

Fund Finance Friday



When Relationships Go South

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In entering into a fund financing, both the Lender and the Fund have expectations that the relationship will be a success. The Lender is appreciative of the association, and the Fund is confident in its ability to raise capital, invest and pay back any borrowings as and when due under the credit documents with the Lender. But what happens when things are not working out and the investment manager/management company needs to operate?

Most credit agreements contain a provision that if there is a potential default or event of default or if a mandatory prepayment is triggered (collectively, a “Cash Control Event”), no credit party may make any payments or advances of any kind, directly or indirectly, on any debts and liabilities to any other credit party, any investor or the investment manager, whether then existing or thereafter arising, and whether direct, indirect, several, joint and several or otherwise, and howsoever evidenced or created (collectively, the “Other Claims”). Furthermore, all Other Claims, together with all liens on assets securing the payment of all or any portion of the Other Claims, shall at all times during the continuance of a Cash Control Event be subordinated to, and junior in right and in payment to the obligations under the credit facility, and all liens on assets securing all or any portion of the obligations under the credit facility. The majority of credit agreements provide that each credit party agrees at the time of execution of the credit agreement to take such actions as are necessary to provide for such subordination between it and any other credit party, *inter se*, including to include provisions for such subordination in the documents evidencing the Other Claims should a Cash Control Event occur. The investment manager would also be asked to acknowledge and agree upfront that, at any time a Cash Control Event has occurred and is continuing, the payment of any and all management or other fees due and owing to it from any credit party shall be subordinated to, and junior in right and in payment to, the obligations under the credit facility.

From a lender standpoint, the inherent issues that exist upon the occurrence of a Cash Control Event necessitate that the Fund be prohibited from allowing cash to exit the Lender’s grip on the collateral account(s). The Fund, on the other hand, is concerned that it is unable to pay management fees to the investment manager. In turn, the investment manager is concerned that it has obligations to employees, leases for office space and other general expenses. These competing fears create a predictable tension that many Funds want to address at the time they enter into a credit facility. It is then that the Lender’s goal of repayment and the request from the Fund to “keep the lights on” at the investment manager-level becomes a balancing act. A Fund without the ability to pay overhead is arguably less viable to operate in a manner that will lead to the repayment of amounts owed the Lender. A Fund that is without the hardship of a restriction on payments is less motivated to set things straight under the credit facility.

Under certain circumstances, the Lender may be willing to allow a prescribed amount of management fees to be paid, but there must be parameters. The Lender, of course, wants the issue causing the block of payments to be resolved quickly. If the amount of management fees that can be paid is set too high, where is the incentive to correct the underlying issue? The Fund, in contrast, desires that the flow of management fees be at a level where there is no disruption while it works to end the root cause of the Cash Control Event. This balance necessitates conversations over creative solutions.

Many lenders take the view that there should be no outstanding obligations under the credit facility if a payment of management fees is to be allowed. Certainly, if an Event of Default causing the Cash Control Event relates to the failure of the Fund to make payments or arises from a bankruptcy proceeding, the ability to pay management fees

should be off the table. There is a compelling argument that no payments should be allowed if the Cash Control Event is the result of the General Partner not funding capital contributions when due. This is an action within the Fund's control and a General Partner missing a payment sounds alarm bells that the underlying problems may be of a serious nature. Furthermore, the fees being paid should represent fees for regular, ordinary course asset management activities and should not be in the nature of performance fees, incentive fees or fees that represent or constitute any carried interest. The exact amount of management fees that are permitted is a bit of a business call. In general, it should keep with the theme of incentivizing a resolution of the underlying issue and only be in an amount that will allow the Fund to operate. That amount obviously varies based on the size of the investment manager and the underlying Fund. Consideration should also be made to whether the investment manager is receiving management fees from Funds outside the credit facility that can assist in its operational costs.

So much of fund finance is about the relationship between the Lender and the Fund. A relationship where both sides at some level want the other to be happy. There may be bumps along the way and arguments over whose turn it is to compromise. But, in the end, both sides must be willing to think of solutions to keep the relationship intact and successful. Fund finance certainly does not equate to the meaning behind Valentine's Day, but the principles of Valentine's Day (let's work together) play a strong role in keeping the payments flowing to both the Lender and to the investment manager during times of distress.

Happy Valentine's Day to all!