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The Anti-Cookson Clause Revisited: A Useful Tool for Lien Restrictions

by Anthony Pirraglia, Partner

In any secured financing, lenders are concerned about their liens being primed. This is of particular concern where the financing permits, as many financings often do, the incurrence of additional secured debt by the borrower or issuer. While there are a number of restrictions that can be added to the financing documentation to guard against the borrower or issuer creating debt that is senior to a noteholder's existing debt, the private placement market has moved toward the use of the so-called anti-Cookson clause.

The anti-Cookson clause began to appear in note purchase agreements after the restructuring of Cookson Group PLC, in which Cookson Group granted security and guarantees to its banks under its permitted lien basket without the consent of the holders of the private placement notes it had issued. The Cookson Group's private placement note documentation permitted additional debt but failed to provide that such debt could not be senior to the existing notes held by the holders.

To address this potentially disastrous result, an anti-Cookson provision was added to private placement documentation so that issuers retain the flexibility to incur additional secured bank debt while holders of notes are not subordinated to that debt.¹ Initially, the anti-Cookson provision was intended to allow noteholders to maintain parity with lenders under the

issuer's principal bank credit agreement. The Model Form has now expanded the protection to "Material Credit Facilities" which include any future credit facility evidencing indebtedness for borrowed money above a to-be-negotiated threshold.

The anti-Cookson clause prevents the issuer from using secured debt availability in the lien basket to secure obligations arising under the issuer's Material Credit Facilities without equally and ratably securing the notes under the note agreement. Even though the market had its wake-up call with respect to lien protection, noteholders must remain vigilant and ensure that the anti-Cookson protection appears in the documentation and is not negotiated away. It is an important protection for the noteholders and should be included in every note purchase agreement that permits the incurrence by the issuer of any additional debt. Below are samples of the anti-Cookson provision:

- A — (k) in addition to the Liens permitted by the preceding subparagraphs (a) through (j), inclusive, of this Section [], Liens securing Priority Debt of the Company and its Restricted Subsidiaries, **provided**

¹ The private placement market first added anti-Cookson protection to the Model Form for domestic issuers in the discussion draft of April 2011 and modified the provision into its current form in October 2012.

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that such Priority Debt shall be permitted by the limitations set forth in Section [priority debt covenant] at the time that the Lien securing such Priority Debt is created, provided further, no Lien pursuant to this Section [] shall secure the Bank Credit Facility, any Additional Company Credit Facility or any Subsidiary Credit Facility or, in each case, guaranties by the Company or any Restricted Subsidiary in respect thereof, unless the Notes are also secured equally and ratably pursuant to an agreement reasonably satisfactory to the Required Holders.

- B — To the extent that Liens and other encumbrances in paragraphs [] through [] above do not secure obligations (including Indebtedness) exceeding at any time []% of Consolidated Net Book Value (the “Lien Basket”); **provided however that Liens and other encumbrances securing Indebtedness under**

a Material Principal Credit Facility shall not be permitted under the Lien Basket unless the Indebtedness of the Obligors under this Agreement (including, without limitation, the Guaranteed Obligations) and the Notes, is equally and ratably secured with all such Indebtedness so secured under the Principal Credit Facility pursuant to documentation in form and substance satisfactory to the Required Holders.

For more information about the anti-Cookson clause and other lien restrictions, please contact [Anthony Pirraglia](#) (212.407.4146 or apirraglia@loeb.com) or any member of Loeb & Loeb’s [Finance Practice Group](#).

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