

Fund Finance Friday



Renewals: Commitment Period and Key Person Event Considerations

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Over the past few weeks, we have fielded a number of questions from our lender clients about a fund's ability to call capital to repay a subscription credit facility after the expiration or termination of the commitment period and upon the occurrence of a key person event under the limited partnership agreement. These inquiries typically arise during the annual renewal of the subscription facility. While the expiration of the commitment period isn't as relevant at the beginning of a fund's life, it becomes more relevant to understand a fund's ability to call capital as the commitment period naturally winds down pursuant to the terms of the limited partnership agreement. The expiration of the commitment period may also be triggered by a key person event under the terms of the limited partnership agreement, which presents a different set of issues when considering the renewal of a subscription credit facility and a fund's continued draw requests under such facility. In connection with a renewal of a subscription credit facility, a lender should confirm that a fund is authorized to call capital after the occurrence of either of these events and that the capital contributions may be used by the fund to repay any existing obligations and future loans that may be requested by the fund under a subscription credit facility.

Commitment Period

In general, a fund's commitment period (also sometimes referred to as the investment period), as set forth in the fund's limited partnership agreement, is a period of time, typically between 3 and 5 years. During the commitment period, a fund will be permitted to call capital from its investors to make new investments and follow-on investments in portfolio companies and to pay partnership expenses. Provided the limited partnership agreement permits the fund to incur indebtedness to fund investments and pay partnership expenses pending receipt of capital contributions from the partners, the fund may decide to draw down on the subscription credit facility during the commitment period to finance the fund's investment. The partnership agreement will further provide that each partner acknowledges and agrees that in connection with a capital call notice made for the purpose of repaying any indebtedness for borrowed money permitted under the limited partnership agreement that each partner shall remain absolutely and unconditionally obligated to fund capital contributions. Thus, during the commitment period, the fund's investors have agreed to commit capital to the fund, to make the capital available pursuant to a capital call, that the fund may incur debt to finance investments and to repay such indebtedness pursuant to the terms of the limited partnership agreement. While it is clear that the fund is obligated to repay debt during the commitment period, the same enforceable obligation to repay indebtedness after the expiration or termination of the commitment period may not be as clear if the limited partnership agreement is ambiguous and fails to provide specific authorization. The fund's authorization to call capital from its investors will most likely be limited following the expiration or termination of the commitment period. These limitations typically include funding capital only for follow-on investments, investments under binding contract and to pay partnership expenses. Many vintage limited partnership agreements define partnership expenses to include only interest and fees. Does this mean that the fund is not obligated to repay principal? It would be reasonable to infer that if the fund is authorized to repay fees and interest that principal would also be permitted. Absent a clarifying provision in the limited partnership agreement, this uncertainty may persist and raise concerns as to whether the fund is authorized to repay indebtedness following the expiration of the commitment period. Many of the more recent limited partnership agreements have responded to this market concern and now specifically call out that the fund is authorized to repay amounts owing under a subscription credit facility, guarantee, letter of credit or similar credit support or other obligation or indebtedness of the fund, in each case, whether entered into before or after the commitment period.

Key Person Event

A related question that we field from clients is whether the occurrence of the expiration or termination of the commitment period also triggers a key person event. Limited partnership agreements commonly name certain key persons of the general partner who must dedicate a majority or substantively all of their time managing the affairs of the fund during the commitment period and/or the life of the fund. A key person event will occur under the limited partnership agreement if a specified number of the key persons cease to be involved in the fund. In addition, the occurrence of a key person event may also cause the early termination or suspension of the commitment period. Upon such occurrence, the fund may continue to operate for a predetermined period of time, but typically its actions and activities, including the making of investments, may be restricted by the terms of the limited partnership agreement. This is sometimes referred to as a limited operations mode. During this limited operations mode, the fund's activities may be restricted to making investments for follow-on investments and previously committed investments. Whether a lender decides to continue to make drawdowns available to a fund on the subscription credit facility or pause all drawdown requests will be influenced by the cause of the key person event. However, the fund should be authorized to continue to call capital to fund these specific permitted activities and to use capital to repay any debt obligations incurred for such activities. If the key person event also triggers the early termination of the commitment period, a review and analysis of the relevant limited partnership agreement provisions previously discussed should be conducted to determine the implications on the fund's authorization to repay obligations under a subscription credit facility. Confirming that the limited partnership agreement clearly permits and obligates the fund to repay a credit subscription facility after the expiration of the commitment period and the occurrence of a key person event is an important part of a lender's diligence when deciding to renew a subscription credit facility.