Milbank

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Leveraged Finance Briefing

Welcome to another Leveraged Finance briefing which compares and contrasts key features of the leveraged finance markets in the US and in Europe.

US vs EU TLB vs HY: Apples and Oranges?

As the English law EU covenant lite TLB market develops, how different are English covenant lite TLB deals to their New York law counterparts, and how much have both instruments moved towards the high yield bond market?

There has been a marked convergence between the EU and US TLB terms in the past year or so. Meanwhile, certain structural features of EU deals are commonly included in cross-border US TLB deals (governed by NY law) for EU credits. Key differences do remain so that overall the US TLB terms are more sponsor friendly but the divergence is diminishing as these markets continue to evolve.

Milbank's leveraged finance team remains at the forefront of these markets, and this briefing provides a snapshot of the key similarities and differences today commencing with a high level overview of US and EU TLB terms.

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1. Overview of Key Differences - US TLB and EU TLB

Provision		
Cost savings/ synergies	No cap, no 3rd party oversight and 12-24 months	Often capped and 3rd party oversight, 12 months
Equity cure	EBITDA cure only in a cov lite context. Overcure not commonly permitted	Mostly net debt only; some EBITDA cures, primarily in cov lite context
Starter basket for debt	Almost always included	Frequently included, often smaller than US equivalent
Controls on ratio debt	If incurred as incremental/accordion debt, limited to the TLB Borrower(s); if incurred as additional ratio debt, any restricted subsidiary can incur it (subject to the non-loan party cap) MFN only on pari passu loans (whether or not outside SFA)	Often limited to specific entities Required to sign up to the ICA MFN (generally even if outside of SFA, although sometimes only on pari passu loans if outside the SFA)
RPs	Builder basket (with "starter")	Subject to leverage and maybe small basket
Baskets	Grower baskets are prevalent	Some grower baskets
Collateral	No guarantor coverage test	Guarantor coverage test
Change of control	Event of default	Mandatory prepayment event or individual lender put right
Mandatory Prepayments	Asset Sales/Insurance Proceeds Excess Cash Flow Rarely includes IPO Proceeds No prepayment with Acquisition/Report Proceeds	Asset Sales/Insurance Proceeds Excess Cash Flow IPO Proceeds Acquisition/Report Proceeds
Transfers	Blacklist or consent (not unreasonably withheld or delayed)	Whitelist or consent (not unreasonably withheld or delayed)
Amends/waivers	>50%	66 2/3 % (occasionally >50%)
Acceleration	>50%	66 2/3 % (occasionally >50%)
Events of default	Do not include unlawfulness, audit qualification, MAE	Included
Call protection	Soft call 101 for repricing/refinancing but with a number of carve outs	Same but with limited carve outs, although broader US style carve outs are being included
Hedging	Not required to be party to ICA Only limited voting (e.g. on changes to waterfall)	Required to be party to ICA Usually vote on enforcement (at least with respect to actual exposures)

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2. US TLB vs EU TLB vs HY Comparison

Provision			
Financial covenant	• Springing leverage covenant for RCF only • Covenant headroom usually 25-35% • Drawn percentage usually 25-30% (may include LC drawings) • Not a drawstop. Cross acceleration for TLB only • Amendments/waivers require 50% of RCF • EBITDA cost savings/synergy add-backs often uncapped, no third party notification required and 12-24 month period	• Same as US TLB • Maximum leverage will be "flat" and set at 30-35% above closing leverage • Only tested if RCF/ancillaries are more than 30-40% drawn (treatment of LC drawings negotiated) • Not a drawstop. Cross acceleration for TLB only • Amendments/waivers require 66 2/3% (sometimes >50%) of RCF • EBITDA cost saving/synergy add-backs often subject to 12 month period and overall cap (10-15%) of annual EBITDA and certified by third party/auditors if over certain (5%-10%) threshold	• None (only incurrence-based covenants)
Equity cure	• Cap: 3-5 in total; 2 per 4 quarter period • Purpose: added to EBITDA (no other purpose i.e. not for pricing / incurrence baskets) • Can be grace/cure period but no RCF drawings permitted during such period • Overcures not permitted	• Cap: 3-5 in total and not in consecutive periods (sometimes 2 per 4 quarter period as per US TLB) • Purpose: usually reduces net debt (and no other purpose); sometimes added to EBITDA as per US TLB • Same as US TLB but no drawstop if grace period • Over cures often permitted	• N/A

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Provision			
Additional debt incurrence	• Incurrence/ratio test based on leverage or FCCR (for junior or unsecured debt) • Starter basket often included on top of ratio test (usually one turn of EBITDA) • Ratio debt can be incurred as incremental/accordion alongside TLB or in separate instrument • Certain/most baskets may include grower component based on % of EBITDA or Total Assets	• Incurrence/ratio test based on total leverage and sometimes senior leverage or (more rarely) FCCR (with levels based on closing ratios) - same as US TLB • Starter basket same as US TLB (can be smaller) • Ratio debt can be incurred as incremental/accordion alongside TLB or in separate instrument as for US TLB • Grower baskets as for US TLB	• Incurrence/ratio test generally based on leverage ratio for secured debt and FCCR for unsecured • Additional permitted debt baskets (which are not subject to ratio tests) typically include credit facility basket, general basket, acquired debt basket, capital lease/purchase money basket and other negotiated baskets • Permitted debt baskets often include growers (typically based on Total Assets)
Incremental / accordion facilities	• Ranking: pari passu secured, within existing documentation and incurred by TLB Borrower(s) • Purpose: permitted acquisitions / capex /general corporate • TLB and RCF • MFN (50 bps, typically on TLB only) sunset 6 – 18 months (generally with flex to remove / extend)	• Ranking: same as US TLB (but sometimes can also be incurred by any TLB Obligor) • Purpose: as for US TLB • TLB (and sometimes RCF) • MFN (50 – 100 bps); often sunset 6 – 18 months (with flex as per US TLB)	• N/A
Additional ratio debt (not as part of incremental/ accordion)	• Pari passu secured, junior lien or senior unsecured/ subordinated • Can be incurred by any restricted subsidiary subject to non-Loan Party cap • Purpose: not restricted • Conditions include: (i) no default (ii) no greater guarantees/collateral (iii) restrictions on maturity • Not required to accede to ICA unless	• Ranking as for US TLB • Generally restrictions on who can incur the debt (e.g. pari debt issuer to be same as TLB Borrower(s) or a TLB Obligor, subordinated debt issuer to be a holding company) • Purpose: similar to US TLB • Conditions: similar to US TLB • Must accede to ICA (whether secured	• Can be pari passu or junior; if secured, would typically be subject to additional leverage test • Generally can be incurred by any restricted subsidiary (but subject to non-Guarantor cap) • Purpose: not restricted.

Provision			
	secured (maybe for unsecured debt in EU deals) • No MFN except for pari passu loans	/ unsecured); sometimes threshold included for unsecured • MFN similar to incremental/accordion MFN (although sometimes only applies for pari passu loans)	
Negative pledge/liens	• Generally permits liens to extent secured debt permitted under Indebtedness covenant, plus other ordinary course liens • Additional general basket (fixed amount with grower based on EBITDA or Assets) • Aggressive deals are now incorporating HY bond-like lien basket	• Generally permits liens to extent secured debt permitted under Indebtedness covenant, plus other ordinary course liens • Additional general basket same as US TLB	• Liens on non-collateral generally permitted if HYBs are equally and rateably secured • If HYBs are secured on specified collateral, permitted collateral liens are generally tighter on collateral compared to non-collateral • Permitted liens typically include liens to secure bank debt, capital Leases, general basket(s), ordinary course liens and other negotiated baskets
Restricted payments/ dividends	• Annual management fees (capped or tied to management agreement) • Annual management equity repurchases (dollar cap) • Management /employee advances (dollar cap) • Parent taxes and expenses • Post IPO dividends (6 % of aggregate gross IPO proceeds per annum) • Leverage basket (subject to no default)	• Annual management fees (capped or tied to management agreement), no conditions • Annual monitoring/advisory fees (capped and usually subject to no event of default) • Management equity repurchases (usually capped) • Parent taxes and expenses • Post IPO dividends (sometimes) (subject to total leverage ratio and only from IPO proceeds that don't have to be prepaid) • Leverage basket (subject to no Event	• Annual management fees (capped or tied to management agreement) • Annual management equity repurchases (usually capped), with rollover of unused amounts • Management /employee advances (usually capped) • Parent taxes and expenses • Post-IPO dividends (generally 5-7% of aggregate gross IPO proceeds per annum; sometimes also includes market cap prong) • Repayment of equity/subordinated debt with proceeds of equity issuance or new subordinated debt or capital contributions • Leverage basket (sometimes

Provision			
	• Builder basket (see below) • General basket (dollar amount subject to grower) • Repayment of junior debt typically subject to same restrictions/baskets although with fewer conditions/ wider leverage tests	of Default), with two levels depending on funding source (wider if funded from Acceptable Funding Sources) • No builder basket – (see below) • Sometimes general (de minimis) basket • Sometimes junior and unsecured debt can also be redeemed instead of dividend/restricted payment	included) • Builder basket • General basket (dollar amount, often subject to grower) • Excluded Contributions (by Sponsor) • Distribution of capital stock of Unrestricted Subsidiaries
Builder basket/ available amount	• "Starter" basket ($$) • Builder component (retained ECF/50% CNI - borrower can be permitted to choose at time of usage) subject to no Event of Default and leverage governor (sometimes no leverage test or wider test if used for investments and/or repayments of debt) • Equity contributions (unless used for equity cure); debt converted to equity • Cash or fair market value of dividends, distributions or other returns on capital from unrestricted subsidiaries or other investments made using builder basket • Amounts from re-designation of restricted subsidiaries • Amounts from dispositions or repayments of an investment • Used for: restricted payments, payments of junior debt, and investments / acquisitions	• Typically no builder basket concept. • Payments under restricted payment/dividend leverage basket sometimes (depending on leverage) required to be 50% funded from Acceptable Funding Sources, usually (i) new equity, (ii) retained excess cashflow, (iii) amounts permitted to be up streamed to sponsor (can include cash overfunding and retained IPO/disposal/insurance proceeds) (and (depending on usage) Permitted Financial Indebtedness) • Acceptable Funding Sources can also be used to restrict sources of funding for acquisitions, joint ventures and debt buy-backs or (sometimes, and in such cases usually excluding Permitted Financial Indebtedness) to increase an available capped basket or leverage / FCCR based basket for joint ventures / acquisitions	• 50% of CNI since beginning of measurement period (minus 100% of any CNI deficit during such period), plus • 100% of capital contributions and net proceeds from sale of equity of issuer, plus • 100% of principal amount of debt converted or exchanged into equity, plus • 100% of amount received from sale of Restricted Investments or Unrestricted Subsidiaries, plus • 100% of FMV of Unrestricted Subs that are redesignated Restricted Subs • Use of builder basket subject to being able to incur $1 under ratio test and no default

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Provision			

Investments and acquisitions	• Permitted Acquisitions uncapped subject to minimal conditions: no default (sometimes just bankruptcy / non-payment), majority stake, same line of business, acquired entities providing guarantees / security if applicable (with cap on consideration paid for entities / assets that do not become guarantors / collateral) and sometimes proforma compliance with financial ratio. Note no cap on negative EBITDA or material contingent liabilities
	
	• Investments baskets include:
	  • Intercompany Investments (usually with cap on investments by Loan Parties in non-Loan Parties)
	  • Investments in Unrestricted Subs (dollar cap)
	  • Investment in JVs (dollar cap)
	  • Ratio-based investment basket (total leverage)
	  • Investments using builder basket (see above)
	  • Dollar cap on acquisitions of, or other investments in, non-Guarantors (including intercompany investments)
	
	• Certain baskets may include grower (e.g. Unrestricted Subs, JVs, non-Loan Parties)
		• Permitted Acquisitions subject to limited conditions: majority stake, no default, same line of business, jurisdictions, acquired entities providing guarantees / security if applicable, may have cap on target's negative EBITDA, no material contingent liabilities, usually pro forma compliance with opening leverage ratio (or sometimes senior secured / FCCR ratio (unless funded from certain Acceptable Funding Sources – see above))
		
		• Investments: generally no "Investments" covenant, protected by "No Loans or Credit" and "No JVs", and including the following baskets:
		  • Loans to Non-Obligors (usually a fixed cap)
		  • General basket for loans (fixed cap)
		  • Investments in JVs (fixed cap + certain Acceptable Funding Sources (see above))
		  • A few recent precedents follow US TLB approach to acquisitions / investments
			• Acquisitions (uncapped as long as target becomes Restricted Sub)
			
			• Investments baskets include:
			  • Investments in Restricted Subsidiaries, not just guarantors (uncapped)
			  • Investments in a Similar Business (dollar amount, typically subject to grower)
			  • Investments in Unrestricted Subs (dollar amount, typically subject to grower)
			  • Loans and advances to employees/directors/officers (dollar amount, typically subject to grower)
			  • General permitted investments basket (dollar amount, typically subject to grower)

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Provision			
Guarantees and collateral	• Senior guarantees from wholly owned domestic restricted subsidiaries only (subject to exceptions) • Material subsidiaries: 2.5-5% (individual); 5 – 10 % (aggregate – in some cases) • No guarantor coverage test • Collateral: senior secured by substantially all the assets of the borrower and guarantors, except for excluded collateral, i.e. CFCs (65% pledge of equity only), equity in unrestricted subs and immaterial subs, leasehold interests, immaterial fee-owned real estate, assets to extent prohibited by law/regulation or requiring government/regulatory consents	• Senior guarantees from all Material Subsidiaries (subject to security principles) • Material subsidiaries: usually EBITDA / assets of 5% (sometimes no assets test). Holding companies of obligors must accede as guarantors • Guarantor coverage test included (usually around 80% of EBITDA / assets (sometimes no assets test)) • Collateral: as for US TLB except that there is no "excluded collateral" concept: collateral determined by reference to security principles (cost/benefit etc)	• Generally no guarantor coverage test; obligation to provide guarantees for HYBs triggered by guarantees of other debt • Some corporate credits may have independent requirement that significant or material subsidiaries become guarantors • Collateral coverage will vary by jurisdiction and transaction, but will typically piggy-back off collateral package negotiated in bank debt; senior secured HYBs in Europe will generally be secured pari passu with bank debt
Change of control	• Triggers an Event of Default • Definition: – Pre-IPO: Sponsor/ Mgmt.< 50% – Post-IPO: third party acquires >35-40% – Loss of direct 100% ownership in holdco chain – Post Qualifying IPO (if leverage following IPO is below a certain level): third party gains control (50%) – No prong for sale of all/substantially all assets (covered in "Fundamental Changes" covenant); Change of Control under	• Usually requires automatic mandatory prepayment (some deals where individual lenders may elect to get prepaid) • Definition is similar to US TLB save that: – Post IPO, Sponsor/ Mgmt. holds < 30% – It is a Change of Control if there is a sale of all/substantially all of the assets of the Group	• Requires issuer to offer to repurchase at 101% • Definition: – Person acquires > 50% (sometimes 35% post-IPO) of voting stock (except Sponsor/ Management) – Can include loss of direct 100% ownership in holdco chain (but typically not) – Sale of all / substantially all assets

Provision			
	other material debt sometimes included • Waiver: Majority Lenders • Management interest sometimes capped • Portability is rare	• Waiver/Amendment: most commonly all Lenders but sometimes Majority Lenders (prior to any actual right to payment having already arisen) • Management interest is not usually capped • Portability is rare but perhaps not as rare as in US	• Waiver: not applicable – each individual holder has option to put bonds at 101% • Portability is common based on rating and/or leverage; number of times negotiable

Asset sales	**Requires Mandatory Prepayment**
	
	• Proceeds to be used to prepay the term loans (i.e. including TLB / Incremental / Capex/Acq) or can be applied to prepay other pari debt
	
	• Subject to reinvestment for purchase of assets for use in the business of the group, financing Permitted Acquisitions/Capex, restructurings within 365-540 days
	
	• Asset sale provisions may also allow reinvestment in shares/businesses
	
	• Could include asset sale step downs (a percentage based on leverage)
		Requires Mandatory Prepayment
		
		• Proceeds to be used to prepay the term loans (i.e. including TLB / Incremental / Capex/Acq) and then RCF / ancillaries
		
		• Reinvestment rights similar to US TLB save that reinvestment period is 365 days (or if committed within that time, a further 180 days)
			Requires <u>Offer to Purchase</u>
			
			• Proceeds may be used during specified period (could be 365-455+ days (or if committed within that time, a further 180 days)) after receipt to:
			  • Pay down non-guarantor debt or bank debt (including RCF), or pari passu debt (typically requires proportionate offer to bondholders) or the HYBs
			  • Re-invest in Additional Assets (assets to be used by group or useful in similar business / shares of similar businesses)
			  • Make capital expenditures
			
			• If Excess Proceeds (above threshold amount) remain unused after specified period, offer to purchase bonds at par required to be made

Excess cashflow sweep	**Mandatory Prepayment Required** • 50 – 25-0% to be prepaid (step down based on leverage) • Similar deductions to EU TLB save that:	**Mandatory Prepayment Required** • Similar to US TLB • Deductions include: • voluntary prepayments of pari	**No Prepayment Required**

Provision			
	• voluntary prepayments re other debt are deducted before; deducted after, for TLB debt • certain restricted payments (if funded from internally generated cash)/prepayments of junior debt could be deducted • "Keeper"/de minimis (rare)	(non-revolving) debt • de minimis (deducted after) • acquisition/capex/ restructuring costs which are not debt funded maybe also: (1) debt buy back amounts (for amount of cash paid), (2) committed capex/acquisitions	
Call protection	• Soft call at 101 for repricing/refinancing • Applicable for 6-12 month period • Usually limited to transactions where primary purpose is to reduce yield • Often limited to refinancings with secured term debt; additional carve outs may include IPO; transformative Acquisition/Investment and in rare cases, dividend recap	• Similar to US TLB • Applicable for 6-12 month period • May be marketed without (but with flex rights to include) • May include Change of Control carve out, additional recent carve outs have also included "primary purpose" and "transformative acquisition"	• Non-call for 2-5 years (generally up to half of maturity) • Initial fixed price call premium set at 75% or 50% of coupon, declining rateably to par in 12-24 months prior to maturity • Exceptions during non-call period: • Make-whole • Equity claw call right (35 – 40%) at par plus a premium equal to 100% of coupon • For all non-U.S. issuers, par call right for changes in tax law
Assignments and transfers	• Consent, acting reasonably (deemed given after 5 – 10 BDs)	• Same as US TLB	• No consents or disqualified list • Securities law transfer restrictions apply - 144A/Reg S notes (which are not registered in the US) must be resold only to (1) QIBs in the US, (2) Non-US persons or (3) pursuant to, or pursuant to an exemption from, US registration requirements

Provision			
	• No white list; instead a "Disqualified Institutions" concept • No transfers to industrial competitors / defaulting lenders • No restrictions following Event of Default (limited to non-payment / insolvency related EoDs) • Debt Buy Backs: as for EU but includes a cap (20 – 30%) and does not allow purchase of RCF • Sub-participations – voting rights limited to "affected lender" votes	• White List (and also subject to minimum rating condition for transfer of RCF) • No transfers to industrial competitors / defaulting lenders • No restrictions following Event of Default (sometimes limited to non-payment / insolvency related EoDs) • Debt Buy Backs: open order/Dutch auction; no cap (unless legal considerations dictate); no default condition (for Group buy backs); no exclusion of RCF • Sub-participations - subject to assignment and transfer provision (voting / non-voting)	
Amendments and waivers	• Majority: 50.01% • Only lenders under "amend and extend" facility, refinancing facility, etc. required to effect amendments in connection therewith • Affected Lenders: increased maturity or due date for interest/fees, increased commitments, reduction in principal/ interest/fees, pro rata sharing provisions • Majority RCF Lenders only: financial covenant, equity cure, financial covenant event of default/acceleration • All Lenders: release of substantially all guarantors or security • "Yank-a-Bank": Defaulting /Non consenting /Increased costs lenders	• Majority: 66 2/3% (ordinary amendments and waivers; acceleration; Structural Adjustments (plus Affected Lenders) (but a few recent deals have adopted the US TLB position of > 50%) • Affected Lenders only: "not materially and adversely affecting the rights and interests of other Lenders" • Majority RCF Lenders only: same as US TLB • All Lenders: amendments and waivers/currency/borrowers and guarantors/ subordination and ICA • Super Majority (80 – 90 %): release of security • "Yank-a-bank": same as US TLB	• Each affected holder (or typically 90% of holders in Europe) must consent to: (1) changes to the interest rate, stated maturity, currency of payment (or other economic terms); (2) waive a default in the payment of principal, premium or interest; (3) impair the right of any holder to receive payment; (4) subordinate the HYBs to any other obligations; and (5) change the amendment/waiver provision • All other amendments require consent of holders of a majority of the outstanding principal amount • All or substantially all collateral can often be released with consent of holders of 66-2/3% (or 75%) of the outstanding HYBs • HYBs owned by the issuer or any Affiliate of the issuer are disregarded for voting purposes

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Provision			
Events of default	• Non-payment	• Non-payment	• Non-payment (30-day grace for interest)
	• Non-compliance with covenants	• Non-compliance with covenants	• Non-compliance with material covenants within 30 days of notice of non-compliance from trustee/holders; non-compliance with other covenants within 60 days of such notice
	• Breach of representations	• Breach of representations	• No breach of rep EoD
	• Cross default to material debt excluding a breach of the springing RCF covenant; cross-acceleration	• Cross default to material debt excluding a breach of the springing RCF covenant;	• Cross-payment default (generally for principal; sometimes for interest) to material debt (€ threshold)
	• Financial covenant in respect of the RCF only unless and until the RCF Lenders have accelerated	• Financial covenant in respect of the RCF only unless and until the RCF Lenders have accelerated	• Cross-acceleration to material debt (€ threshold)
	• Insolvency	• Insolvency	
	• Bankruptcy (or similar) proceedings	• Insolvency proceedings	• Bankruptcy defaults
		• Creditors' process	
	• Judgments to the extent not covered by insurance and undischarged for 30-60 days (usually same threshold as cross default/acceleration)	• Litigation	• Judgment defaults (usually same € threshold as cross-default/acceleration)
	• Impairment of security interests in collateral; invalidity of guarantees	• Unlawfulness and invalidity	• Impairment of security interests in collateral; invalidity of guarantees
	• Change of control	• Intercreditor Agreement	
	• ERISA	• Cessation of business	
		• Audit qualification	
		• Expropriation	
		• Repudiation and rescission of agreements	
		• Material adverse change	

Provision			
Secured hedging obligations	• Non-speculative hedging permitted (uncapped) • May be secured if provided by a lender or its affiliate and become part of the "Secured Obligations" • Typically recover from collateral proceeds pari passu with the loans • Hedge counterparties not required to accede to intercreditor • Intercreditor does not restrict termination/ close-out • Hedge providers may negotiate for limited voting rights (e.g., changes to waterfall) in credit agreement • Release of collateral/ guarantees may be triggered on repayment of loan obligations (even if hedges remain outstanding) • No minimum hedging requirement	• Non-speculative hedging permitted (may be capped) • May be secured regardless of who provides the hedge • Typically recover from Collateral proceeds pari passu with the loans (same as US TLB) • Hedge counterparties (to the extent secured) must accede to the intercreditor • Termination and close-out of swaps restricted under certain circumstances • Instructing creditors under intercreditor agreement include hedge counterparties • Secured hedges must be terminated and repaid prior to release of collateral and guarantees • Often include an obligation to implement minimum interest rate hedging post-closing	• Non-speculative hedging generally permitted (uncapped) • May be secured as a permitted lien • Secured hedges provided by the banks will be part of "Secured Obligations" (on pari passu basis)

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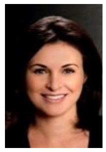

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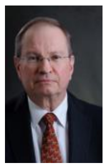

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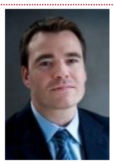

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