Survey of Position Enhancing Transactions in Bankruptcy

Jennifer Hardy | Lauren Kanzer | Maegan Quejada

November 17, 2023

Position Enhancing Transactions ("PET") Overview

What is a PET?

- Management of a borrower's outstanding debt obligations
- Consensual and (generally) out-of-court
- Applies to performing, stressed or distressed borrowers
- Opportunistic or reactive
- Often transactions are done hand-in-hand with raising additional capital

Why do a PET?

- Liquidity – manage debt service obligations (interest, amortization)
- Cost of capital
- Maturity
- Recapitalization / deleveraging
- Financial or other covenant default
- Contractual limitations and requirements

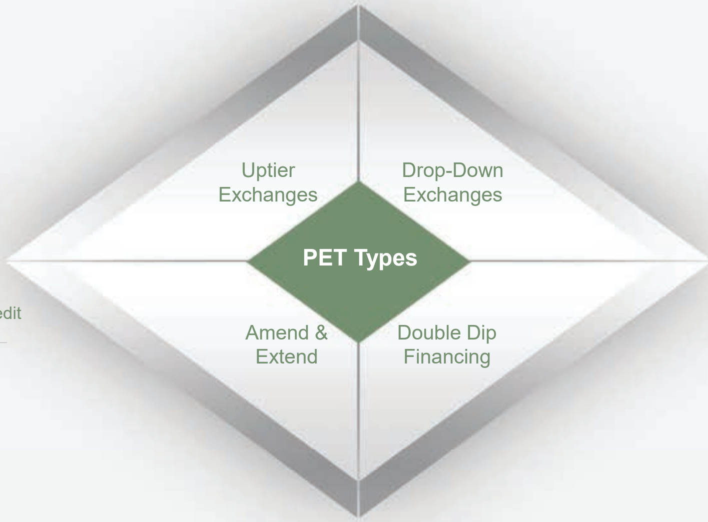
Borrower Goals	Lender Strategies
▪ Bridge to a more normalized operating environment.	▪ Enhance credit support for existing exposures, including improving priority vis-a-vis other existing lenders.
▪ Reduce the aggregate principal amount of existing debt (and corresponding interest burden).	▪ Maximize return on existing loans by supporting borrowers' operations during a period of distress (and avoid an in-court restructuring), by providing additional liquidity, covenant relief or maturity extension.
▪ Address upcoming maturities, obtain covenant relief from potential financial or other defaults.	▪ Prevent other lenders from taking actions that will disadvantage their existing exposures.
▪ Maximize flexibility in a challenging operating or financing environment, address extreme liquidity conditions.	▪ Earn a return on capital that meets internal return hurdles, in addition to transaction and other fees.
	▪ Ensure a seat at the table to maximize recovery in the event of an in court restructuring.

Commonly used by companies to offer security to existing holders in exchange for debt discount, reduction in cash interest expense, and/or maturity extension

- Boardriders
- Elara Caring
- Envision Healthcare
- Incora
- NYDJ
- Serta
- TPC Group
- Trimark
- wework
- West Marine

A company puts assets in an unrestricted subsidiary, and subsequently issues structurally senior debt at that subsidiary

- Cirque du Soleil
- Claire's
- Envision Healthcare
- J.Crew
- PetSmart / Chewy
- Revlon
- Travelport



Provides companies with a maturity extension in exchange for certain credit enhancements

- AAM
- Community Choice
- Neiman Marcus
- Windstream

Company issues debt at a new or otherwise empty subsidiary and then lends proceeds to parent, providing lender with lien on intercompany receivable, plus guarantees from parent or other subsidiaries

- At Home Group
- Sabre Corp.
- Trinseo
- Wheel Pros

"Up-Tiering" Transactions

What is an "Up-Tiering" Transaction?	• An "up-tiering" exchange refers generally to exchanges of junior debt for senior debt (e.g., unsecured for secured, 2L for 1.5L), typically on a non-pro rata basis.
	  • More recently, super-priority debt facility primes 1Ls, even though not initially permitted under existing credit agreement.
	• Borrower, in conjunction with "participating" lenders that constitute at least a majority of lenders, amends existing credit agreement to permit secured super-priority debt that ranks above (in right of payment or in right of security) the existing loans.
	• Borrower may offer to exchange debt under the new super-priority debt facility for the existing debt of the "participating" and other lenders.
	  • "Participating" lenders may be given opportunity to exchange at par.
	  • Other lenders may not be offered the chance to participate or are offered worse terms.

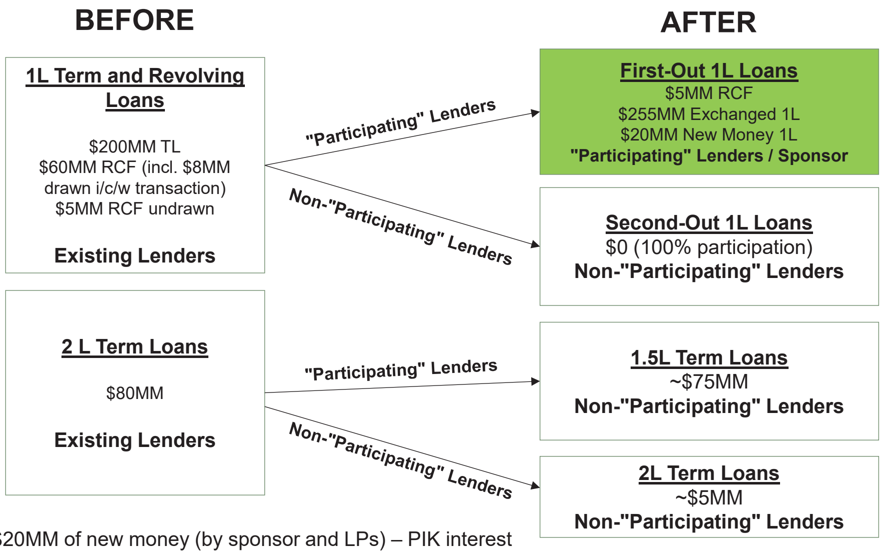
Benefits to Borrowers	• May provide additional runway for company execute on business plan, and/or reduced debt balance • Lenders / sponsor may also provide new money under new senior debt facility
Considerations for Borrowers	• Disadvantages existing non-participating lenders ("lender-on-lender violence") • Likely significant litigation risk

“Up-Tiering” Transactions cont’d

Other Considerations

- Avoid amending any "sacred rights" provisions (i.e., provisions that require the consent of all or affected lenders to amend).
  - Examples: Pro rata sharing provision, waterfall provision, release of all or substantially all of the collateral provision, right to payment of interest and principal
- Consider use of open-market purchase provisions for the debt exchange,
  - Even where no cash changes hands, borrowers have argued these provisions are utilized to avoid modification to pro rata sharing provisions.
- May strip covenants and events of default in junior debt.
  - Among other things, transactions have tried removing lender’s right to seek indemnification from borrower and requiring lenders to act only through the administrative agent and fully indemnify the administrative agent in advance for fees, expenses and potential liability before any suit can commence (but see TriMark).
- Understand voting thresholds
  - May involve "sham" commitments – e.g., obtaining revolving commitments from cooperating lenders so that majority (50.1%) lender consent is obtained – Revlon (challenged), Windstream (nullified), Neiman (threatened but not needed).

“Up-Tiering” Transactions Visualized



- $20MM of new money (by sponsor and LPs) – PIK interest
- $255MM of "rolled up" existing 1L loans (exchanged at par)
  - Deferred amortization, financial covenants, added 2%PIK; extended RCF maturity
- $75MM of “rolled up” 2L loans
  - PIKed interest, convertible to preferreds

Title search: Survey of Position Enhancing Transactions in Bankruptcy

First appeared as part of the conference materials for the
42nd Annual Jay L. Westbrook Bankruptcy Conference session
"Survey of Position Enhancing Transactions in Bankruptcy"