

Negotiating Mortgage Warehouse Lines of Credit

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Negotiation Questions

- Is it worthwhile to negotiate?
 - Yes, you should try to get the best deal you can.
 - Yes, the bank's documents rarely fit the deal or the Mortgage Company out of the box.
- Will your bank negotiate?
 - Yes, if the Mortgage Company has good credit, most banks will almost always negotiate.

Provisions to negotiate: Committed vs. Discretionary Lines

- Is your line a Committed Line?
 - Some Lines are committed; some Lines are not.
 - Generally, the terms of the Repurchase Agreement will determine if the Bank is committed to purchase loans or lend.
 - Only if the Repurchase Agreement says “the Bank agrees to purchase Mortgage loans” is the Bank committed.

Provisions to negotiate: Committed vs. Discretionary Lines

- Why do Banks provide uncommitted lines?
 - Less risk
 - Faster approval
 - Less paperwork
 - Quicker to close

Provisions to negotiate: Committed vs. Discretionary Lines

- Why do Mortgage Companies accept uncommitted lines?
 - Mortgage Company does not need a committed line
 - Less paperwork
 - Cheaper (no fees, less closing cost)

Provisions to negotiate: Committed vs. Discretionary Lines

- Why do Mortgage Companies prefer committed lines?
 - Add to liquidity (including in many states, required statutory liquidity)
 - Certainty that the Bank will purchase loans when needed (absent a default)

Provisions to negotiate: Committed vs. Discretionary Lines

- Be aware that some Banks provide only uncommitted lines.
- Communicate early on that a commitment is necessary (if it is necessary for regulatory or liquidity purposes).
- You may not be able to find a Bank willing to provide a committed line because of credit concerns and market factors.

Provisions to negotiate: Representations

– Representations:

- There is no litigation pending or threatened
- There has been no adverse change in financial condition
- Complies with all laws
- Complies with the Bank's procedures

Provisions to negotiate: Representations

- Why are representations important?
 - The Mortgage Company making representations are a condition precedent to the Bank purchasing loans (even if you have a committed line the Bank has no obligation to fund if Mortgage Company cannot make a representation)
 - If a representation becomes untrue when made or when it is deemed made (at or prior to funding), the Line may be in default and subject to acceleration (repurchase of all outstanding loans)
 - Representations are deemed to be made when the Mortgage Company request the Bank to purchase a loan

Provisions to negotiate: Representations

- You should attempt to qualify representations with knowledge and materiality requirements.
 - The litigation representation:
To the knowledge of the Mortgage Company, there is no litigation pending or threatened against the Mortgage Company which if prosecuted successfully is likely to cause a material adverse effect on the financial condition of the Mortgage Company or the ability of the Mortgage Company to perform and comply with this Agreement.

Provisions to negotiate: Representations

- The adverse change representation:
To the knowledge of the Mortgage Company,
there has been no material adverse change in
the financial condition of the Mortgage
Company, since the date of the last financial
statements delivered to the Bank.

Provisions to negotiate: Representations

- The compliance with laws representation:
To the knowledge of the Mortgage Company, the Mortgage Company is not in violation of any applicable laws, the violation of which, considered in the aggregate, would cause a material adverse effect in the financial condition or operations of the Mortgage Company.

Provisions to negotiate: Representations

- The compliance with procedure representation:

To the knowledge of the Mortgage Company,
the Mortgage Company is not in violation in
any material respect with the Bank's
procedures provided to the Mortgage
Company in writing.

Provisions to negotiate: Representations

- Alternative to the compliance with procedure representation:

Any default stemming from procedural non-compliance should be subject to reasonable notice and opportunity to cure.

Provisions to negotiate: Covenants

– Covenants:

- Payment of taxes
- Restrictions on borrowing
- Restrictions on liens
- Restriction on selling Mortgage Loans
- Compliance with laws
- Compliance with procedures

Provisions to negotiate: Covenants

- Why are Covenants important?
 - Failure to comply with covenants will cause a default, may terminate the Mortgage Warehouse Line and subject to acceleration (repurchase of all outstanding loans)

Provisions to negotiate: Covenants

- Covenants should be qualified by exceptions

- Payment of taxes

Pay all taxes when due upon the Mortgage Company's income, profits or property, except to the extent the amount or validity thereof is contested in good faith by appropriate proceedings so long as Mortgage Company has set aside adequate reserves.

Provisions to negotiate: Covenants

— Restrictions on borrowing:

Mortgage Company shall not create, incur, assume or permit to exist any indebtedness except (a) Indebtedness to the Bank, (b) other indebtedness described on Schedule 1.1, attached hereto and made part hereof by this reference, (c) indebtedness incurred in the ordinary course of business which is unsecured and consists of open accounts extended by suppliers on normal trade terms in connection with the purchase of goods and services; and (d) indebtedness for capital expenditures not to exceed \$_____, per fiscal year of the Mortgage Company.

Provisions to negotiate: Covenants

- Restrictions on liens:

The Mortgage Company shall not create or permit to exist any lien, security interest or encumbrance of any nature whatsoever on any of the Mortgage Company's property, except for Permitted Liens.

Provisions to negotiate: Covenants

“Permitted Liens” means:

(a) Liens for Taxes which are not delinquent or which (i) are being contested in good faith and the Mortgage Company has maintained adequate reserves with respect thereto, and (ii) are not, and will not be with appropriate filing, the giving of notice and/or the passage of time, entitled to priority over any lien of the Bank; (b) deposits or pledges to secure obligations under workers’ compensation, social security or similar laws, or under unemployment insurance in the ordinary course of business;

Provisions to negotiate: Covenants

(c) Liens securing any or all of the obligations owed to the Bank; (d) judgment Liens to the extent the entry of such judgment does not constitute a Default under the terms of this Agreement; (e) purchase money security interests for capital expenditure permitted under this Agreement; and (f) any other liens existing as of the date hereof which are set forth on Schedule 1.1 attached hereto and made a part hereof.

Provisions to negotiate: Covenants

– Restriction on selling Mortgage Loans

Mortgage Company shall sell any mortgage loans (other than the Loans sold under this Agreement) except (a) loans sold to Permitted Investors; and (b) loans sold under other repurchase agreement described on Schedule 1.1 attached hereto and made part hereof.

Provisions to negotiate: Covenants

- Compliance with law covenant
 - Comply with all laws, rules, regulations and decrees to which the Mortgage Company may be subject, a violation of which is likely to cause a material adverse effect on the business, operation or financial condition of the Mortgage Company.

Provisions to negotiate: Covenants

- Compliance with procedures covenant
 - Materially comply with all of the Bank's procedures relating the purchase of loans provided to the Mortgage Company in writing.
 - Alternative - Any default stemming from procedural non-compliance should be subject to reasonable notice and opportunity to cure.

Provisions to negotiate: Cure Periods

- In addition to qualifying representations and covenants, Banks will usually grant cure or grace periods for certain defaults.
 - Payment
 - Failure to deliver financial statements or perform negative covenants
 - Affirmative covenants
 - Involuntary Bankruptcy

Provisions to negotiate: Cure Periods

- Five (5) days' cure period for payment is typical (without notice). A minority of Banks will even permit five (5) days from notice of non-payment.
- The failure of the Mortgage Company to pay any of the Obligations as and when due and payable in accordance with the provisions of this Agreement, and such failure shall continue uncured for a period of five (5) days.

Provisions to negotiate: Cure Periods

- Most Banks will not give cure periods for the failure to give notice of default, the failure to deliver financial statements (after the delivery period has lapsed), for the breach of negative covenants or breach of financial covenants.

Provisions to negotiate: Cure Periods

- Banks will generally give one cure period (usually thirty (30) days) for breach of affirmative covenants other than non-delivery of financials or failure to give notice of default. The cure period typically runs from the occurrence of the default and not the Bank's notice to the Mortgage Company.

Provisions to negotiate: Cure Periods

- The failure of the Mortgage Company to perform, observe or comply with any of the provisions of this Agreement other than those covered by Sections ____ and _____, above, and such failure is not cured to the satisfaction of the Bank within a period of thirty (30) days.

Provisions to negotiate: Cure Periods

- Most Banks will give sixty (60) days' cure period for involuntary Bankruptcy.
- If proceedings in bankruptcy, or for reorganization of the Mortgage Company, or for the readjustment of any of the Mortgage Company 's debts, under the United States Bankruptcy Code (as amended) or any part thereof, or under any other applicable laws, whether state or federal, for the relief of debtors, now or hereafter existing, shall be commenced against or by the Mortgage Company and, except with respect to any such proceedings instituted by the Mortgage Company, shall not be discharged within sixty (60) days of their commencement.

Provisions to Negotiate: Remedies

- Most Banks will not negotiate remedies following default. However, sometimes Bank will negotiate “confession of judgment” clauses. In some jurisdictions, confession of judgment provisions allow the Bank to obtain a judgment without the debtor (the Mortgage Company) even being present in court. In most jurisdictions this is against public policy.

Provisions to Negotiate: Miscellaneous Provisions

- Notice
- Servicing
- “participate out”
- Governing law / jurisdiction
- Waiver of jury
- Mandatory arbitration

Provisions to Negotiate: Miscellaneous Provisions

- Banks will generally negotiate notice provisions. Banks will generally agree that only receiving notice by receipted courier will be sufficient for required notice under a Repurchase Agreement. Most Banks will not agree to receive notice by email or fax.

Provisions to Negotiate: Miscellaneous Provisions

- Most Repurchase Agreements contain servicing provisions designed to make the Mortgage Company entirely responsible for servicing the sold loans and an indemnity for any legal actions brought by any customer of the Mortgage Company against the Bank. Banks rarely negotiate these provisions.

Provisions to Negotiate: Miscellaneous Provisions

- Most Repurchase Agreements contain a provision saying that the Bank may participate out or assign its rights under the Repurchase Agreement. Some Banks will remove these provisions if they have no real intention to participate or assign the Repurchase Agreement.

Provisions to Negotiate: Miscellaneous Provisions

- Repurchase Agreements contain governing law provisions and jurisdiction provisions. Some Banks are willing to vary governing law and jurisdiction, as long as they stay within the Bank's footprint.

Provisions to Negotiate: Miscellaneous Provisions

- Most Repurchase Agreements contain waiver of jury provisions. Most Banks will not negotiate this out, and I would not advise any party to ever voluntarily go before a jury.

Provisions to Negotiate: Miscellaneous Provisions

- Some Repurchase Agreements contain mandatory arbitration provisions.
- I would try to get these removed, but the Banks that include arbitration provisions are unlikely to agree to remove them.

Mortgage Warehouse Lines

- Closing Remarks
 - Your Bank's Repurchase Agreement are not pre-negotiated.
 - Chances are they are not customized to your business and may be fundamentally inconsistent with your business' operation.
 - Chances are good your Bank will be willing to negotiate and you can end up with a Repurchase Agreement that works for the Bank and the Mortgage Company.

Mortgage Warehouse Lines

Questions?

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CMLA
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Thank you.

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