We Are Going to Need That from the Start

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By **Tim Hicks**
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In a prior **article**, we highlighted common issues contained in side letters that are concerning to Lenders. Whenever a problematic side letter provision is included, a Lender is faced with either excluding the applicable investor from the calculation of the borrowing base or developing a workaround to allow the Fund to keep its contractual arrangement with the investor in the side letter intact while also protecting the Lender's interest. One such circumstance in a side letter is exemplified by the following provision:

> "The General Partner agrees that each Capital Call notice shall be signed by an authorized officer of the General Partner (which signature may be an electronic signature on a PDF file) or come from an e-mail account of an authorized officer (including an e-mail generated by a reporting site directing the Investor to a Capital Call notice)."

In a typical subscription credit facility, the Lender, upon the occurrence and during the continuance of an event of default, may, among other things, initiate one or more capital calls in order to pay the obligations under a credit facility then due and owing. The side letter provision above has the potential to frustrate that right, as the Lender is neither an authorized officer of the General Partner nor would it have the necessary e-mail account.

To address this issue, Lenders have developed a few creative solutions, the first of which is to include a covenant in the credit agreement similar to the following:

> "On or before the Closing Date, each Fund shall deliver to the Lender, Pre-executed Capital Call Notices for each Investor that has a Side Letter that either prohibits the Lender from signing or requiring only the General Partner or an officer thereof to sign any Capital Call Notice provided to such Investor. With respect to Pre-executed Capital Call Notices that have been previously delivered to the Lender pursuant to the terms hereof, amended Pre-executed Capital Call Notices for such Investors whose name or address information has changed, after the applicable Fund has knowledge of such change of name or address. In addition, the Lender shall have the right to request, and each Fund shall deliver to the Lender, additional Pre-executed Capital Call Notices if the Lender issues the original Pre-executed Capital Call Notices pursuant to the Lender's rights hereunder and, after the time for payment of the related Capital Contributions, any Obligations remain outstanding."
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> "'Pre-executed Capital Call Notices' means Investor Capital Call notices executed by a Fund Party in blank as to the amount of the applicable Investor Capital Call, and delivered to the Lender in accordance with the terms hereof."

Under this scenario, pre-executed notices are delivered to the Lender with blank amounts and held until such time (if ever) as the Lender needs to issue such notices to facilitate the repayment of the facility. This workaround is not without a few logistical challenges. If the notices are purely electronic, the Lender is simply tasked with maintaining appropriate electronic recordkeeping. However, if the notices are provided as original executed counterparts, the Lender must maintain proper safeguarding of the physical copies. Also, after the facility is terminated and all obligations are repaid, the Fund will likely ask for the pre-signed notices to be returned in much the same way as an original promissory note. Any bank refinancing the facility would also be concerned about a return of these notices. The Lender and the Fund must also agree on how many executed notices for each investor must be provided. Given the potential need that more than one capital call may be issued to an investor in a default scenario, obtaining multiple pre-executed notices for each applicable investor is prudent.

There is also the consideration of whether the Lender's counsel holds the notices and assumes the safeguarding risk. In addition, the administrative burden can be extensive. The Fund will need to deliver a pre-executed notice with respect to each new investor joining the Fund with this side letter provision, and a most favored nation election by many investors in a large commingled Fund can result in two or three pens without ink after signing the necessary notices.

A second alternative is not as common and is often met with some level of scrutiny by both the Fund and the Lender. The above problematic side letter provision makes reference to the notice coming from an authorized officer of the General Partner. This poses the question as to whether individuals employed by the Lender could be appointed an officer of the General Partner for the limited purpose of issuing a capital call. Many Funds raise concerns about an individual contacting the investors with a capital call notice under the guise of an officer of the Fund. Many banks do not like the idea of being placed in a position of authority with the Fund and are unsure if this appointment imposes fiduciary risk. For these reasons, this alternative is less frequently pursued.

Like many side letter provisions, this scenario is one in which a Fund and the Lender can develop a solution through mutual consideration of the issues. In this case, the solution is likely to have pre-executed notices delivered up front, and all involved hope the same number of notices so delivered are returned to the Fund at the conclusion of a successful deployment of capital and repayment of the facility.

Women in Fund Finance and C200 – Unpacking the SPAC

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By **Leah Edelboim**
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The record SPAC IPO activity from 2020 has continued into 2021, and this white-hot market continues to set records. So far this year, 311 SPACs have raised over $100 billion in gross proceeds, surpassing 2020's electrifying performance with 248 SPACs that raised over $83 billion in gross proceeds – a far cry from 2019 when 59 SPACs raised about $13.6 billion in gross proceeds.

This week, members of Women in Fund Finance (WFF) were invited to attend a virtual event hosted by C200 titled "Unpacking the SPAC: Everything You Need to Know But Are Afraid to Ask." This powerhouse panel featured WFF Co-Chair Dee Dee Sklar, who wears many hats, including as a board member of SPAC Kernel Group Holdings.

Dee Dee was joined for this "101" introduction to SPACs (Special Purpose Acquisition Companies) by Betsy Cohen, Chairman of FinTech Masala, a SPAC sponsor focused on technology innovation in the financial services industry. As one of the few women leading the SPAC industry, she has been described as everything from the "SPAC Queen" to the "Lone Wolf." Betsy is known as a serial dealmaker and trailblazer, with a career that has included an impressive list of accomplishments. After serving as CEO of Jefferson Bank, which she founded, she took the company public in 1999 and that same year founded The Bancorp, a commercial Internet bank which provided financial services to non-bank fintech companies. She retired as The Bancorp's CEO in late December 2014 and just 8 days later, in January 2015 filed her first SPAC, which was the first of a series of nine SPACs to date that have collectively raised more than $3 billion.

Rounding out this panel of SPAC experts was Andrew Stull, Managing Director at Houlihan Lokey in its Board Advisory Services and Opinion practice, where he advises boards and special committees of public companies on a range of transactions including SPAC mergers. Alexandra Lebenthal, a Senior Advisor at Houlihan Lokey, moderated the panel discussion. Both Alexandra and Dee Dee are members of C200, an invitation-only women's business leadership organization that fosters, celebrates and advances women's leadership in business.

The experts on this panel broke down everything from the SPAC process to the benefits for investors, sponsors and target. The group weighed in on the qualities of an ideal sponsor, which include successful dealmakers and operators, management expertise, and the infrastructure to evaluate, underwrite, and structure an acquisition. Likewise, the panel discussed those qualities that make the target ripe for a SPAC acquisition – the most salient being that it has qualities that make it an IPO candidate in its own right.

It was clear from the discussion that each member of this panel is a serious dealmaker. The group walked through the key points to negotiate in SPAC transactions, which included valuation and consideration, the cost of capital, governance and control, and the terms of PIPE financing. This group gave the audience a playbook on navigating a target's combination with a SPAC. They also weighed in on the trends for key terms and the implications for each of the parties involved.

It was also interesting to hear that while target companies operate in a wide variety of sectors, these companies have the common denominator of often being based on a software platform that disrupts existing industries or pioneers new technologies. A large number of SPAC target companies focus on what was referred to as the "electric revolution" and the markets associated with it, such as electric vehicles, automated trucking and robo-taxis.

The FFF Primer Navigator

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New to fund finance or know someone who is? Here's a guide to primers we've previously published in *Fund Finance Friday*.

Capital Commitments, Side Letters and Other Investor Considerations

A Waiting Game…

Topic: Annual limits on capital calls in the LPA.

Cross-Referenced Debt Limits

LPA leverage limits that may be revised by advisory committee consent.

Immunity Unlikely

Sovereign immunity and related concepts.

Not All Commitments Are Treated Equal

Investor commitments structured as both a loan commitment and equity commitment.

(Over) Call Me, Maybe

Types of overcall limits and their prevalence.

Political Contributions Cease Funding Rights

Cease funding rights tied to political contributions by a fund or its affiliated personnel.

Side Letters: A Round-Up of Common Issues for Lenders

Common side letter terms most relevant to subscription lenders.

Credit Agreement Concepts

It's My Equity, and I'll Pledge If I Want To

The exclusion event related to an investor encumbering its equity interest in a fund.

Concentration-Linked Overcall Limitations

Applying a use-of-proceeds limitation to address an investment concentration-linked overcall limit in the LPA.

Letters of Credit – An Increasingly Popular Tool?

Letters of credit in the subscription facility context.

Cash Collateralizing Letters of Credit

The interplay between outstanding letters of credit and credit facility repayment at maturity.

Call Me MAE-Be?

Material adverse effect clauses.

Whose Cash Is It Anyway?

Negotiating the available sources of payment available to service certain required payments by the borrower.

You're Out!

Lender replacement provisions in the credit agreement.

The Involuntary Bankruptcy Exclusion Event

Lender exposure related to an investor's involuntary bankruptcy during the typical cure period.

The Intersection of Overcall Limitations and the Investor Default EOD Trigger

The interrelationship between the cumulative default EOD and a fund's percentage overcall limit.

April Showers Bring … Umbrella Facilities?

Considerations in structuring umbrella facilities.

Umbrella Academy: A Guide to Umbrella Facilities in Fund Finance

An update on applying an umbrella structure in various contexts.

Top 10 Items to Consider When Structuring Your ESG Facility

A top-10 list of structuring considerations for ESG facilities.

SONIA: A Primer

Differences between SONIA and SOFR, plus key terms for loan documents.

NAV Facilities

Structuring Security for NAV Loans

Security for NAV loans and related concepts in the lender's disposition of collateral.

Considerations for Post-IPO NAV Financing

Considerations specific to post-IPO shares pledged as collateral.

Blurred Lines

NAV facilities to primary funds.

An Introduction to Secondaries

The private equity secondaries market.

Other Borrower and Transaction Structures

Top Considerations for Structuring an SMA

Key considerations in lending to an SMA.

One Is the Loneliest Number

Unique issues lenders face in lending to SMAs.

Key Issues for Loans to '40 Act Funds

Common issues that are addressed in loan documentation when the borrower is a registered investment company.

Get To Know Your BDCs

BDC basics and subscription facility considerations.

A Closer Look at Management Fee Facilities

Management fee line collateral, due diligence, credit support and common terms.

Getting Personal — Lending to Fund Executives

Diligence and structuring points related to loans to fund executives in a European context.

Diligence Considerations for Fund Executive Facilities

Due diligence demands with respect to the executives and their rights to receive distributions in their capacity as LPs of the co-invest vehicle.

Diligence Considerations for GP Facilities

Due diligence requirements specific to GP facilities.

Financial Covenant Protection in GP Facilities

Structuring of financial covenants in the context of GP facilities in Europe.

Lending to Venture Capital Funds

Points to keep in mind when structuring credit facilities with venture capital funds.

Open-Ended Funds: A Few SCF Considerations

Distinguishing factors of open-ended funds.

Preferred Equity — The Best of Both Worlds?

Preferred equity, particularly with regard to secondary investors.

Other Transaction Documents

Payoff Letters – Routine until Rocky

Fundamental legal principles underlying the use of and the market practice of payoff letters.

Investor Letters: Key Provisions

Investor Letters continue as a credit support tool for certain types of facilities.

Get Well, Keep Well

Credit enhancement through guaranties, equity commitment letters and keepwell agreements.

Equity Commitment Letters under English Law: Beware of the Pitfalls!

Key aspects of equity commitment letters and implications for lenders.

Other General Topics

Ten Things Every Fund Finance Banker Should Know About the UCC

UCC building blocks relevant to fund finance.

ERISA in Fund Finance

An overview of ERISA and related concepts in fund finance.

Cadwalader Advises Investec on €1 Billion Secured Note Programme

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Cadwalader advised Investec on a €1bn secured note programme backed by subscription credit facilities with one of the UK's largest insurers. The **transaction**, one of the first in this new product area for the London market, will enable the insurer to take advantage of an opportunity to participate in an attractive investment-grade rating product in a current environment of low yields from high-quality credit, rated A and better.

Citco Article on Safeguarding Against Unknown FF Risks

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Shiraz Allidina of Citco Capital Solutions Inc. provides some guidance for fund finance lenders when evaluating the constellation of service providers − attorneys, auditors and fund administrators − retained by a fund or its manager, as part of due diligence procedures to safeguard against unknown risks. Read the article **here**.

Brickfield Article on Offshore Recruiting

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In its latest article updating the fund finance community on recruitment trends, **Brickfield Recruitment** talks to **Simon Raftopoulos** at Appleby in the Cayman Islands about potential changes to national law that will impact how non-Cayman legal associates will be able to practice there. Also under discussion is the current outlook for associates looking to move into the offshore market. The article is available **here**.

Brickfield is the only talent acquisition agency dedicated to the fund finance sector. Lawyers interested in developing their career in the Cayman Islands or other offshore jurisdictions should contact **Rory Smith** at **rory@brickfieldrecruitment.com** or by telephone on +44 7800 963 594.

Fund Finance Hiring

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Fund Finance Hiring

Investec Bank is looking for a Solicitor to join the UK Legal Team to support the Fund Solutions team.

Investec Bank is looking for a Solicitor to join the UK Legal Team. The role has a primary focus supporting the bank's Fund Solutions business. The position is in London with comprehensive coverage across other key geographies within Europe, North America, and other developing markets. This is a high-profile and technically rewarding role requiring 1-4 years post qualification experience in a banking and finance team at a leading UK or U.S. law firm. The role will involve working on a wide range of financing transactions supporting funds and their managers, within Investec's market-leading Fund Solutions business. For more information, please visit **here**.

Investec Bank is also looking for a mid-level Solicitor as maternity cover to join the UK Legal Team in the Private Bank Legal Risk Department within its Private Bank Division.

Investec Bank is looking for a mid-level Solicitor to join the UK Legal Team. The role has a primary focus supporting the bank's Fund Solutions business. The position is in London with comprehensive coverage across other key geographies within Europe, North America, and other developing markets. This is a high-profile and technically rewarding role requiring 4-7 years post qualification experience in a banking and finance team at a leading UK or U.S. law firm. The role will involve working on a wide range of financing transactions supporting funds and their managers, within Investec's market-leading Fund Solutions business. For more information, please visit **here**.

On the Move – Fund Finance Tidbits

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On the Move

Stifel Venture and Fund Banking recently appointed Charlie Smith as a Managing Director and Head of Fund Banking for the Western U.S. Stifel's Fund Banking group assists sponsors across all asset classes with financing such as subscription finance, management company lending and GP capital commitment finance. Charlie will also be building relationships with sponsors focused specifically on technology, healthcare and other verticals that are strategic to venture banking, as well as the broader Stifel Investment Banking and Wealth Management divisions.

Charlie joins Stifel after 10+ years with City National Bank and Wells Fargo, where he focused on the needs of sponsors and their affiliates.