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FINANCIAL SERVICES

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Can Companies Add Tariffs Back to EBITDA?

With the recent and continually evolving tariffs announced by the current U.S. executive administration, a number of issuers, borrowers and financing parties have been asking "can those new tariffs be added back in calculating EBITDA?"[i] The answer to this question may depend on a number of factors including:

- What is the definition of EBITDA? – that is what are the words in the contract; and
- Are the tariffs ongoing or are they temporary and/or fluctuating?

Whether a contract explicitly permits tariff add-backs will depend on what the parties to those agreements agree. But where the parties to a contract are not explicit in permitting, or excluding, tariffs as an add-back in calculating EBITDA, there is room for interpretation, and this article addresses where the arguments are strongest. This article also addresses certain additional considerations for companies calculating EBITDA in filings with the Securities and Exchange Commission ("SEC").

EBITDA definitions can vary greatly. To keep things simple, I've excerpted below the definition from the Loan Syndication and Trading Association's ("LSTA") concept credit agreement from 2021 and **bolded** a few of the provisions I touch on in this Article.[ii]

"Consolidated EBITDA" means, for any period, Consolidated Net Income for such period plus, without duplication and to the extent deducted in determining Consolidated Net Income for such period, the sum of (a) interest expense, (b) **provision for taxes based on income**, (c) **depreciation expense**, (d) **amortization expense**, [(e) **unusual or non-recurring charges, expenses or losses**] and (f) other non-cash charges, expenses or losses (excluding any such non-cash charge to the extent it represents an accrual or reserve for potential cash charge in any future period or amortization of a prepaid cash charge that was paid in a prior period), minus, to the extent included in determining Consolidated Net Income for such period, the sum of [(i) unusual or non-recurring gains and non-cash income,] (ii) any [other] non-cash income or gains increasing Consolidated Net Income for such period (excluding any such non-cash gain to the extent it represents the reversal of an accrual or reserve for potential cash charge in any prior period) and (iii) any gains realized from the disposition of property outside of the ordinary course of business, all as determined on a consolidated basis. For the purpose of calculating Consolidated EBITDA for any period, if during such period the Borrower or any Subsidiary shall have consummated an Acquisition, Consolidated EBITDA for such period shall be calculated after giving pro forma effect thereto as if such Acquisition occurred on the first day of such period.

TARIFFS AS A TAX

Firstly, what are tariffs? In general, tariffs are a tax imposed (paid) by an importing (purchasing) company. So, tariffs are a tax right? Then the answer should be simple – EBITDA is earnings before taxes. But not so simple. Under U.S. GAAP ("GAAP"), tariffs are treated as part of the cost of goods and included in inventory cost. They are capitalized and then expensed as cost of goods sold when the inventory is sold. The LSTA concept credit agreement definition is quite clear that only "provision for taxes based on income" are added back to consolidated net income in calculating EBITDA. It would be difficult to argue that tariffs, which are more similar to an excise tax or value-added tax, would be added back under the "taxes based on income" prong. The argument would be stronger if the definition just said "taxes." In such case, a borrower or issuer might make the argument that tariffs as a "tax" should be added back.

But, additionally, tariffs are not new – they likely have existed historically for most of the companies to which the current administration's increased or expanded tariffs now apply. If a company has not historically treated tariffs as addbacks to EBITDA under the "taxes" prong, it may be a bridge too far to try to latch on to the tax add-back at the current juncture.

TARIFFS AS DEPRECIATION

What about depreciation and amortization? EBITDA is earnings before depreciation and amortization, right? Again, not so simple. In general, the cost of the tariff under GAAP is capitalized, but is only depreciated when the goods are sold as cost of goods sold.[iii] And again, crucial in the analysis may be what the company has done historically with respect to tariffs in calculating EBITDA. The tariffs are likely not new, just potentially more recently expanded and with changing (and sometime volatile) rates.[iv]

TARIFFS AS UNUSUAL OR NON-RECURRING CHARGES, EXPENSES OR LOSSES

Ok – this is where things get interesting.

- The term "unusual" is interpreted under GAAP to mean an underlying event or transaction with a high degree of abnormality and of a type clearly unrelated to, or only incidentally related to, the ordinary and typical activities of the company, taking into account the environment in which the company operates.
- The term "infrequent" – not present in the LSTA sample credit agreement but present in GAAP and often seen in EBITDA definitions - is interpreted to mean an event or transaction that would not reasonably be expected to recur in the foreseeable future.
- The term "non-recurring" is not a GAAP term – although it is frequently used as a non-GAAP measure, particularly in presenting EBITDA.

Even though a company may not have traditionally added the cost of tariffs back to consolidated net income in calculating EBITDA - on the theory that those tariffs were a normal-course cost of doing business (cost of goods sold!) – there is an argument that the administration has applied the tariffs so dramatically as to be "unusual."

Further, because the administration has actually changed the tariff rates unpredictably and dramatically in a way no one – and certainly no business – could predict (or can predict) – that the tariffs, at least for the interim period, are both a shock and a moving target as to be unusual, infrequent (at least with respect to rate and possibly country of origin) and non-recurring insofar as they appear, disappear and are varied over incredibly short time periods.[v]

Other parties might argue, however and as previously mentioned, that tariffs have been around for a long time and the subject company has never added them back to EBITDA in this manner. Or that tariffs are not unusual or non-recurring and in fact are to be expected as part of doing business internationally.

In sum, there is no absolute right answer, but there is at least a basis for adding the tariffs back based on the administration's vacillating stance with respect to tariff countries, products and rates over very short periods of time. Adding back the cost of the tariffs might raise certain other questions, however, such as whether to add them all back – or just the new ones since the administration began its tariff campaign. Additionally, should the cost of the tariffs cease to be added back at some point when they stabilize?

Providing explicitly for tariff add-backs to an EBITDA definition would clear things up, providing a measure of consistency for investors even if inflating the EBITDA number compared to prior definitions and periods. Similarly, explicitly stating that tariffs should not be added-back in calculating EBITDA would at least provide a measure of consistency in both interpretation and application. Financial covenants and incurrence covenants and baskets in financial instruments could then be appropriately sized off a more consistently applied metric. However, even the benefits of this approach may not help predict company performance in the face of the tariffs, which may not be known for some time, until it can be determined how much, if any, of the increase in cost of goods sold can be passed on to consumers at time of sale.

PUBLIC FILING EBITDA PRESENTATIONS

In public filings the SEC becomes the arbiter as to the appropriateness of adding back the cost of tariffs to non-GAAP financial metrics such as EBITDA. The SEC will decide if presentation of EBITDA that includes add-backs for the tariffs violates Regulation G as being misleading. There is an argument to be made that providing the tariff information as a separate component in reconciling EBITDA to consolidated net income is within the spirit of Item 10(e) of Regulation S-K, is not misleading under Regulation G, and is in fact beneficial to investors in that they are able to quantify the vagaries of tariffs which are changing in scope and amount on a daily basis. The SEC would have to concur with any such argument, however.

[i] Please note this article is limited to the direct effects of the tariffs and their direct potential impact in calculating EBITDA for purposes of a company's financial presentation/reporting in connection with its debt instruments. We do not touch at all in this Article upon other potential knock-on effects to a company's financial presentation including amongst others, other potential tax deductions due to the tariffs, impacts upon company contracts that could affect financial performance or metrics, or potential impacts on company liquidity and financial presentation implications therefrom.

[ii] There are some defined terms in the sample definition itself but as those don't provide any additional information for this article, I have chosen to ignore them rather than explain the definitions. Readers who are interested can find them in the same concept credit agreement. I've also limited this discussion to calculations under U.S. GAAP. Application of the accounting standards of another jurisdiction could potentially produce a different analysis.

[iii] There may be some exceptions here for tariffs paid in connection with long-lived fixed-assets.

[iv] Although not the only consideration in defining EBITDA, definitions of which vary and are not logically consistent across the financial markets, tariffs are a cash charge. They must be paid upon import by the importer and it is not certain whether that importer will recoup some or all (or any) of that cost until the sale of the product subject to the tariff is complete.

[v] Adding to the ambiguity of the situation may be that, although not present in the sample EBITDA definition, many definitions of EBITDA may include the concept of "extraordinary charges". Prior to 2015, GAAP included this concept as something that was unusual in nature and infrequent in occurrence. But the concept has since been eliminated. In most situations where pre-2015 GAAP does not govern interpretation of a company's financial presentation, the term is then subject to conjecture. One party might argue it is appropriate to look to the pre-2015 GAAP interpretation, but this is by no means the only view possible and another party might interpret the term otherwise.