

Fund Finance Friday



Cayman Ultimate General Partners In Subscription Facilities: Do They Ultimately Matter?

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By **Georgina Pullinger**
Consultant | Appleby



By **Appolina Winton**
Senior Associate | Appleby

In subscription finance transactions where the borrower or another pledgor entity (such as a feeder fund or guarantor) is a Delaware limited partnership or a Cayman Islands exempted limited partnership (ELP), the role of the general partner (GP) is well understood and regarded as fundamental to the security structure. The GP is the entity that exercises the right to call capital from investors and typically grants security over those rights in connection with the facility.

Given the GP's importance, it is commonly included as a party to the credit agreement and treated as a "Credit Party," meaning that it is subject to the standard suite of representations, covenants, and other obligations under the facility. The GP also signs the security agreement in its own right as a pledgor.

Additional issues arise, however, when the GP itself is a Cayman ELP. Why does this matter? Unlike a Delaware partnership, which has separate legal personality, a Cayman ELP does not. It exists and acts solely through its own general partner. As a result, if there is a failure or issue at the level of the GP's own general partner (referred to as the "ultimate general partner" or the "UGP") it could jeopardize the integrity of the entire fund structure.

Credit agreements often include helpful language clarifying the GP/ELP relationship, along the lines of the below:

"References to a Cayman Islands exempted limited partnership taking any action, having any power or authority or owning, holding or dealing with any asset are to such partnership acting through its general partner (or, as the case may be, such general partner's ultimate general partner)."

While this language works to capture the actions of a UGP as needed for the majority of credit agreement provisions, it does not adequately address entity-specific representations, deliverables or conditions precedent (CPs). For example, a representation that each "*Credit Party is duly established and in good standing*" would not capture the UGP, as it is not a credit party. Similarly, a CP requiring the delivery of the Credit Parties' organisational documents would not capture the UGP's documents or, if applicable, its corporate registers. This creates a potentially significant gap, particularly as the enforceability of the facility and the security—and even the existence of the fund—can be impacted by the UGP's legal status and capacity to execute documents on behalf of the GP and the underlying ELP.

To mitigate this risk, parties should consider explicitly addressing the UGP in the credit agreement. This typically involves:

1. Defining the "Ultimate General Partner" as a specific term in the credit agreement.
2. Undertaking diligence on the UGP. This includes, where the UGP is a Cayman entity, reviewing its constitutional documents and corporate registers (i.e., the register of directors and officers, and the register of mortgages and charges (ROMC)).

3. Extending selected representations and CPs to the UGP—particularly those relating to due incorporation and existence, good standing, solvency, authority and capacity, organizational documents and, where applicable, corporate registers.
4. As a post-closing covenant, requiring the UGP's ROMC be updated to reflect the security granted pursuant to the facility (this is particularly important given there are no UCC-1 or equivalent public security filings in the Cayman Islands to notify creditors of existing security interests).
5. Ensuring that the UGP's resolutions adequately approve entry into, and execution by, each of the ELP, GP and UGP, as appropriate, the transaction documents and updates to the UGP's ROMC.

While we appreciate that lenders are generally not looking to designate the UGP as a full "Credit Party," with all accompanying rights and obligations, the UGP's significance cannot be dismissed. Accordingly, UGP additions and provisions in a credit facility are to be carefully considered, with the aim ultimately being to ensure the enforceability and structural robustness of the facility, while balancing the commercial considerations of the parties.