

# Fund Finance Friday



## Conditions Precedent: Borrower Deliverables

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The credit agreement for a subscription credit facility will list several conditions precedent that are required prior to the credit agreement becoming effective and/or the first extension of credit occurring thereunder. Typically, lender's counsel will control the credit agreement, security agreements and other collateral documents. However, there are several important documents and conditions precedent required from the Borrower/Borrower's counsel for execution and delivery thereof at closing. While negotiation of the credit agreement receives most of the attention from deal teams, these "borrower deliverables" are usually worked on in the background in tandem with the credit agreement. Having a clear understanding of these deliverables will avoid any surprises and delays when it's time to close.

### Closing Certificate

One such condition precedent to closing the credit facility or adding a credit party to the credit facility (including qualified borrowers) is a requirement that the credit parties deliver standard corporate deliverables, including without limitation, constituent documents, resolutions authorizing the entry into the transactions contemplated by the credit agreement and an incumbency certificate (listing the authorized signatories), in each case certified by an officer or director (or other similar person) of the entity that has the authority to act on behalf of the general partner, ultimate general partner, manager, or managing member of the applicable credit party (i.e., the "Responsible Officer"), the lenders may rely on the closing certificate for confirmation of the valid existence and good standing of each credit party. These deliverables are delivered in the form of a "Closing Certificate", "Officer's Certificate" or "Secretary's Certificate", and the terms are often used interchangeably (though not to be confused with a "Responsible Officer's Certificate", see discussion below.)

- **Constituent Documents.** The constituent documents comprise (i) the certificates of formation or limited partnership, as applicable, as certified by the Secretary of State (or equivalent governmental authority) of the jurisdiction of organization of such credit party and (ii) the limited partnership agreement and/or limited liability company agreement (or similar agreement) of such credit party. The constituent documents, including any amendments thereto, for each credit party will be attached to the closing certificate and will typically include a certification from the Responsible Officer that each of the constituent documents are true, correct and complete copies thereof and remain in full force and effect as of the date thereof. Prior to closing, the reviewing attorney should confirm that the limited partnership agreement and/or limited liability company agreement (or similar agreement) is executed and consistent with the version previously reviewed by the attorney and that the certifications of formation or limited partnership, as applicable, are certified as of a recent date from the relevant Secretary of State (or equivalent governmental authority).
- **Good Standing Certificates.** The good standing certificates will be certified by the Secretary of State (or equivalent governmental authority) of the jurisdiction of organization of such credit party. The good standing certificates should be dated close in time to the date of the closing certificate (usually within one to two weeks of the date thereof).
- **Resolutions.** This deliverable is sometimes called a written consent of the managing entity. The resolutions will describe the authority of the managing entity to act on behalf of each credit party by referencing the governing document and the consideration or benefit the credit parties will receive by entering into transactions under the credit agreement. The resolutions will be specific to the credit agreement authorizing and approving the terms and provisions of the loan documents being executed at closing along with the performance of the credit parties'

respective obligations under such documents. Frequently, each loan document being executed at the initial closing will be itemized to avoid any discrepancies. It is preferable to have any amendments, any committed or uncommitted options to increase the facility size, and any options to extend the maturity date authorized by the resolutions so that down the road the credit parties may confirm that the existing resolutions remain in full force and effect instead of being required to deliver additional resolutions. The resolutions will also authorize the officers, directors, executives or any other person designated as an authorized signatory or authorized representative of the managing entity, acting alone or with one or more of such officers, to take actions on behalf of the credit parties, along with the execution, delivery and performance of the credit agreement and the other loan documents. Additionally, the resolutions will authorize the grant of security interest in and liens on the credit parties' respective rights, titles and interest in the collateral to the lenders pursuant to the collateral documents and the filing of financing statements and other filing or recording documents or instruments with respect to the collateral in such form and offices as appropriate to perfect the lender's security interests under the loan documents. Finally, the resolutions will provide that all acts and actions taken by the authorized signatories prior to the date of the resolutions with respect to the transactions contemplated by the credit agreement are confirmed, approved and ratified as of the date of the resolutions are executed. Prior to closing, a reviewing attorney should confirm the chain of authority described in the resolutions and confirm that the authorized signatories described in the resolutions sync with the authorized signatories listed on the incumbency certificate.

- *Incumbency Certificate.* The incumbency certificate provides a list of the specified individuals, together with their title and specimen signatures, that are authorized to enter into the legally binding transactions on behalf of the credit parties. Any individual that executes the credit agreement, any loan document or any amendment should be an individual listed on the incumbency certificate. It is not uncommon throughout the life of a credit facility for the authorized signatories listed on the incumbency certificate to change. When this occurs, the credit parties will need to deliver a new incumbency certificate certified by a Responsible Officer and, if necessary, to ensure that the authorizing provision in the resolutions with respect to the authorized signatories syncs with the new incumbency certificate, and new resolutions also certified by a Responsible Officer.

### **Responsible Officer's Certificate**

Many credit agreements will also require delivery of a Responsible Officer's Certificate in addition to the closing certificate described above. The Responsible Officer's Certificate is usually a form provided by the lender that is delivered by the credit parties at closing of the initial credit facility and when any additional credit party joins the facility. In this certificate, a Responsible Officer will typically certify as of the closing date (i) that all representations and warranties in the credit agreement and the other loan documents are true and correct in all material respects, (ii) that no event of default or potential default has occurred and is continuing, (iii) that no circumstances exist or changes have occurred since the date of the most recent financial statements delivered to the lenders that could result in a material adverse effect; (iv) that there are no proceedings pending or threatened against any credit party, other than as disclosed to the lenders or any that would not have a material adverse effect; and (v) that either the underlying assets of any fund under the credit facility do not constitute Plan Assets with respect to ERISA or that such fund has delivered an opinion as to its status as an operating company. Sometimes the closing certificate and the Responsible Officer's Certificate will be combined, including all of the certifications described in a single document.

### **Opinions**

As a condition precedent to the initial closing, each joinder of an additional credit party and sometimes with amendments to the credit facility, a written opinion of counsel to the credit parties is required. In general, the opinions will cover the capacity of the credit parties to enter into the credit agreement and the other loans documents and the enforceability of the credit agreement and the other loan documents, as well as certain security related opinions. For purposes hereof, we will not describe the opinion requirements for subscription facilities further. Many opinions will reference the Closing Certificate and rely on this certificate for confirmation as to the valid existence and good standing of the credit parties. The opinions are an important borrower deliverable to start early in the negotiation process so that there is enough time to iron out any issues without causing delays to the target closing timeline.

### **Other Borrower Deliverables**

- *Investor Documents.* As part of the underwriting for any subscription credit facility, the credit parties are required to provide duly executed subscription agreements and side letters. A diligence review of the investor documents should also be started early in the process of negotiating a new credit facility.
- *"Know Your Customer" and Beneficial Ownership Certification.* The credit parties will provide such information request by the lenders for the credit parties by become "KYC compliant." For any Borrower that qualifies as a "legal

entity customer,” the borrower will provide a Beneficial Ownership Certification to the lenders.

- *Schedule of Investors/Borrowing Base Certificate/Borrowing Request.* Most credit agreements will require a schedule of all investors setting forth their capital commitments and uncalled capital commitments. The schedule of investors and their capital commitments should be confirmed against the subscription agreements received for such investors. If there is a borrowing on the date of closing, the Borrowers will also be delivering a borrowing request together with a borrowing base certificate.
- *Jurisdictional Matters.* Depending on the jurisdiction of formation with respect to each credit party, there may be additional conditions precedent required for closing on the initial credit facility or for joining an additional credit party to the credit facility. Such additional conditions precedent may include investor notices, confirmation of registration with Cayman Islands Monetary Authority, or lien searches in the respective jurisdiction, to name a few. Best practice is to confirm such deliverables with local counsel.