VENABLE LLP

sub-debt report

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In this issue:

Welcome from the Chair

by Chuck Morton, Chair, Mezzanine Finance Practice Group

Every American taxpayer is now a mezzanine lender to AIG. Barney Frank is discussing capturing the upside through warrant coverage. Can any of us really say we saw this coming?

In the midst of these unusual times, some things appear clear. Deals will get done. As senior lenders contract, there will be more opportunities for sub-debt lenders. It is also a safe bet that the billions of dollars raised in the last nine months by mezzanine funds will be deployed.

What is equally obvious, however, is that this generally dynamic market is especially volatile now. In these times, it is important for business people and lawyers to stay on top of rapidly evolving deal terms. In response to the times, we have redoubled our commitment to subordinate lenders. I recently spoke in Denver on current market terms. Team members also attended a conference in New York with industry leaders. We have recently launched a LinkedIn Group, Subordinated Debt/ Preferred Equity/Mezzanine Finance (click here for web page), to facilitate open communication during these challenging times. Finally, we have decided to offer to each of our readers a seminar at your office at a mutually convenient time to explore with you how we view the new economic climate as impacting mezzanine lenders. Please contact me to schedule such a meeting.

This issue of our newsletter focuses on SBIC regulations and warrants. The SBIC program, now 50 years old, should be part of any effort by the federal government to ensure capital is available for small businesses. Over the past 50 years, the program has provided billions of dollars, thereby creating hundreds of thousands of jobs. It is a tested vehicle to spur innovation and growth. In this issue, Joal Barbehenn explores SBIC regulations and how to draw on SBIC funds. We appreciate the thoughtful input we received from Anne Anquillare from PE Services for this article. We rely on her familiarity with fund administration and are grateful for her insight.

Warrants are back! They are now the subject of kitchen table discussions. Properly structured, they are an easy way to enhance yield without burdening borrowers with larger current payment obligations. If not properly structured, however, warrants can add significant complexity to transactions without providing additional return. The article prepared by Mike Schiffer and Bob Fraley provides an excellent summary of things to remember.

A closing caution – these times require great care with term sheets. When terms evolve quickly, short hand that works to streamline discussion during more routine circumstances can invite controversy and delay in less certain scenarios. For example, "standard subordination terms" or "standard anti-dilution provisions" may not have a shared meaning. During these times I encourage you to consider more detailed term sheets and to involve counsel earlier in the process.

With these things in mind, I hope you find this newsletter instructive and thought provoking.

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Small Business Investment Company Debenture Financing: A Primer on U.S. Small Business Administration-Backed Loans

by Joal Barbehenn

Once licensed and qualified, a Small Business Investment Company (an "SBIC") may borrow funds ("Leverage") in the form of debentures ("Debentures") that are guaranteed by the United States Small Business Administration ("SBA"). These Debentures are structured as unsecured, non-recourse loans with a ten-year term, semi-annual interest payments and a lump sum payment of principal due at maturity. Debentures are typically pooled and sold to investors through securities offerings. An eligible SBIC can receive Leverage of up to three hundred percent of the amount of investment capital committed to the SBIC from sources other than the SBA or SBA-backed loans ("Private Capital"), depending primarily on the amount of Private Capital raised.[1] The focus of this article is to describe the process a typical SBIC undergoes to obtain Leverage.

Eligibility

In addition to being licensed as an SBIC and receiving a commitment from the SBA as discussed below, to be eligible to receive Leverage, SBICs must comply with the eligibility regulations provided in Part 107 of Title 13 of the Code of Federal Regulations (the "Code"). Also, the SBIC must demonstrate a need for Leverage by showing evidence of investment activity and a lack of funds for investment.[2] For an SBIC's first issuance of Leverage, a lack of sufficient funds for investment is presumed if the SBIC has already invested over fifty percent of its Private Capital that has been called to date.[3] For future issuances of Leverage, the fund will then have a track record with the SBA upon which funding decisions will be made. To continue to draw Leverage, the SBIC must have enough Private Capital available to provide reasonable assurance of its ability to operate soundly and profitably over the long term and to operate actively in accordance with its business plan, as approved by the SBA, and its organizational documents.[4] The SBA's discretionary determination of whether the SBIC has satisfied the requirements for financial viability takes into consideration actual and anticipated income and losses on the SBIC's loans and investments and the experience and qualifications of owners and management[5]; nonetheless, the amount of Private Capital an SBIC has raised and the SBIC's current Capital Impairment Percentage[6] are probably the most important metric used by the SBA to determine which SBICs will receive Leverage. To receive any Leverage, an SBIC must have raised at least $10,000,000 in Private Capital.[7] The SBIC must also certify in writing that Smaller Enterprises encompass at least twenty percent of its total investment financings.[8] Finally, the SBIC must demonstrate to the SBA that its management is qualified, having the knowledge, experience and capability necessary to invest in the business types contemplated by the Code and its business plan. These Code provisions give the SBA the authority to make Leverage decisions based on the reputation of the SBIC's managers, which should be a reminder of the vital importance of maintaining one's reputation throughout the tedious Leverage funding process. In addition to the eligibility requirements, SBICs can be classified as ineligible for Leverage commitments and Leverage draws if there is a pending merger, change of control, reorganization or if the SBIC is under investigation by the SBA's Inspector General. Once the SBIC seeking financial assistance has met all of the eligibility requirements, it may apply for SBA Leverage.

Commitment of SBIC Debentures

The first step in the Leverage application process is to apply for a Debenture commitment from the SBA. Historically, Debenture commitments were offered at a limited number of specified times each year. The SBA would announce to SBICs that it would accept commitment applications on certain dates. However, recently the SBA has stopped announcing such dates. Nonetheless, at the time of printing, the SBA's Investment Division is accepting applications for commitment requests at any time and anticipates that new regulations will be issued that allow for commitment requests at any time, but limit the number of requests from each SBIC to twice annually.

To request a Debenture commitment from the SBA, the SBIC must submit a letter requesting the commitment. The letter must include the name, address and license number of the applicant and the requested amount of the commitment, which must be a multiple of $5,000. In addition, the letter request must include specific language set forth in the memorandum of instructions available from the SBA[9] and several exhibits, including certain SBA forms, financial statements, an investment plan, an opinion of counsel and information necessary for the transfer to the SBIC.

After an extensive review by the SBA, successful applicants will receive a commitment letter that will automatically lapse on September 30th of the fourth year following issuance.[10] SBICs with current outstanding commitments should note that the shelf life of any outstanding commitments issued in 2004 is set to expire on September 30, 2008 if not yet drawn.

There are two main conditions accompanying any Debenture commitment. The first condition is the payment of fees. First, a non-refundable commitment fee, of one percent of the face amount of the Leverage must be paid to the SBA before any Leverage is drawn by the SBIC.[11] Second, a leverage fee of 2%, an underwriter's fee of 0.375% and an administrative fee of 0.05%, for a total of 2.425% of the face amount of the Leverage will be deducted from the Leverage proceeds at the time the Leverage is drawn.[12] Finally, each year that the Leverage is outstanding, the SBIC must pay to the SBA an additional fee (currently 0.717% for 2008 commitments) on the outstanding Leverage under the commitment.[13] Automatic cancellation of the commitment occurs unless the required fees have been paid by 5:00 P.M. Eastern Time on the 30th calendar day following the commitment's issuance.[14] Also, to remain eligible to draw down against an outstanding Leverage commitment, the SBIC is required to submit to the SBA a financial statement on SBA Form 468[15] as of the close of each quarter of the SBIC's fiscal year, filed within thirty days of the close of such quarter,[16] and remain in compliance with the regulations in the Code.

Drawing Down Against Commitments

By submitting a request for a draw against the SBA's Leverage commitment (a "Draw Request"), an SBIC authorizes the SBA to guarantee the Debenture and to sell it with SBA's guarantee.[17] In order for the SBA to consider funding a request, the SBIC must submit the following documents to the SBA: (1) Leverage Security Instruments; (2) Form 468 and Statement of No Material Adverse Change; (3) Statement of Compliance; (4) Statement of Need; (5) Smaller Business Financing Certification; and (6) Opinion of Counsel.[18]

Draw Requests, which may contain up to five takedowns made in increments of $5,000, may be submitted to the Funding Control Officer of the SBA's Investment Division twice a month (typically the first and third Wednesdays of the month). Generally, the Draw Request review process takes six days and, if approved, the SBA will send a separate approval notice for each approved takedown (an "Approval Notice"). Once the SBIC has received an Approval Notice it must complete Section II and fax the entire document to the Bank of New York by 2:00 P.M. the day before an anticipated takedown. Provided that these requirements are met, the funds should be available to the SBIC by the close of business on the day of its takedown. Funds can be received as early as the Friday following receipt of an Approval Notice and as late as fifty eight days following such receipt. Approval Notices expire if not submitted for funding, but the SBIC may make further Draw Requests so long as its Leverage commitment has not expired.

Funding of Draw Requests

When the SBIC submits a Draw Request, it authorizes the SBA to enter into any agreements on the SBIC's behalf as are necessary to sell the Debenture to a short-term investor, to allow for the repurchase of the Debenture by the SBIC or another investor or to allow for pooling of the Debenture with other Debentures with the same maturity date.[19]

In the event that the Debenture is sold to a short-term investor by the SBA, the SBIC must pay interest (at a somewhat higher rate) to the short-term investor for the period of time the Debenture is held by such investor.[20] In order to repurchase its Debenture from a short-term investor, the SBIC must give the SBA written notice at least ten days before the cut-off date of the pool in which its Debenture is to be included and pay the Debenture's face amount plus interest to the short-term investor.[21] Otherwise, the Debenture will be pooled with other Debentures and sold to long term investors.

Pooling of the SBA-guaranteed Debentures is the final step of the Debenture funding process. Semi-annual poolings combine newly issued securities that are sold publicly. The interest rates applied to the Debentures are negotiated and based on market rates at the time of pooling.

SBA Leverage is a less expensive alternative to other sources of investment capital. Despite the additional administrative burdens that accompany SBA Leverage, this funding serves an important role for many investment funds whose investment strategies are compatible with SBA goals. By familiarizing themselves with the requirements and procedures involved in obtaining SBA-guaranteed Debentures, SBIC investors will reduce the time, cost and difficulty involved in obtaining these funds.

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[1] For the maximum amounts of Leverage available to SBICs, see Code § 107.1150(a) and notices issued by the SBA annually to increase the maximum Leverage ceiling to reflect increases in the Consumer Price Index.

[2] Code §107.1120(a), Jan. 1, 2007.

[3] Id.

[4] Code §107.1120(b), Jan. 1, 2007.

[5] Id.

[6] An SBIC's Capital Impairment Percentage is the ratio between its Private Capital and any realized or unrealized losses calculated pursuant to § 107.1840. If an SBIC has a Capital Impairment condition (as defined in § 107.1830(c)) then the SBIC is not in compliance with the terms of its Leverage and the SBA has the right to impose remedies, including accelerating the Leverage. §§ 107.1830(c), 107.1810(g).

[7] The Code states that the minimum is $5,000,000; however, the SBA has an internal policy of approving Leverage only if the SBIC has $10,000,000 in Private Capital. Code § 107.1120(c), Jan. 1, 2007. Also note that if an SBIC does not meet this capital requirement, it may still qualify for Leverage, but must invest only in Smaller Enterprises (as defined in the Code) and must assure the SBA that the issuance of Leverage will not create or contribute to an unreasonable risk of default.

[8] Code § 107.1120(d) – (e), Jan. 1, 2007. If applicable, the SBIC must also certify that it has met the special requirements for Leverage over $90,000,000. *See* Code § 107.710(d).

[9] The memorandum of instructions for the application for a Debenture commitment can be found on the Web at http://www.sba.gov/aboutsba/sbaprograms/inv/forsbic/SBIC_APP_DEB_COMMITMENT.html.

[10] Code § 107.1200(d), Jan. 1, 2007.

[11] Code § 107.1130(b), Jan 1, 2007.

[12] Code § 107.1130(a) and 107.1210(a), Jan. 1, 2007.

[13] Code § 107.1130(d), Jan. 1, 2007.

[14] Code § 107.1210(b), Jan. 1, 2007.

[15] SBA Form 468 (Short Form) can be found on the Web at: http://www.sba.gov//aboutsba/sbaprograms/inv/nmvc/INV_NMVC_FORMS.html.

[16] Code §107.1220, Jan. 1, 2007.

[17] Code § 107.1230(a), Jan. 1, 2007.

[18] Additional documentation may also be required, as explained in the SBA's detailed instructions and tips on preparing a successful Draw Request which may be found on the Web at: http://www.sba.gov/idc/groups/public/documents/sba_homepage/commitment_draw_instructions.pdf.

[19] Code § 107.1240(a), Jan. 1, 2007.

[20] Code § 107.1240(b), Jan. 1, 2007. The terms, conditions and remedies of SBA Debenture Leverage are outlined in Code § 107.1810. An SBIC that violates any term or condition will be subject to the remedies described in Code § 107.1810.

[21] Code § 107.1240(d), Jan. 1, 2007.

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Warrants: Key Issues and Current Practice

by Mike Schiffer and Bob Fraley

Due to senior lenders tightening the credit market over the past year, junior capital is playing an increasing role in the capital structure. With the increased need for junior capital and the increased risk to be borne by junior lenders, warrants are again becoming a common component of mezzanine financing transactions. We, therefore, thought this to be an appropriate time to review some of the key issues related to warrants - namely dilution protection and put rights, change of control rights and the original issue discount. Warrantholders, of course, also need to consider various other rights as putative equity holders, such as tag along and voting rights, though we will address those considerations in a future article.

Dilution of Warrant Value

A warrant generally permits its holder to purchase a percentage of a borrower's outstanding ownership interest as of the date of the loan transaction. This percentage generally assumes conversion of all current outstanding options or rights to purchase shares (including an agreed-upon management option pool). There are several ways in which a warrant, or the equity interests into which it is convertible, may be diluted. The three primary dilutive transactions are: (1) share splits; (2) the sale of additional equity interests; and (3) distributions of cash or property.

1. *What happens upon a share split or dividend?* A split of the outstanding equity interests of a borrower into a greater number of outstanding interests (*i.e.*, a stock split) or a dividend of additional shares to existing equity holders (*i.e.*, a stock dividend) decreases the value of a warrant by increasing the number of outstanding equity interests without a corresponding increase in the value of the borrower. On the other hand, a combination of outstanding equity interests of a borrower into a lesser number of outstanding interests (*i.e.*, a reverse split) artificially inflates the value of the warrant by decreasing the outstanding equity interests without a corresponding decrease in the value of the borrower. Because a warrant is generally exercisable for a specific number of shares or based on a set percentage of the outstanding equity interests of the borrower on the date of issuance of the warrant (rather than on the date of exercise), the warrant or other related documents must provide that, in the case of stock splits, stock dividends, reverse splits or similar recapitalization events, the number of equity interests into which the warrant is convertible upon exercise is increased (or decreased) in proportion to all such recapitalization events. This type of provision is included in all warrants and should not be controversial.

2. *What if the borrower subsequently issues additional equity after the issuance of the warrant?* Future issuances of shares at a price below the price of the shares on the date of issuance of the warrant dilute the value of the warrant because such future issuances reduce the overall per share value of any share issued at a higher price. In addition, issuances of additional shares, whether at a higher or lower per share price at the time of the issuance of the warrant, dilute the percentage of ownership of the borrower that the warrant entitles the holder to purchase. A warrant should address each of these types of dilution.

(a) <u>How should you address dilution resulting from future issuances below the price of the shares on the date of issuance of the warrant?</u> Assume that a borrower was valued at $100 and that, as of the date of the issuance of a warrant for 10% of the borrower, 100 shares of equity interest were deemed outstanding (75 shares outstanding, 15 shares reserved for a management option pool and 10 shares reserved for issuance upon exercise of the warrant). The per share value upon issuance of the warrant is $1 and the initial value of the warrant is $10. If on the next day, the borrower sells an additional 100 shares for $0.50 per share, the value of the borrower is now $150. With 200 shares outstanding, the value per share is now $0.75 and the value of the warrant has been reduced to $7.50. A warrant should protect against this issue by providing for an adjustment based upon either the "weighted average anti-dilution" or the "full ratchet" method.

The "weighted average anti-dilution" method increases the number of shares into which the warrant is convertible by taking into account the average equity value of all shares, including the subsequently issued shares. One version of the formula would be to multiply the original number of warrant shares by a fraction, (a) the numerator of which is the sum of the number of shares outstanding immediately prior to the date of issuance of the additional shares and the number of additional shares issued and (b) the denominator of which is the sum of the number of shares outstanding immediately prior to the date of issuance of the additional shares and the number of additional shares that the aggregate consideration for the total number of additional shares would have purchased at the original per share price. Keeping with our example above and based on the above formula, you would multiply 10 by the quotient obtained by dividing 200 by 150. Thus, the warrant would now entitle its holder to receive approximately 13.33 shares. That number of warrant shares times the new per share price of $0.75 would result in a current warrant value of approximately $10, thereby maintaining the correct value of the warrant. Naturally, doing so will dilute the value of the outstanding shares and the management option pool. However, this mechanism is generally viewed as appropriately balancing the rights of the various parties involved.

Another more aggressive, albeit simpler, option, is the "full-ratchet" formula. Rather than adjusting for the average post additional offering equity value, it adjusts the number of shares to be issued upon conversion of the warrant based solely on the price at which the additional equity was sold. Basically, it lets the warrantholder take advantage of the lowest price paid by the purchasers of the additional shares. In our example, the warrant with a value of $10 could now purchase 20 shares, as the conversion price would be reduced from one dollar to $0.50. This adjustment mechanism substantially dilutes the holders of outstanding shares in favor of the warrantholder and is generally used only in specifically negotiated circumstances.

(b) <u>Should a warrant provide for preemptive rights?</u> Although issuances of additional shares above the per share price at the time of the issuance of the warrant do not dilute the value of the warrant, such an issuance, as with any future issuance of shares, will dilute the percentage of ownership of the borrower that the warrant entitles the holder to purchase. Preemptive rights permit an equity holder to purchase a number of equity interests in a subsequent offering to maintain the percentage of equity interests such holder held prior to the subsequent offering. As discussed above, a warrant that provides for weighted average anti-dilution or a full ratchet adjustment protects the warrantholder from diminution in the value of the warrant based on an issuance of additional equity interests. However, the weighted average anti-dilution adjustment mechanism does not provide a mechanism for the lender to maintain its proportionate ownership interest in the borrower. Moreover, even a full ratchet adjustment may not assure a warrantholder that it will maintain its proportionate interest in the company (*i.e.*, an issuance of preferred stock excluded from the adjustment mechanism). Continuing our example above and assuming the weighted average anti-dilution adjustment, the warrantholder's original warrant value was maintained at $10, but, rather than holding a warrant to purchase 10% of the borrower, it only holds a warrant to purchase approximately 6.66% (*i.e.*, 13.33 of 200 rather than 10 of 100). If it is important to the lender to protect its full upside, the warrant or other equity-related documents should provide the holder with preemptive rights to purchase its pro rata amount of the shares issued in any future offering. In considering the importance of preemptive rights, careful thought must be given to whether any decisions were made with respect to voting thresholds for major corporate decisions of the borrower based on the percentage of ownership reflected in the warrant. Preemptive rights are commonly provided for, and generally not objected to, by borrowers. However, some borrowers will seek to avoid limitations on future issuances caused by preemptive rights. Such rights can cause delays for future investments because of the notice and exercise periods provided to the holder and may discourage future potential investors who wish to acquire an entire class of equity interests.

3. *What if the borrower distributes cash or other property prior to exercise?* There are three main alternatives for protecting a warrantholder against the dilution inherent in distributions of cash or property. First, the warrant could simply prohibit distributions. However, this may overly restrict a borrower during the term of the warrant, which tends to be significantly longer than the term of the loan.

Second, the holder could be entitled to receive all dividends and other distributions on a real-time basis as, and when, they are made. Finally, the warrant could provide that dividends and distributions accrue on an ongoing basis, and that, when the holder exercises the warrant, such amounts become due and payable as if the holder had held the underlying equity interests since the date of issuance. Either of these second two options is a reasonable alternative, with the former favoring the lender at the expense of the borrower because the borrower would have to make distributions to the warrantholder rather than retaining the additional cash for corporate growth. Particular care should be paid to any tax distributions made by a pass-through entity, such as a limited liability company, while the warrants are outstanding. Tax distributions are generally treated as an advance on future distributions (rather than the payment of an actual distribution), and therefore, a borrower will assert that a warrantholder should not receive a distribution based on a tax distribution. In such a case, warrantholders risk being excluded from significant distributions that could be stripping value from the borrower. The organizational document of the borrower must be drafted carefully to properly address all distribution issues.

Put Rights

Any lender holding a warrant desires certainty that its equity interest in the borrower be liquid. Without the power to force a liquidation of the warrant, a lender may find it difficult to model its expected rate of return. Moreover, many lenders have limited duration funds and need to be reasonably assured that they can cash out their investments in a timely manner in order to distribute returns to their investors. While this could be done in any number of ways, a common mechanism is to provide that the warrantholder may, rather than exercising its warrant for the agreed-upon ownership interest in the borrower, require the borrower to redeem the warrant at a particular time and for a price based on a predetermined formula.

1. *When should a warrantholder be permitted to require the borrower to redeem the warrant for cash?* A determination of when the warrantholder should be permitted to require the borrower to redeem the warrant is a factual matter and should be based upon the lender's investment objectives, the borrower's projected growth targets and the term of the loan. In general, a lender will want to be able to exercise its put rights at any time after the loan has matured because that is the initial time horizon for the intended investment. Moreover, after debt obligations are paid in full, a lender may lose most of its control and informational rights over a borrower, leaving the lender, as with any other minority equity holder, in a precarious position.

For the same reason, consideration should also be given to whether prepayment of the loan, whether mandatory, optional or as the result of an acceleration of the loan, should trigger the put right. The inclusion of these provisions is based on a variety of investment-specific decisions.

Additionally, lenders should consider whether certain major events, such as a change of control transaction, should result in the right of the warrantholder to immediately put the warrant to the borrower. Similarly, a lender should carefully consider whether the transfer of all of a particular owner's interest or group of owners' interest (even if such transfer would not result in a change of control) should also accelerate the put right. For example, in an equity sponsored deal, the transfer by a key member of management or all of management (even if substantially less than a majority of the overall ownership of the borrower) may be an appropriate triggering event because the people on whom the lender is relying to run the business no longer have a direct financial incentive for performance.

2. *What price should the borrower pay to redeem the warrant?* Obviously, exact pricing details are deal specific. However, there are a few commonly used methodologies for determining the price to be paid to redeem the warrant. A multiple of EBITDA, based on a trailing twelve-month period or a multiple twelve-month period, is a common pricing formula. Also, a default alternative of fair market value determined by an independent appraiser should be provided. This alternative provides certainty that the warrantholder receives the true value for its warrant in the event that a current or averaging EBITDA methodology is not reflective of value.

Other Issues

1. *What happens upon a change of control, sale of substantially all assets or liquidation?* As noted above, often a change of control transaction will trigger the put right. However, a warrant should also provide for the right of a warrantholder to receive the consideration to be received by other equity holders of the borrower in the event of a change of control, sale of substantially all assets or liquidation transaction. If a holder has not exercised a warrant prior to such a transaction, the equity interests of the borrower may be of little or no value or may not be exercisable at all. The most common way to address this concern is to provide that the warrantholder be treated as having exercised the warrant immediately prior to such event or for the warrant to automatically convert into shares effective immediately prior to such event. Thus, the holder would be entitled to receive its pro rata amount of the consideration received by the equity holders in the transaction. Such a provision is common in warrants and the borrower should not object to it.

2. *What is original issue discount and how does it relate to a debt transaction involving a warrant?* The Internal Revenue Code requires the lender to ratably include the original issue discount of any debt instrument held by the lender in its taxable income. Original issue discount is the excess of the redemption price of a debt instrument over its purchase price. In a transaction involving a debt instrument and a warrant, the Internal Revenue Code requires that the issue price be allocated between the debt instrument and the warrant based upon the relative fair market value of each. Because valuing a warrant in a private company is difficult and because both the borrower and the lender must report the issue price to the IRS, the documentation of the transaction to which the warrant relates should allocate the value of the overall transaction between the debt instrument and the warrant.

* * *

The aforementioned issues, as well as other issues that are relevant to the holder of a warrant (and potential equity holder), must be considered and negotiated and care must be given to ensure that these and the other rights are properly reflected in the warrant, related transaction documents and the borrower's underlying organizational documents.

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