

Avoiding traps when documenting make-whole premiums for term loans

April 26, 2018 | Articles & Books

As the structure of term loans continues to evolve to include variations on “call protection” – provisions compensating lenders for early prepayments – such features need to be documented with care. One form of such call protection – long a hallmark of high-yield bonds – involves a “non-call period” that, notwithstanding its name, will typically allow borrowers to prepay loans during such period upon payment of a “make-whole premium” to lenders. Attorneys and bankers asked to adapt that feature to the term loan market should be aware of several common mistakes that have appeared in recent loan documentation of make-whole premiums, as well as some uncertainties around the enforceability of these provisions.

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