

Fund Finance Insights: Trends in Competitor Provisions in Subscription Facilities

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PRACTICES Fund Finance

Our review of subscription facilities from 2023 and 2024 reveals several interesting trends in how competitor provisions related to the assignment of loans or participations are playing out in loan documents. These competitor assignment restrictions are often a point of spirited negotiation, with lenders typically seeking flexibility to assign their loans, particularly after an event of default or other trigger event, while borrowers aim to maintain control over who holds their debt. Borrowers are especially wary of competitors gaining access to sensitive confidential information, such as investor lists and management fees.

Key Findings:

- **Market standard varies greatly.** The range of solutions in credit agreements varies widely across several different approaches.
- **More deals still have no competitor restrictions.** The largest percentage of deals still have no competitor assignment restrictions.
- **Trigger events and the definition of “Competitor” are crucial.** When competitor assignment restrictions are included, trigger events for when such restrictions fall away and how a “Competitor” is defined are both crucial to balancing the interests of the parties and will drive the structure of such restrictions.
- **Larger transactions are more likely to restrict assignments to competitors.** Larger deals (at least \$1 billion at initial closing, which are generally available only to larger sponsors) are more likely to include competitor provisions.

Market Standard and Variations:

In a review of our broad database of recent deals, we observed competitor provisions structured in one of the following four categories.

1. **No competitor concept:** The largest group of deals lacked competitor assignment restrictions altogether.
2. **Competitor restrictions that fall away after a trigger event:** Many agreements have competitor assignment restrictions that cease to be effective upon the occurrence of a trigger event, such as an event of default, a material potential event of default or enforcement of remedies, to name a few. As a practical matter, prior to an event of default or another trigger, the borrowers have a type of veto right over assignments to competitors because borrower consent is typically required for assignments. The practice varies more with respect to participations.
3. **Competitor restrictions surviving an event of default or trigger event:** When competitor provisions that survive an event of default or other trigger event are included, a common feature is to retain competitor restrictions for only a limited period of time (*i.e.*, 30 or 60 days) or until another trigger event occurs, such as payment or bankruptcy defaults.

- 4. Permanent competitor restrictions:** A small share of deals include provisions permanently prohibiting assignments or participations to competitors, even after a trigger event. These tend to be more heavily negotiated transactions for the largest sponsors and tend to have well-defined and narrow definitions of a “Competitor.”

When competitor assignment restrictions are included, the related trigger events are highly negotiated, as may be the definition of “Competitor.” Trigger events range from a material potential event of default (like an involuntary bankruptcy still within the period to procure a stay), to events of default, to exercise of remedies, to any number of other solutions, but they always need to be carefully considered. Among the many factors that a lender should take into consideration are internal policies related to and historical practices in connection with distressed assets. The agreed definition of “Competitor” can also affect whether the restrictions survive a trigger event. For instance, in deals where the definition of “Competitor” is limited to a scheduled list of specific names, the restrictions are more likely to apply after a trigger event, for at least some period of time. Where the definition is broader and instead describes criteria for being a “Competitor” that could apply to many entities, lenders are likely to have a smaller pool of assignees available, and they may want the documents to permit assignment without restriction, either upon an Event of Default or after some cure period. Broad definitions require different considerations, and the resulting provisions are more varied.

Conclusion:

The presence and structure of competitor provisions in subscription facilities remain highly negotiated and dependent on many different factors. As competitor provisions continue to evolve, careful negotiation remains essential for borrowers and lenders alike. Lenders need to understand their own internal policies and preferences before agreeing to any such competitor assignment restrictions.

For more detailed insights and sample provisions, please refer to our full article on “Competitors & Disqualified Institutions: Considerations & Sample Provision,” published in *Bloomberg Law* and found [here](#).

These insights are based on data from Subscription Facilities documented by Haynes Boone during the referenced period for the largest domestic and international lenders, as well as for regional and super-regional banks.

For more information on fund finance market trends, please reach out to any member of the [Haynes Boone Fund Finance Practice Group](#).

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