

FUND FINANCE FRIDAY

Subscription Finance Loan Agreement Series, Part 14: Representations and Warranties

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This article focuses on those representations and warranties that are unique to a subscription/capital call facility and provides some colour. A number of the representations and warranties in these types of facilities are similar if not identical to those in a standard LMA facilities agreement. For the sake of brevity as much as anything else, these “standard” provisions which are common to both are not covered specifically in this article. As you would expect, the primary thinking behind these sections of the subscription/capital call facility (as elsewhere) is on the investors and their commitments to the fund and the continuing ability of the fund to service their debts to the lenders by calling on those commitments (or, in an enforcement scenario, for the lenders to call on the investors directly).

Before getting into the details, a brief aside for the more legally minded: Why do English law facilities agreements include “representations *and* warranties” (and not just one or the other)? This is because there is a fairly fundamental difference between the two in legal terms. A “representation” is a statement of fact or opinion which induces another party to enter into a contract, while a “warranty” is a contractual term, secondary to the main purpose of a contract, which in effect gives the other party to the contract a right to an indemnity if the warranty is not true. Remedies for a breach of “representation” (or, more accurately, a misrepresentation) can include rescission of the contract as well as damages. Remedies for breach of “warranty” are usually limited to damages. The reason they are always included together is, first, that it is sometimes difficult to establish exactly what statement belongs in one category or the other and, second, that it is useful to ensure that the widest range of remedies will be available to the lender if there is a breach. For the rest of this article (and to avoid too much repetition) we have used the term “representations” to cover both “representations and warranties.”

All of which leads naturally to a discussion of what issues need to be considered in the representations and warranties section of a subscription/capital call facility. There are three items to consider here in this context.

The first is the question as to which entities within the fund group should provide the representations and warranties. In general, the fund itself will only represent for itself, but the general partner (and/or the manager, if there is one) will often make representations both for itself and for the fund (and sometimes for other parties within the fund group).

Once that is established, the second question is which areas to focus on in terms of what representations are given. Specifically, in a subscription/capital call facility, these will almost always include the following representations: (i) that any financial information provided is true and correct, (ii) that those representing the fund (in particular, the general partner and/or manager) are all those entitled to represent the fund, (iii) that the fund documents (*i.e.*, the LPAs or equivalent, subscription agreements and any side letters) are in full force and effect, (iv) that there are no breaches of those documents and no rights of investors to reduce or refuse to pay when their commitments are requested, (v) that all those documents have been produced to the lender, (vi) that the general partner (or other person) is specifically authorised to issue drawdown notices to investors, and (vii) that the assets of the fund (and other obligors) are not “plan assets” for the purposes of ERISA. (Note that ERISA is a whole separate can of worms as far as subscription finance/capital call finance goes and will be the subject of its own dedicated article in this series.) Finally, it is also important from a lender’s perspective to include a representation to the effect that any prospectus issued to an investor is accurate in terms of what is stated in that prospectus. Other representations to consider, if there are any possible concerns on this, are representations as to the general partner or manager not being in dispute with investors or facing resistance from investors to paying down commitments in other funds.

And, finally (as with any other facilities agreement), to what extent and when should the representations be repeated? In terms of the “when,” this is generally similar to the approach taken on in a standard LMA facility (in that the representations which are being repeated are usually repeated on the date of any utilisation request and on the first day of any interest period). As to what is repeated, again the approach will be similar to the standard LMA approach (where representations are common between the standard LMA and a subscription/capital call facility). The difference is that most if not all of the specific representations referenced above (*i.e.*, those which relate to the fund and the fund’s investors) will and should be repeated.

In the next two articles in this series, we will look at two further sections of a subscription/capital call facility which relate closely to the “representations and warranties” section – namely, those sections devoted to, respectively, (i) covenants and undertakings and (ii) events of default and acceleration. Leaving aside for a moment the legal differences between these three sections, the one thing to say about these for now is that in terms of negotiation and drafting of facility agreements, a point that should always be considered is the extent to which representations and warranties (specifically, those that are repeating) may also be covered in the covenants or undertakings and even in the events of default. These three sections are different (and, to some extent, have different areas of focus). The question is that, if they are covered in these other sections, to what extent do they need to be covered more than once? We will consider this and other specific issues in the following two articles.