

**LOAN DOCUMENT CONSIDERATIONS IN CONNECTION WITH THE
BANKRUPTCY FILING OF LEHMAN COMMERCIAL PAPER INC.**

On Sunday, October 5, 2008, Lehman Commercial Paper Inc. (“LCPI”) filed for bankruptcy protection under chapter 11 of the United States Bankruptcy Code. The case has been consolidated with the cases of Lehman Brothers Holdings Inc. (“LBHI”) and certain of LBHI’s other subsidiaries and is being heard by Judge James M. Peck of the United States Bankruptcy Court for the Southern District of New York, docketed under Case No. 08-13555. Prior to its filing, LCPI served as Lehman Brothers’ principal originator, administrative agent and trading counterparty for secured and unsecured loans. As such, its filing raises important considerations for (a) borrowers and syndicate lenders under credit facilities where LCPI is a syndicate lender or a participant, (b) borrowers and syndicate lenders under credit facilities where LCPI is the administrative agent and (c) participants and subparticipants in loans held or participated in by LCPI.

Concurrently with its bankruptcy petition, LCPI filed a motion (the “First Day Motion”) to (a) continue to utilize its agency bank account, (b) terminate agency relationships and (c) elevate loan participations. The First Day Motion was heard on Monday, October 6, 2008, by Judge Peck and was, with certain clarifications and reservations, entered by the Bankruptcy Court. The effect of the First Day Motion on the various interested parties is discussed below.

Parties to Credit Facilities Where LCPI Is a Syndicate Lender or Participant***LCPI Is Not Funding its Commitments Under Revolving Credit Facilities***

According to the First Day Motion and reports from the Loan Syndication and Trading Association, LCPI has not made any advances required to satisfy its ongoing commitments under credit facilities where it acts as a lender (or as a participant in its own right) since the chapter 11 filing of LBHI. This will not change with the filing. This is relevant, of course, only for revolving credit and similar delayed-draw facilities.

Defaulting Lender Provisions May be Triggered by LCPI’s Failure to Fund

Many credit agreements provide that a lender such as LCPI that fails to fund a valid draw request under a committed credit facility becomes a “defaulting lender.” The implications of being a defaulting lender may include loss of voting rights, loss of the right to receive voluntary and mandatory prepayments, exclusion from payments of commitment fees and the administrative agent gaining the right to set off amounts owed to the defaulting lender against amounts owed by the defaulting lender to the administrative agent. In addition, defaulting lenders are often subject to involuntary replacement at par by the borrower (with the caveat that, in the current marketplace, repayment at par may be very attractive to the defaulting lender).

While the existence of a defaulting lender does not generally excuse performance by other members of a lending syndicate, which must continue to fund their commitments, it is worth noting that some letter of credit facilities allow the issuing bank to refuse to issue letters of credit for the account of the borrower thereunder when a defaulting lender is part of the syndicate until arrangements satisfactory to the issuing bank are made (which may translate into a requirement that the borrower post some amount of cash collateral). Such provisions protect the issuing bank (which relies on the lender syndicate to reimburse drawings if the borrower defaults on its reimbursement obligation) from having to make up the difference when the defaulting lender defaults on a reimbursement payment. In such a situation, the borrower may be required to post cash collateral to cover the defaulting lender's pro rata portion of the letter of credit.

Sellers of Participations to LCPI Contemplating Future Loans May Be Responsible to the Borrower for the Funding of Such Future Loans

A lender that has sold a participation in its loans and/or commitments in a credit facility to LCPI remains obligated to fund any future loans it has committed to fund under the credit facility. To the extent that LCPI (or its subparticipant) does not fund under its participation, the participant would be required to cover the necessary funding and seek its remedy against LCPI.

Parties to Credit Facilities Where LCPI Is the Administrative Agent

According to the First Day Motion, LCPI serves as administrative agent on several hundred loans, in some cases without currently owning any economic interest in the underlying credit facility. Pursuant to such roles it, among other things, administers loans, collects advances from syndicate lenders and transfers such advances to borrowers, and collects distributions of principal, interest and fees from borrowers for distribution to syndicate lenders.

LCPI Has Attempted to Sell Its Loan Agency Business

LCPI reports in the First Day Motion that it has unsuccessfully shopped its agency business to Barclays Capital Inc. and other third parties. Barclays, according to the First Day Motion, was not interested in purchasing any agency positions. LCPI also indicated that the fees earned for serving as an administrative agent do not actually cover the costs of performing the relevant administrative services.

The Bankruptcy Court Order Allows LCPI to Terminate its Agency Relationships

The First Day Motion indicates that LCPI has been resigning its positions as agent where possible. The Bankruptcy Court granted further relief permitting LCPI to continue resigning agency positions. LCPI indicates that it would like to do so "as expeditiously as possible" while it "seeks to continue to fulfill its [agency] obligations." Any such resignation must be reported to the Bankruptcy Court.

Borrowers and lenders should consult their specific credit agreements to determine the administrative agent's right to resign. Usually the resignation provisions of credit agreements permit the administrative agent to resign upon notice to the lenders and the borrower and often

provide that the successor is appointed by the “Required Lenders” with, unless there is a continuing default, the consent of the borrower. The relevant provisions of the credit agreement may provide that the successor must accept the appointment before the administrative agent is released from its obligations. Otherwise, if no replacement is appointed within a specified time period, the administrative agent can appoint its own replacement or the “Required Lenders” themselves may be required to step into the role. Obviously it is in the interest of the other lenders and the borrower to obtain a replacement administrative agent prior to the expiration of such a time period. In some cases an institution without any economic interest in the loan may be appointed (at additional cost to the borrower). In such a case additional changes to the credit agreement may be required since credit agreements often give the administrative agent discretion and such a delegation was intended to be exercised by an institution with a significant economic interest in the loan rather than an institution hired purely to perform administrative tasks.

Prior to Such Resignations, the Bankruptcy Court Order Permits LCPI to Collect and Distribute Loan Payments and Advances in the Ordinary Course of Business

A concern raised by the bankruptcy of LCPI and its parent entities is whether amounts transferred to LCPI and earmarked as either advances distributable to borrowers or amounts payable to lenders would either be deemed to be property of LCPI (and thus subject to the claims of its creditors) or, no less a concern, be trapped in the bankruptcy estate of LCPI pending disposition of all outstanding claims.

To address these concerns and minimize disruptions, LCPI moved in the First Day Motion to be permitted to continue to be able to transfer amounts paid by borrowers and owed to lenders and advances made by lenders and owed to borrowers, in each case paid to LCPI, as agent, through its agency bank account to the appropriate parties. LCPI expressly disclaimed any beneficial ownership in the funds on deposit in such account, stating that “the funds on deposit in the [agency bank account] do not belong to LCPI and, therefore, do not constitute property of LCPI’s estate. Rather, such funds represent payments by borrowers held by LCPI as agent on behalf of the syndicates or funds advanced by the syndicate members to LCPI for re-advance to the relevant borrowers.” It further acknowledged that “[t]he equitable interest [in the agency bank account] belongs to third party borrowers or lenders and LCPI submits that it is both necessary and appropriate that LCPI be authorized to transfer such funds to the entities having the equitable interest therein.”

The requested relief was granted and LCPI remains able to collect and disburse funds in its role as agent, without such funds being deemed part of LCPI’s bankruptcy estate or being caught up in the administration of the bankruptcy proceedings.

Purchasers of Loan Participations or Subparticipations from LCPI

LCPI Intends to “Elevate” Participations to Assignments

LCPI acts as an intermediary for more than 500 participations or subparticipations in syndicated loans. Unlike an assignment, where there is a complete transfer of the underlying loan to the assignee, a participation transfers only economic rights and risks to the participant. The selling lender, in this case LCPI, retains the lending relationship with the borrower and collects payments from the borrower and remits them to the participant. Given the bankruptcy of LCPI, a natural concern of participants, similar to the concerns of borrowers and lenders under credit facilities where LCPI is the agent, is whether funds paid by the borrower to LCPI for remittance to the participant will be considered property of LCPI’s bankruptcy estate and whether the claim held by the participant for such funds is a secured claim or a general unsecured claim against LCPI.

To eliminate its role as a middleman and avoid liability for such fund transfers, LCPI sought and received permission from the Bankruptcy Court to “elevate” participations—that is, to cause participants to become lenders under the relevant credit facility, in full contractual privity with the borrower and other lenders. The right to do so was granted for “true participations,” but not for participations not constituting “true participations.” LCPI expressed in the hearing that it was willing to work with participants that would suffer harm (such as adverse tax consequences) from such elevations on a one-off basis.

Elevation Is Limited to “True Participations”

The distinction drawn by the Bankruptcy Court between “true participations” and other participations reflects the legal distinction between participations that create a perfected security interest in the stream of payments from the borrower and those that do not. While the analysis is technical, participants whose participation agreement provides that their economic rights in the underlying loan match those of the selling lender in the underlying loan (i.e., same interest rate, term, principal amount and amortization and no guarantee from the selling lender) will likely be viewed as having a perfected security interest in the underlying loan and the payment streams therefrom, as a result of application of either the Uniform Commercial Code provisions regarding “payment intangibles” or, in some cases, provisions of the participation agreement creating a trust relationship between the participant and the selling bank. These “true participants” will be subject to elevation. For participations with unusual economic terms, there is a risk of recharacterization of the participation as an unsecured loan to the selling lender—such terms include a substantial difference between the underlying loan and the terms of the participation as well as other relationships between the participant and the selling lender that indicate that recharacterization is appropriate. Participants with concerns about whether their loans constitute “true participations” should call their WF&G contacts to arrange the appropriate analysis.

Claims against LCPI

Borrowers will need to file a proof of claim against LCPI at the appropriate time for damages resulting from any failure of LCPI to perform its obligations under applicable loan documents.

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This memorandum was prepared by William Hiller, Marc Abrams, William Dye, Jeffrey Goldfarb and various other members of the WF&G Government Rescue and Credit Crisis Task Force. The Task Force (which includes UK insolvency professionals from our strategic ally, Dickson Minto W.S., and attorneys from our European offices) was formed to respond to client questions and provide targeted advice in connection with the government bailout and the credit crisis (including the Lehman Brothers Holdings Inc. bankruptcy). If you have any questions about this memorandum, please contact any of the members of the WF&G Government Rescue and Credit Crisis Task Force listed below or the attorney with whom you regularly work.

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