

CADWALDER



By **Leah Edelboim**
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This was a busy week in the loan market. LIBOR transition is accelerating daily, we have a new form of credit agreement from the LSTA, and what has been deemed an “existential threat” to the syndicated loan market has reared its head once again. Here’s the rundown.

1. The Shift to SOFR Is in Full Swing

Over the past few weeks, we have seen banks originating and refinancing loans based on SOFR at an accelerating pace. There were a number of big loans in the leveraged space that skipped right over LIBOR and went SOFR first in the month of October.

The Alternative Reference Rates Committee (ARRC) held a symposium last week – the sixth in a series covering the transition from LIBOR to SOFR. Acting Comptroller of the Currency Michael Hsu spoke about the transition away from LIBOR. Banks and borrowers also weighed in on how they are doing with their efforts to keep pace with the guidance that there be no new LIBOR loans issued after December 31 of this year. As a reminder, market participants are supposed to stop originating LIBOR-based loans by the end of this year although existing credit agreements may continue to use LIBOR as the relevant benchmark, so there will still be draws on LIBOR-based loans into 2022.

Various banks chimed in on their status in the transition. Some banks have clear stop-sell dates on LIBOR-based loans that have already come and gone this year. Others are a bit slower in the transition. Despite the guidance on the end of origination, many banks take the position that they didn’t fully embrace the SOFR transition until the ARRC endorsed Term SOFR in late July. Given that was only a few short months ago, the pace of SOFR-based loan issuances is actually seen by some as quite impressive.

We are seeing a number of SOFR-first term sheets and SOFR-first deals, so it’s safe to say that SOFR has arrived in fund finance.

2. LSTA Has a New Form

This week the Loan Syndications and Trading Association (the “LSTA”) circulated to its members its new Form of Revolving Credit Facility, which refreshed the comprehensive Form of Revolving Credit Facility that was first issued in 2017. Prior to that time, the LSTA had “Model Credit Agreement Provisions,” a library of standard provisions for a credit agreement, but it had not previously offered its members a full-form credit agreement.

The LSTA form credit agreement establishes a baseline for where the market is as it relates to the rights and obligations of the parties to a financing transaction. Parties can often agree that they will go with the “LSTA standard” for portions of their credit agreement.

As to the revised agreement, the changes cover several topics, but, significantly, there are updated provisions that pertain to the LIBOR transition and include hardwired fallback language. This is important to many market players because while some banks have developed their own language for the transition, many other banks and their counsel are relying heavily on the model language produced by the LSTA.

Other significant changes relate to the letter of credit-related provisions. Additional changes include updates to the ERISA and Bail-In provisions, as well as standard language pertaining to U.S. QFC Stay Rules.

Cadwalader finance partners Chris McDermott and Jeff Nagle served as external counsel to the LSTA on this project.

3. Litigation Update – Are Loans Securities?

The question of whether syndicated loans constitute securities under federal and state securities laws has come up at various points for decades. The question has come up again in a case before a federal district court in New York. In this latest case to ask this question, a litigation trust that came out of the Millennium bankruptcy case sued agent banks that underwrote a \$1.75 billion loan to the debtor and alleged that the agent banks violated state securities laws when they originated these loans. The banks sought to dismiss the case on the basis that, among other things, the

loans are not securities. The District Court granted a motion to dismiss in 2020, and the plaintiff subsequently filed other motion practice that exhausted their remedies in that court. They have now taken the case, including the state (and, by extension, federal) securities laws questions to the Second Circuit Court of Appeals.

The LSTA has cautioned that finding these loans to be securities could pose an “existential threat” to the agency business and the loan market as a whole. The LSTA filed an amicus brief in the district court and may potentially get involved in the appeal. We could also see federal regulators being asked to weigh in. We will be following this.

'Fund Finance Friday: Industry Conversations' — Samantha Hutchinson Speaks with Neno Raic and Slade Spalding of No Limit Capital

November 5, 2021 | Issue No. 151



FUND FINANCE FRIDAY
INDUSTRY CONVERSATIONS



Samantha
Hutchinson



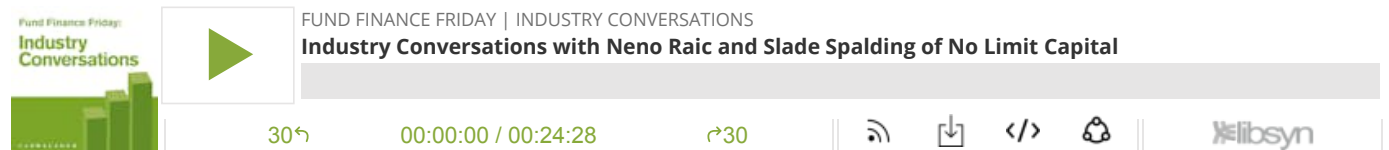
Neno
Raic



Slade
Spalding

Industry Conversations
with Neno Raic
and Slade Spalding
of No Limit Capital

In this week's *FFF: Industry Conversations*, Cadwalader partner Samantha Hutchinson sits down with No Limit Capital co-founders Neno Raic and Slade Spalding to discuss the exciting launch of their new fund, how their strategy interplays in the fund finance markets and what to expect from them in 2022 and beyond.



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FFA: APAC and EMEA Executive Committees

November 5, 2021 | Issue No. 151



INDUSTRY NEWS

The FFA Board recently announced the formation of an Executive Committee in both APAC and EMEA. In addition to the Executive Committee, the FFA Board has also created regional Advisory Councils in the APAC, EMEA and U.S.

Cadwalader Fund Finance partner Samantha Hutchinson, a member of the EMEA Executive Committee, is among the several dozen professionals who will devote their time to the FFA in these capacities.

The FFA Board, working in collaboration with these new committees, has many exciting initiatives planned for 2022.

Walkers Podcast Featuring Dee Dee Sklar

November 5, 2021 | Issue No. 151

In the 4th episode of Walkers' "We Talk Banking & Finance" podcast, Partner Zoë Hallam and Senior Counsel Julia Keppe discuss diversity and innovation in financial services with Dee Dee Sklar. To listen, click [here](#).

Wes Misson's ESG Leadership Recognized by the FT Innovative Lawyers North America 2021 Awards

November 5, 2021 | Issue No. 151



Wes Misson's market-leading work in the ESG area has earned him and our fund finance team a significant honor: a shortlisting for "Innovation in Sustainability & ESG" for the upcoming FT Innovative Lawyers North America 2021 awards.

Wes has been a prolific advisor on ESG-linked fund finance loans, which incentivize funds to meet various ESG targets. Since January 2020, Wes has worked on an impressive 9 ESG fund finance facilities for various financial institutions, including the largest one ever closed and syndicated, this past February: advising Bank of America on a \$4.1 billion ESG-linked credit facility to funds managed by The Carlyle Group tied to Board diversity.

Cadwalader was shortlisted for two other awards: "Innovation in Creating New Standards" for its LIBOR leadership and "Innovation in Digital Legal Practice" for its development of an automated structured notes issuance platform developed *and coded* by the firm's lawyers themselves.

We're very excited for Wes – and our other firm colleagues – and will be eagerly anticipating the winners announcement on December 9 and the next-day feature in a special *Financial Times* supplement.