

Cases and Concerns

- Between 2010 and 2014, the Dept. of Justice convicted UBS, JP Morgan, Bank of America and over 20 individuals of bid-rigging and fixing interest rates on investment agreements for tax-exempt municipal bonds.
- *Dahl v. Bain Capital Partners, LLC*, 937 F.Supp.2d 119 (D. Mass. 2013) (denying summary judgment to private equity defendants for “club deals”). Led to settlements in excess of \$600 million in 2015.
- In April 2017, the EU’s DG Comp. launched a study of potential competition issues in loan syndication. It is expected to be completed by the end of 2018.

Guidelines for Lending Consortiums

- Forming lending clubs or consortia to lend money to a public corporation is not a per se violation of the antitrust law, but entering into agreements with other lenders to restrict or corrupt what should be a competitive market for loans can be illegal.
- A lender's decision to lend or not to lend (and the terms of any loan) should be based on its own independent business strategy and not on agreements with competitors or on "club etiquette."
- Be careful when the lenders from an original syndicated agreement have an appreciable level of market power if they are the only ones that can offer refinancing.
- Be careful about excluding a lender from a consortium without a legitimate business justification.

Amendment Best Practices - PPIA Recommendations

Ground rules for a successful process

- Recommendation for Issuers
 - Timing
 - Information
- Recommendation for Investors & their Counsel
 - Organization
 - Communication
- Recommendation for Investment Bankers
 - Important support for issuer
 - Role in managing expectations

Educating Issuers

- Maintain an accurate note register beginning at closing
- Don't expect the noteholders to blindly follow the banks
- Provide them with a copy of the PPIA Best Practices Recommendations