Umbrella Academy: A Guide to Umbrella Facilities in Fund Finance

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Fund Finance Friday has previously provided an overview of traditional umbrella subscription facilities and their pros and cons – please see Wes Misson's excellent article published in **April 2019**. Those were simpler times. Over the two years since that article, we have seen more innovation in the market. As Wes noted at the time, these "complex but interesting creatures" continue to evolve.

The Cadwalader fund finance practice closed 13 umbrella facilities in 2020. Deal size averaged $135.4 million, not far off from the average deal size for "vanilla" subscription facilities. While deal count increased, we didn't see as many facilities with maximum commitments of more than $1 billion as we did in 2017–2019. This trend is consistent with the appearance of a wider variety of umbrella facilities in the market.

How to Structure an Umbrella Facility

An umbrella facility is a credit facility with multiple borrowing bases. Typically, given the separate borrowing bases, representations and warranties, covenants and events of default only apply to the set of borrowers that comprise a given borrowing base. Fees and expenses are also limited to the borrowers that comprise a given borrowing base, and usually the obligations of each borrowing base will not be cross-collateralized with the obligations of borrowers in other borrowing bases.

The key to structuring any umbrella facility is a "Fund Group" concept. Once the concept is implemented throughout the loan documents, then the credit facility can operate with separate borrowing bases, covenants and events of default. While conceptually simple, Fund Groups and related defined terms touch upon nearly every aspect of the credit agreement and collateral documents. Essentially, anywhere a borrower or borrowing is mentioned, the lawyers drafting the documents must incorporate the appropriate Fund Group umbrella mechanics. In parallel, the bankers and their respective operations teams must account for multiple Fund Groups and borrowing bases, which may impose additional administrative burdens on the lender. The cost to set up and run umbrella facilities may therefore be considerably higher than a "vanilla" subscription credit facility. However, in certain situations, the flexibility of an umbrella facility's multiple borrowing bases justifies the additional cost.

Many Possibilities Under an Umbrella

It turns out the simplicity of the Fund Group concept is robust enough to accommodate a number of different fund structures. Recently, we have seen several innovative solutions designed by sponsors and lenders when there is a business reason for multiple borrowing bases – out of necessity due to fund structure or for the convenience of the sponsor.

The Traditional Umbrella: Fund Group Borrowers

The "traditional" umbrella is simply multiple related borrowers in each Fund Group. The borrowers of such Fund Group share a common borrowing base cross-collateralized with respect to each other borrower in such Fund Group. Fund Groups are often composed of a main fund and its alternative investment vehicles and parallel funds, and may also include overage funds and co-investment vehicles, to the extent such cross-collateralization is permitted with respect to all borrowers in the Fund Group. New Fund Groups can be added as new funds are raised and older Fund Groups can be removed without terminating the facility. While each Fund Group is typically governed by the same terms, NAV covenants and other provisions may apply only to late-stage funds that have called most of their capital commitments.

The Single-Investor Umbrella: Multiple Single-Investor Funds

If a sponsor has or intends to have multiple funds with a single investor, the sponsor may wish to join such funds into one umbrella facility. Ideally, each single-investor fund would be based on a similar set of governing documents so that the main structuring goal in the credit agreement will be assigning a borrowing base with respect to each single-investor fund.

The Pool Umbrella: Multiple Capital Groups in the LPA

If a fund's governing document, usually a limited partnership agreement, is structured in a way so that capital commitments are in segregated series or pools that cannot be cross-collateralized, a facility with umbrella mechanics can be a relatively straightforward solution to the problem. While the structuring of the credit facility will depend on the precise terms of the LPA, the multiple borrowing bases of an umbrella facility should, with some modifications, be able to accommodate the multiple capital pools set forth in such an LPA.

The Luxembourg Umbrella: Multiple RAIF Compartments

A more exotic umbrella is based on the Luxembourg Reserved Alternative Investment Fund (RAIF). It is possible to structure the RAIF as a borrower with multiple compartments, with each compartment being essentially a distinct borrower under the RAIF. In an umbrella facility based on such a RAIF, each RAIF compartment would have its own separate borrowing base, and any test or covenant would be measured as to each compartment. (A Luxembourg RAIF's governing document may be supplemented or amended to reflect the addition of a new RAIF compartment, which could then be joined to the umbrella facility as a borrower pursuant to specialized joinder mechanics.) Given that the RAIF concept of "compartments" does not map precisely onto the traditional Fund Group concept, the Luxembourg RAIF Umbrella results in more complicated loan documents and is less commonly seen in the market.

Conclusion: When to Open an Umbrella?

As bankers and lawyers know, the bunny slopes of a term sheet discussion can quickly turn into a double black diamond when it comes to drafting the actual facility documents. To take one extreme example, one Luxembourg RAIF umbrella facility included hybrid comingled/SMA compartments with dedicated Cayman and Delaware feeders above each compartment in a cascade of local and New York law pledges.

As noted above, the upfront cost and administrative burden of an umbrella facility that is initially comprised of one or two Fund Groups may exceed what a sponsor would expect if it entered into an independent credit facility for each Fund Group. However, as more Fund Groups are added, the umbrella should become a relatively more efficient vehicle, assuming such Fund Groups share essential structural features.

In addition, an umbrella facility may be attractive to a lead lender because it makes it more likely that it will also be the lead lender for the next vintage of the fund. For sponsors, some umbrella facilities also provide for one aggregate maximum commitment which the borrowers can allocate and re-allocate among Fund Groups (with availability limited by the borrowing base of each fund group), potentially lowering the unused fees incurred by the sponsor and the total amount of capital that the lender has to allocate to the sponsor's credit facilities. Of course, the alternative to umbrellas is producing a strong precedent between a sponsor and lender which can be the basis for future facilities. It is up to the lender, the sponsor and their respective counsels to decide when an umbrella is the most desirable option for a given set of funds.

An Interpretation of 'Discharge for Value'

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As most in the loan market are by now aware, the United States District Court in the Southern District of New York issued a decision on February 16, 2021 *In Re Citibank August 11, 2020 Wire Transfers* that certain lenders were entitled to retain approximately $500 million in funds erroneously sent by the administrative agent under a credit facility to Revlon, Inc. The court's decision came as a shock to many in the lending community. However, it is based on an interpretation of the "discharge for value" doctrine, and stands for the fact that payors are in the best position to avoid errors in payments and are the appropriate party to bear the risk of any associated losses.

What does this mean for agent banks? As a first principle, institutions should redouble efforts to ensure that mistaken payments are not made in the first place. In addition, many agents have begun incorporating "clawback" language into the agency provisions in new deals so that, contractually, they have recourse to recipients in the event that an erroneous payment is made. The Loan Syndications and Trading Association (LSTA) has launched a project to standardize clawback language that, when finalized, will likely be included in many credit agreements.

It is often wondered why credit agreements are so long – the answer is that many provisions in each agreement are addressing court decisions, default rules, situations or outcomes that parties desire to contractually modify. At least for some time, most of us will be able to remember why the "if you erroneously receive payment you must return it" provision is included in the agency section.

For a more in-depth discussion of the case, click ***here*** *for the Cadwalader Clients & Friends Memo by partners Steve Herman and Chris Dickson.*

Fund Finance Association Updates

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The Fund Finance Association has been active in the last week, including soliciting nominations for its 2021 Industry Awards. The Julian Black Lifetime Contribution to the Industry Award, the Dee Dee Sklar Women in Fund Finance Award and the NextGen Member of the Year Award are familiar to the industry. Two new awards have been added this year: the Diversity in Fund Finance Award, which will recognize an individual's contribution to furthering diversity, equity and inclusion efforts in the fund finance industry, and the Annual Contribution to the Industry Award, which aims to recognize several individuals who have made outsized contributions in the past year.

Nominations are due Friday, March 26. Click **here** for the awards nomination site.

Additionally, the FFA's NextGen initiative announced a virtual event to be held on Thursday, March 11 titled, "Cross-Border Relationships: A Journey in Diversity." Event panelists will discuss their personal career journeys and the obstacles they have overcome to get to their current positions. For more information, click **here**.

Investec Secondaries Report

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Investec recently produced an annual secondaries report, and for those of us who enjoy well-presented data, it's definitely worth a read!

The key findings sum up the views of 44 secondary fund managers and answer provocative questions like, "Are you currently seeing secondary deals done that maybe shouldn't get done?" The report also collates some insightful data around the predominant deal types in the market at the moment, deal pricing and, of course, the impact of COVID-19 on the secondaries market. The report (including downloaded pdf) can be found **here**.

Fitch Concludes Private Equity CFO Sector Review and Discusses 2020 Performance and Outlook for 2021

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Fitch hosted a webinar last week discussing Private Equity Collateralized Fund Obligations (“PE CFOs”). The webinar focused on the performance of PE CFO transactions through the COVID-driven downturn, market and regulatory developments for the sector, and the outlook for 2021. An on-demand link to a replay of the webinar can be accessed **here**.

The hosting of the webinar also coincided with Fitch concluding its PE CFO sector review, resulting in several positive ratings actions for the sector (see links below), and the recent publication of several Fitch research reports regarding PE CFOs. The research reports broadly cover both the PE CFO sector generally (including detailing Fitch’s ratings criteria for PE CFOs and an in-depth analysis of the 2021 outlook for the sector) and specific transactions, such as the newly announced Astrea VI Pte. Ltd. PE CFO sponsored by Temasek. Links to the Fitch research reports can be accessed below.

Fitch Ratings Activity:

- **Fitch Upgrades Astrea III's Class B to 'A+sf'; Affirms Class A-2 at 'A+sf'; Outlook Stable**
- **Fitch Upgrades Astrea IV's Class A-2 to 'A+sf'; Affirms Class A-1 and B; Outlook Stable**
- **Fitch Upgrades Astrea V's A-1 Bonds; Affirms A-2 and B Bonds; Assigns Positive Outlook to A-2 Bonds**
- **Fitch Affirms Nassau 2019 CFO LLC; Revises Outlook to Stable**
- **Fitch Affirms SWC Funding LLC Class A Notes' 'BBBsf'; Revises Outlook to Stable**
- **Fitch Affirms MCA Fund III Holding, LLC**

Fitch Research Reports:

- **Private Equity Collateralized Fund Obligations (PE CFO) Rating Criteria**
- **Fitch Ratings 2021 Outlook: Global Private Equity Collateralized Fund Obligations**
- **PE CFOs Weather Coronavirus-Driven Downturn**
- **MCA Fund III Holding, LLC – New Issue Report**
- **Astrea VI Pte. Ltd. – Presale Report**

Maples Group Article – Cayman Islands and the FATF ‘Monitoring List’

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The Cayman Islands has been added to the “Monitoring List” by the Financial Action Task Force (“FATF”), as of February 25, 2021. What does this mean? It means the Cayman Islands is now one of the jurisdictions being more closely monitored by the FATF with regards to anti-money laundering/countering terrorist and proliferation financing ("AML/CFT/CPF"). The Cayman Islands’ addition to the “Monitoring List” is likely due to a combination of the FATF’s recognition of the Cayman Islands as a somewhat newer financial epicenter, and because the Cayman Islands is a jurisdiction that is actively working with the FATF to strengthen its AML/CFT/CPF regime.

For more on this, including an analysis of the practical consequences of the Cayman Islands being added to the FATF’s “Monitoring List,” check out the Maples Group **article**.

Emma Wang of East West Bank Featured in Article

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Emma Wang of East West Bank was featured in a recent article discussing the trends and outlook for the fund finance market in the Asia-Pacific region. The article also included her perspectives on gender equality in private equity. The article is available **here**.

Fund Fanatics Takes a Look at Venture Capital

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Fund Fanatics Scott Aleali and Jeff Maier interview Laurel Touby and Jenny Friedman of Supernode Ventures about a host of topics, including Bitcoin, Miami’s evolving tech scene and what’s good on Netflix (our vote is Cobra Kai). All of that and more **here**.

Fund Finance Webinar Series: Credit Agreement Negotiation

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In this sixth installment of the new "Fund Finance" webinar series (hosted on February 25), Michael Mbayi, Wildgen's Fund Finance expert, is joined by panelists for an in-depth discussion concerning the structuring and the negotiation of the credit agreement. The panelists discuss LIBOR transition and provide a market update at the end of this session. Panel members include industry leaders Benjamin Berman (Latham & Watkins), Kathryn Cecil (Fried Frank), Spencer Gross (RBS International), John Oberdorf (Loeb & Loeb) and Shani Unantenne (ANZ). To watch the entire webinar, click **here**.

Brickfield Article on Recruitment – Part II

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Brickfield Recruitment's latest **article** on talent search and recruitment in the fund finance industry looks at the issue of relationship building and how hiring managers, candidates, HR and recruiters can work together effectively to secure the best possible outcome.

Readers looking to receive regular updates on talent acquisition trends in fund finance can **follow Brickfield on LinkedIn**. Law firms, banks, funds, alternative lenders and candidates with specific enquiries should contact Rory Smith at Brickfield Recruitment by **email** or by telephone on +44 7800 963 594.

McCann FitzGerald on The Irish Investment Limited Partnership

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McCann FitzGerald released a briefing on the recent reforms to Ireland's Investment Limited Partnership ("ILP") legislation, which has resulted in a fit-for-purpose partnership structure being available in Ireland. The **article** provides a helpful "speed read" summary of the ILP and its advantages before further detailing the key features of the ILP and how it works in practice.

On the Move – Fund Finance Tidbits

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On the Move

Chris Cook has recently been promoted to Managing Director and Americas Head of Global Markets Structuring in the Global Markets Structuring Group at UBS. The group works with origination teams to cover institutional clients, family offices and ultra-high-net worth individuals. Chris oversees multi-asset structuring for the Americas region, including private equity and hedge fund finance, structured finance, fund-linked derivatives, public distribution, securitized and OTC structured solutions for equities, fx, rates, credit, equities, derivatives and quantitative investment strategies.

Fund Finance Hiring

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Fund Finance Hiring

JP Morgan: Corporate and Investment Bank – Legal – Finance Lawyer – Assistant Vice President

JP Morgan is looking for a finance lawyer to work in the Markets Practice Group of the Legal Department within the Corporate Investment Bank (CIB) in EMEA. The role has a particular focus on fund financing but will also support other areas of the team's coverage, including the proprietary indices, structured OTC derivatives and securitised products businesses. This is a high-profile and technically challenging role requiring strong analytical skills. For more information, please contact **Mick Young**.

Cadwalader Fund Finance London Opportunities

Cadwalader is looking to hire an experienced finance paralegal and an NQ to junior-level associate in its Fund Finance group in the London office. Ideally, the candidates would have experience working as borrower or lender-side counsel on financing transactions or, if an NQ, have completed at least one training contract seat in finance. The applicants should be self-starting, highly motivated individuals who enjoy working in a busy team environment. For more information or to suggest candidates, please contact Cadwalader's **London recruitment team**.