

Fund Finance Friday



Balancing Lender and Borrower Confidentiality Interests

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Confidentiality provisions in subscription credit facilities have always served a central purpose – protecting sensitive fund and investor information. These provisions have grown more detailed, more prescriptive, and, for lenders, more operationally demanding.

From the borrower's perspective, the reasons for this shift are clear. A fund's investor base is one of its most valuable assets, and maintaining control over investor communications is essential to preserving those relationships. Investor identity, contact details, commitment amounts, and investment terms are not only commercially sensitive but can, if disclosed improperly, cause reputational harm or create regulatory complications. Similarly, deal-specific information such as pricing, borrowing base certificates, and compliance reports may reveal portfolio strategies or liquidity positions that a fund would prefer to keep within a tightly managed circle. For lenders, increasingly restrictive confidentiality provisions can mean slower processes, heavier compliance burdens, and less flexibility, especially when a quick response is needed.

Borrower Motivations and Protections

Borrowers generally seek three main protections: control over dissemination to prevent uncoordinated outreach to investors, limitation on the scope of what can be shared so nearly all facility-related materials fall under the restriction, and centralization of communications to ensure consistency with investor relations strategies. These protections are not simply defensive. In competitive fundraising markets, managing the flow of information can be a key part of positioning the fund for future commitments.

Lender Considerations and Challenges

While these protections make sense from a borrower's perspective, lenders need to be mindful of the operational and commercial implications. From the lender's standpoint, expansive confidentiality provisions can introduce operational friction. Consent requirements for investor contact may delay critical enforcement steps, administrative burdens may arise from tracking disclosures to a wide range of third parties, and overly broad definitions may inadvertently capture public or lender-generated information. For example, the ability to communicate with investors quickly can be critical to addressing any issues that may arise under the credit agreement; if the credit agreement requires borrower consent before such outreach, lenders may face delays precisely when speed is most important. Coordination can also become challenging where different departments within a financing institution interact with the borrower in separate contexts.

Balance, Practicality and Flexibility

Lenders often seek to refine confidentiality provisions in a way that preserves borrower protections while easing operational constraints. This may include narrowing definitions to exclude publicly available data or independently developed information, pre-approving certain recipient categories such as affiliates engaged in related financing, hedging, or risk-management activities, and further permitting internal sharing within the lender's organization without repeated consent. Pre-approving certain categories of third-party recipients, such as regular syndication partners or established counterparties, can also streamline operations. Other negotiated points may include clear carve-outs for investor contact in default or enforcement scenarios and alignment with the lender's regulatory obligations and compliance frameworks, including tax and whistleblower disclosures. These adjustments can help avoid situations

where overly restrictive terms inadvertently hinder the lender's ability to manage its risk or exercise remedies. Aligning the credit agreement's confidentiality provisions with existing NDAs and regulatory obligations can further reduce duplication and the risk of conflicting requirements.

Implications of More Restrictive Formulations

Where confidentiality provisions are drafted at their most restrictive, limiting disclosure to affiliates, potential participants, prospective syndicate lenders, rating agencies or to any person with respect to swap, derivative, securitization or risk transfer transactions; requiring borrower consent for nearly all disclosures, imposing recipient-specific undertakings, and reserving investor contact exclusively to the borrower, the lender must factor in the increased cost of compliance. This can involve new approval processes, and staff training to avoid inadvertent breaches, add steps to syndication and secondary trades and require tracking compliance across multiple teams and transactions. Without careful drafting, the result could be a materially reduced collateral value and enforcement rights.

Conclusion

Confidentiality is not just a boiler plate legal provision, it's a reflection of collaboration between borrowers, general partners, investors and their financing partners. For borrowers, tighter provisions can safeguard sensitive investor relationships. For lenders, they are an operational and enforcement consideration which can complicate syndication, increase compliance overhead and legal fees, and, if not carefully negotiated, limit flexibility at critical moments. The most effective provisions balance the borrower's need for control and investor protection with the lender's need for flexibility, efficiency, and timely access to information. A measured approach, refining definitions, pre-approving disclosures, and providing targeted carve-outs, can help ensure that confidentiality remains a shield rather than a stumbling block.