

Fund Finance Friday



Ogier CAYLUX – Fund Finance: The Investor Notice

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The security package for a subscription facility will typically include security over the uncalled capital commitments of a fund's investors, including: (i) the right to make capital calls on investors in respect of their uncalled capital commitments, together with rights to enforce payment of them; and (ii) the right to receive the proceeds of such capital calls. It will generally also include security over the bank account into which investors are required to deposit their capital contributions.

Giving notice to investors is a common feature of taking security over the uncalled capital commitments of investors of Cayman and Luxembourg domiciled funds. Below we have set out 10 frequently asked questions regarding the investor notice from a Cayman and Luxembourg law perspective.

1. Why is notice required?

Cayman

Priority of the security is achieved by giving notice of the creation of the security interest to the investors. Generally, where there are competing security interests over uncalled capital commitments, the first security interest that has been notified to the investors will take priority regardless of when the security interests were created.

Luxembourg

The security interest is perfected by execution of the security agreement. Delivery of the investor notice to each of the fund's investors ensures that no investor may discharge its obligations to commit capital other than as provided in the investor notice on the basis that it had no knowledge of the security.

2. What form should the notice take?

Cayman

The notice should be in writing, but there are no specific requirements concerning the form of notice. All that is required is that the investors are made aware of the security. The notice should contain a description of the security document, a statement that the security comprises security over uncalled capital commitments and rights to call capital from investors and the identity of the secured party. The form of notice is typically agreed in advance of closing and is appended to the credit agreement.

Luxembourg

No specific form of notice is required under Luxembourg law. Similarly to the Cayman investor notice, for the Luxembourg investor notice it is advisable that the notice be in writing and contains a detailed description of the security documents and security interests created pursuant thereto. The notice is agreed by the parties prior to closing and a form thereof is included as a schedule to the Luxembourg law-governed security agreement over uncalled capital commitments.

3. When does the notice need to be given?

Cayman

Notice of the security can only be given once the security has been created. Notices are often delivered upon execution of the relevant security document, or within 3-5 business days, to ensure the secured party's priority is fixed.

If the general partner of the fund is a Cayman company, the security interest created should be recorded in its register of mortgages and charges. The credit agreement or security document should also contain a requirement that notice be given to any new investor that is admitted to the fund after closing of the facility.

Luxembourg

Lenders are taking a stricter approach with respect to delivery of the investor notice. In Luxembourg, the notice should be delivered as soon as possible following closing. Market practice and e-delivery methods have encouraged a move towards delivery of the notice on closing or within 3-5 business days.

4. Does the notice need to be executed?

Cayman

While there is no legal requirement for the notice to be signed by the fund or the fund's general partner, generally the fund and/or the fund general partner will sign the notice.

Luxembourg

For consistency with the Luxembourg pledge over uncalled capital and to avoid complications due to competing laws, it is advisable to have notices be governed by Luxembourg law and effectively executed.

5. Who should the notice be sent by?

Cayman

The notice may be sent by the security provider or the secured party, although in practice the notice is typically given by the security provider.

Luxembourg

Although there is no legal prescription on the way notices should be served, binding effect is better achieved if the terms of the notice are actually aligned with the provisions of the pledge over uncalled capital and executed by the Luxembourg fund acting through its general partner.

6. How is the notice delivered?

The notice should be delivered in accordance with the provisions of the constitutional documents of the fund that govern service of notices on the investors. Very often, notices will be sent to investors via email. However, it is increasingly common to see investor notices delivered via online portals.

7. When is the notice effective?

The notice is only effective upon receipt of the notice by the investor (not upon it being sent by the fund). This is why evidence of delivery is required to ensure the investors have been notified.

8. What evidence of delivery should be obtained?

Lenders require a fund to confirm what form of evidence of delivery of investor notices will be provided ahead of closing, and the available evidence will depend upon how the notices have been delivered. If the notices have been sent by email, a copy of the email from the fund to its investors is often provided by the fund. On some occasions, confirmation that no bounce-back emails have been received are requested by lenders.

If the notice has been uploaded onto the fund's online portal, the available evidence will depend in part on what the portal can generate to evidence delivery. We would expect the lender to receive a copy of the email or message that is sent to the investors (which can provide additional comfort to lenders where it explicitly refers to the security being granted over the uncalled capital commitments), notifying them of a posted notification, together with a screenshot of the notice uploaded to the portal. Certain online portals can now also generate reports that confirm, among other things, the date and time that the notice was posted, the identity of the investors and confirmation of when each investor last accessed the online portal. Albeit untested before the courts, the provision of such reports to lenders is generally accepted as an effective way of evidencing delivery of investor notices.

9. If the facility is being amended or amended and restated, should the fund re-issue the notice to investors?

Assuming the security package is remaining the same, it is not strictly necessary to re-issue the notice. However, a lender may wish to consider asking for the notice to be re-issued, particularly if (i) the initial notice was sent some time ago; or (ii) if the initial notice contained specific information on the amount of or term of the facility that is no longer correct. If there have been changes in the fund's investor base, re-issuing the notice would ensure that all current investors of the fund have received the notice and are aware of the security.

10. What if the notice is not sent?

Cayman

If notice is not sent and if the fund subsequently grants a competing security interest to a third party, and if notice of that competing security interest is sent to the investors, the third party's security interest will take priority. However, it is worth pointing out that in such circumstances the third party would not get priority if, at the time the third party's security interest was created, the third party had notice of the pre-existing security interest.

Luxembourg

While not strictly necessary for perfection, notice of the creation of the security interest should nevertheless be given, as under the Luxembourg civil code (and reiterated in the Financial Collateral Law), if an investor is unaware of the security interest created over its obligation to pay, such investor may validly discharge that obligation directly to the Luxembourg fund.