

Quick Question: Opinions on Amendments to Credit Agreements

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By

Q: Do I need an opinion from borrower's counsel on an amendment to an existing credit agreement?

A: Opinions from borrower's counsel are routinely provided on the due authorization, execution, delivery and enforceability of all documents executed by a borrower on an initial financing. However, borrowers typically resist a requirement for the delivery of a similar opinion on an amendment to the credit agreement so as to avoid the additional time and costs associated with the delivery of that supplementary opinion.

The decision to require an opinion on an amending agreement will involve a consideration of several factors relating to the content and scope of the amendment:

New Advance of Funds – if the amendment involves an increase in a credit facility, a new advance or facility, or the introduction of a new monetary obligation, then an opinion is advisable to ensure the initial authorization of the board extends to the increased funding

Additional Security – if additional security is being delivered or provided at the same time as the amendment, an opinion would typically be warranted to cover all of the new documents being delivered by the borrower

Syndicated Loan – if the loan is syndicated, many other lenders within the syndicate may expect and be accustomed to receiving an opinion on each formal amendment so that the documentary package is complete for any potential assignee of its commitment

Customer Relationship – a lender may choose to forego the requirement for an opinion on an amendment to preserve a client relationship where none of the other above factors suggest otherwise

Complexity / Contentious Provisions – if the amendment involves complex or contentious provisions, an opinion may provide some assurances that an allegation of the unenforceability of such provisions will not be raised at a later date. On the other hand, simple, technical or housekeeping style amendments will not typically warrant a supplementary opinion

Borrower Controlled by Multiple Shareholders – if the borrower is controlled by two or more shareholders or groups of shareholders, the opinion process itself will ensure that the requisite due diligence is done to confirm all shareholders have been involved in the loan approval process and are aware of the terms of the amended deal

If an opinion is not obtained on an amendment for any reason, a lender may still be able to rely on the indoor management rule, and to proceed as if the amending agreement has been properly authorized, executed and delivered by the borrower unless the lender has knowledge to the contrary.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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