We're Here to Help

March 17, 2023

We know this has been a challenging time for many of our clients and friends in the fund finance industry, both professionally and personally. We join the broader fund finance community in offering our support in every way we can.

Stepping back and looking to provide industry guidance more broadly, we have created a "**Financial Markets Resource Center**" to serve as a central point of access for our firm's insights regarding market developments.

The resource center features our best thinking on fund finance and the banking industry more broadly – in the form of *Clients & Friends Memos* and special issues of *Cabinet News and Views*, *Fund Finance Friday* and *REF News and Views*. We are also populating the resource center with additional informational resources and will continue to add timely content as it is produced.

And, of course, our best resource of all is our transatlantic fund finance team. Our lawyers have been working around the clock and around the globe to monitor developments, advise our clients on active transactions, and help them and the fund finance community keep pace with the broader implications of the ever-changing developments.

We're here to help.

FFA Statement of Support

March 17, 2023

The FFA Board has issued a “statement of support” on the recent events in the banking industry and fund finance community. You can read it **here**.

Loan Assignments: Common Techniques and Key Considerations

March 17, 2023

By **Katie McShane**
Special Counsel | Fund Finance

The past six months have been turbulent in the fund finance world. We have seen lenders in the market deal with significant capital constraints, we have seen a small amount of lenders scale back in the fund finance lending market, deciding to deploy capital elsewhere, and we have also seen a large number of new lenders enter into the fund finance market to take advantage of rising interest rates and quality sponsors in need of liquidity. The past week has brought with it unprecedented times, and it of course remains to be seen how the aftermath of the collapse of Silicon Valley Bank and Signature Bank will play out, and specifically what exactly will happen to the fund finance loans held by those lenders. We know this has been a challenging time for our friends and colleagues at these institutions, and we join the broader fund finance community in offering our support. For further information on the impacts of the SVB/Signature FDIC takeover on fund finance transactions, please refer to the articles we published earlier this week **here** and **here**, noting that this is a fluid and constantly evolving matter.

In light of the above background, we thought it would be helpful to highlight some of the techniques commonly used by market participants when transferring an existing loan, and some key considerations when doing so.

Assignment by Participant Lender

If a *participant* lender wishes to assign its loan, thereby exiting the facility, this can usually be done by way of execution of an assignment and assumption agreement and compliance with the various other conditions to assignment pursuant to the terms of the underlying loan documents.

In the assignment and assumption agreement, the assigning lender sells and assigns to the assignee lender, and the assignee lender purchases and assumes all of the assignor lender’s rights and obligations under the loan documents.

It is important to thoroughly review the conditions precedent to assignment, including any consents that may be required. Often times the consent of the borrowers is required unless an event of default has occurred and is continuing at the time of such assignment, or unless such assignment is to an existing lender or an affiliate thereof. The new lender must qualify as an eligible assignee under the terms of the loan agreement, and certain persons are usually prohibited therefrom, such as natural persons, defaulting lenders or subsidiaries of the credit parties.

If a defaulting lender is assigning its rights and obligations, typically the parties to such assignment are also required to make certain additional payments to cover all liabilities of the exiting lender.

Upon the effectiveness of the assignment, the assignee lender becomes a party to the loan agreement, and the assigning lender is released from its obligations and ceases to be a lender thereunder, but it continues to be entitled to the benefits of certain indemnification and other rights such as the payment of fees, to the extent such rights relate to the time prior to the assignment.

The administrative agent (the “agent”) is typically required to maintain a register of loans that identifies the name and address of each lender and the amounts of the lenders’ commitments and loan balances, including copies of all assignment and assumption agreements. After assignment, the administrative agent should update this register with the details of the new lender and related loan.

It’s also worth flagging that, in some instances, the new lender may require certain updates to the loan agreement by way of amendment, and/or reliance letters, which provide consent to the new lender to rely on the existing opinions. These are all items that get considered and negotiated when a new lender joins a facility.

Agent Resignation and Appointment; Lender Assignment

If the agent and the assignor lender are one and the same, the parties may wish to effect the loan assignment by removing the existing agent, replacing it with a successor agent, and assigning the loan. The existing lender would also assign its loan to the new lender in the same way that we have detailed above. The steps that are generally followed under this method are set out below, but it is important to note that each deal is different, and it is necessary to follow the terms and satisfy the conditions of the existing loan documents.

(i) Agent Resignation and Appointment Agreement

Typically the existing agent has a right to resign pursuant to the loan documents, and can do so by way of notice to the parties to such loan agreement, upon receipt of which the majority of lenders will have a right to appoint a successor agent. Similar to a loan assignment, the borrowers usually have consent rights to the successor agent and will therefore need to approve the successor agent, provided that no event of default has occurred and is continuing at the time of such resignation. The parties can document the resignation and appointment by entering into an agent resignation and appointment agreement.

In the LSTA's Model Credit Agreement Provisions, the successor agent must be a bank with an office in a named city, although sometimes this has been negotiated out of the document if parties didn't wish to be limited in this respect. The parties will therefore need to ensure that the successor agent meets the criteria set out in the loan agreement.

If the person serving as agent is a defaulting lender, the loan documents typically permit (subject to applicable law) a majority of the lenders (other than the defaulting lender), upon consultation with the borrowers, to remove such agent and appoint a successor. It's extremely important to obtain legal advice if the parties wish to use this mechanism, since this provision is a little more complex and would be subject to applicable law.

Upon execution of an agent resignation and appointment agreement, the existing agent will be discharged from its duties and obligations as agent under the loan documents, and the successor agent assumes such duties and obligations. The existing agent also assigns and transfers to the successor agent all of its rights as agent granted or assigned to it under the collateral documents (including security agreements and collateral account pledges) and the successor agent accepts all such rights for its benefit and for the benefit of the other secured parties. The existing agent will typically still hold on to certain indemnification and other rights that relate to the period prior to such resignation or removal.

(ii) Assignment and Assumption Agreement

As detailed in "Assignment by Participant Lender" above, the parties would enter into an assignment and assumption agreement, and follow the conditions precedent to assignment. See "Assignment by Participant Lender" for further detail.

(iii) Omnibus Amendment to Loan Documents

The existing credit parties, resigning agent and successor agent would enter into an omnibus amendment to the loan documents, whereby the parties replace all references to the existing agent with the successor agent. It is important to thoroughly review each loan document when preparing the omnibus amendment to ensure compliance with the amendment provisions therein. The notice information will also need to be updated, and the successor agent may have other certain updates that are required to be included in the omnibus amendment.

(iv) Account Control Agreements

The parties will likely need to amend and restate the existing account control agreements, or enter into new ones, as required by the depositary bank in question and the terms of the applicable control agreements. Sometimes depositary banks permit the account control agreement to be amended and restated, but sometimes they require new ones to be entered into.

(v) Lien Searches and UCC Filings

The parties will need to run new lien searches, and ensure those are in order, and similarly file UCC-3 amendment filings. The amendment filings will include the successor agent as the secured party.

(vi) Opinions

It is important to obtain new opinions for the successor agent, since the existing ones will not be addressed thereto and to ensure enforceability and security interest coverage given the amended documents and security filings.

(vii) Certificates and Resolutions

It is also important to obtain new corporate certificates with respect to the credit parties in the transaction and resolutions authorizing the entry into of the transactions contemplated by the omnibus amendment.

(viii) Investor Notices

Depending on the jurisdiction of the credit parties, new investor notices may have to be sent, notifying the relevant investors that the agent and lender have assigned their interests to the successor agent and lender. It is important to consult with local counsel in order to ascertain whether or not such investor notices may be required. If the deal is an SMA and an investor letter is likely already in place, investor notices would typically be sent regardless of the jurisdiction, in order to notify the investor of such assignment and transfer.

(ix) Payoff Letter

Sometimes the departing lender will require a payoff letter, confirming that they are exiting the deal upon receipt of the payoff amount, which amount usually represents all obligations due and owing to it pursuant to the loan documents. This is sometimes baked into the omnibus amendment, rather than a stand-alone document.

The above approach can be enticing for new lenders that are looking to also take on the role of agent, which can be lucrative and also provide more insight and control. This technique is also attractive to new lenders when the existing loan documents generally look acceptable and the parties wish to save on fees and expenses that might otherwise be incurred by terminating the existing facility and entering into and negotiating a new one entirely. This method might also be a more attractive option if there are other lenders in the deal and the new lender/agent does not wish to disturb those existing lenders to the extent possible. As mentioned above, every deal is different and has different nuances that will need to be considered and addressed.

Termination of Existing Facility and Entry into of New Facility

This is perhaps the most common way we see loans being transferred to or refinanced by new lenders. Typically, this method is used when a loan is already set to mature, but the existing lender does not wish to renew. The borrower will probably wish to have the new loan commence on or prior to the maturity of the existing loan.

With this approach, the existing loan is terminated and the existing lender is paid off pursuant to a payoff and termination letter; this closes substantially concurrently with the entry into of a new facility. All of the typical requirements associated with a new deal are entered into, which we won't get into for the purposes of this article; however, it is important to note that the new lender will also need to make sure that UCC-3 termination filings are filed immediately prior to the UCC-1 filings being filed, in order to ensure its priority with respect to the collateral. The existing account control agreements will also need to be terminated and new ones entered into.

The parties to the "new loan" may wish to use the existing loan agreement as precedent for the transaction, since the material issues will likely already have been addressed; however, this depends on the appetite of the new lender, depending on how those existing loan documents were drafted and depending on how old they might be; in some instances, it may make more sense to start with a new lender's form documents.

Other considerations, such as outstanding letters of credit, will need to be addressed too, depending on how the existing facility was set up. For example, the new lender may be asked to provide a loan to the borrower in order to cash collateralize its existing letter(s) of credit.

Conclusion

The above methods, while used in the fund finance market, are high-level overviews only. It is important to seek guidance from counsel and address the particular nuances of the deal at hand. Cadwalader is happy to assist and discuss any of the above in further detail.

Lenders Showing Muscle with 'Flex'

March 17, 2023

By **Leah Edelboim**
Partner | Fund Finance

By **Joseph Polonsky**
Partner | Leveraged Finance and Private Credit

In recent months, as lenders in the fund finance market have been more selective and demand for financing from fund borrowers remains high, we have seen a number of instances of lenders considering the use of and actually incorporating "market flex" provisions into their deal documents. Any term sheet that goes out either has these provisions incorporated − or there was at least a conversation about them. In light of the events of late last week with two major sources of financing in the subscription market under FDIC control (see our commentary **here**), we have seen a major focus on these provisions from other lenders in the space.

What exactly are these provisions? How do they work? What exactly do they say and where do you put them? We break that down to the basics here.

The Background

First, a bit of a primer. As is typical, many creative solutions come from the leveraged loan market, and market flex is no different. These provisions are a typical feature in commitment papers in the leveraged loan market.

Flex provisions are intended to give arrangers a degree of flexibility on certain terms of a financing during the syndication process to help ensure successful syndication. A market flex is a provision that gives the arranger flexibility on certain terms of the financing after the credit documents have been signed − meaning that the terms of the financing can be changed to improve the economic and structural terms for the lenders if these changes will help the arrangers achieve a successful syndication.

What Flex Provisions Say and Where Do They Go

In a leveraged finance deal, these terms are found in the fee letter, which is delivered in connection with a commitment letter whereby the arranger provides a borrower with a financing commitment. The terms of the commitment letter will cover a number of features of the financing (including attaching a term sheet for the financing), the relationships between the parties, confidentiality, as well as the marketing process for the arranger to put together a lender syndicate. In addition to a description of the fees payable in connection with the closing of the transaction, the fee letter will include market flex optionality for the arranger in order to help it achieve a successful syndication. These provisions will allow for the borrower and the agent to bilaterally update the credit agreement for lender-favorable changes related to pricing, amortization, tenor, other financial terms (including covenants), the collateral package, and allocation or structure where the financing contemplates multiple facilities. While most leveraged finance fee letters contain a litany of potential changes, pricing flex is the ultimate hammer – particularly in a rising rate environment, a borrower will almost always choose to make structural changes (*e.g.*, reducing the tenor of the loan by a year) rather than raising its interest expense. Any pricing flex in a leveraged deal would be applicable to all lenders. In a syndication, the arrangers may not provide the full fee to all incoming lenders, potentially "skimming" some for themselves (*e.g.*, they may get 200 bps in upfront fees but be able to sell the paper for 150 bps so the arranger gets to skim the additional 50 bps for its own benefit).

Similarly, in a fund finance deal, these flex provisions are found in the agent and lender fee letters. The flex in a fund finance transaction generally just relates to pricing and fees, but it could in theory encompass a number of the other options listed above. Right now we are specifically seeing an ability to increase pricing. The other thing we are seeing is that an agent may negotiate an upfront fee with the borrower and then reserve its rights such that if another lender that comes into the deal is given an upfront fee that exceeds the upfront fee that the agent has negotiated for itself, the agent will be entitled to receive an additional upfront fee in an amount equal to the difference between the upfront fee negotiated and the increased upfront fee, accruing from the date such other lender receives such amount. We see some skimming in the market, but it is on a fairly limited basis and for a smaller amount (generally 5-10 bps).

Keep in mind that fee letters are confidential among the arrangers and the borrower, so those parties (and only those parties) will decide whether the flex is necessary to syndicate the loan(s). (The borrower will not want the arranger giving any prospective lenders a “shopping list” of terms that would otherwise be more restrictive to the borrower, so it is an important consideration that any market flex terms remain confidential between the arranger and the borrower. An incoming lender will not be privy to the document and will not see the economic terms that the agent had before they joined. Likewise, it is possible that a lender may end up with different terms than another lender if the first lender in the deal didn’t reserve rights to have their fees and margin matched to any incoming lender who may benefit from better terms.

Best practices indicate that the credit agreement should have an exception to the amendment section that allows the agent to amend the credit agreement terms for market flex provisions without obtaining the level of consent one would typically need to amend the economic terms of a credit agreement.

Switch It and Reverse It

Finally, we note that in some markets, you may see what’s called “reverse flex.” This isn’t something that has made its way to the U.S. leveraged finance market with any consistency and is largely just found in European markets. The concept is exactly as it sounds. If the marketing process for a loan is so successful that lenders are willing to commit for larger amounts than are available, in certain circumstances, the loan may be “reverse flexed” or “flexed down” and close on terms more favorable to the borrower.

The typical change is to the spread, and that can take the form of a reduction to the applicable margin or involve a step down to the applicable margin if the borrower meets certain financial covenants. Unlike market flex, reverse flex won’t be in the commitment papers, and thus the arranger isn’t obligated to pursue these better arrangements. This is frequently relationship-driven when a strong credit sees higher demand for its loan that originally expected.

Women in Fund Finance Event: Women in Infrastructure

March 17, 2023

By **Leah Edelboim**
Partner | Fund Finance

Women in Fund Finance hosted a panel discussion yesterday, co-hosted by National Australia Bank and Simpson Thacher & Bartlett LLP, which was held at NAB's beautiful new office in midtown Manhattan. This discussion featured a panel of senior women in infrastructure who discussed everything from their career paths to issues facing the infrastructure industry, such as the fundraising outlook, fund allocations, the impact of inflation and valuations, and the use of debt in these structures (according to the panel discussion, the infra finance market is about $600 billion). Not surprisingly, ESG played a prominent role in the discussion.

This superb panel was moderated by Ashley Belton Gold, a partner in Simpson Thacher's Banking and Credit and Fund Finance practices, and included:

- Elise O'Connell, a director in the BlackRock Legal Transactions Group, who serves as counsel to BlackRock's Diversified Infrastructure Equity Fund, Global Renewable Power Fund, and Infrastructure Debt Fund;
- Jennifer Gray, who is a Senior Managing Director, Deputy General Counsel and Chief Compliance Officer at ECP, where she chairs the Compliance Committee and co-chairs the ESG Committee;
- Emily Zovko, also of ECP, where she is Head of Investor Services and Managing Director - Investor Relations and is involved in the firm's investor relations, marketing, fundraising and public relations activities and serves as Co-Chair of the ESG Committee;
- Helen McNamee, the North America ESG/Sustainability Leader at QIC Global Infrastructure, where she is responsible for sustainability strategy, integration, and outcomes within the global Infrastructure team across the investment lifecycle, from the evaluation of new investments to the active asset management of portfolio companies;
- Adrienne Saunders, Senior Managing Director with Stonepeak and the firm's General Counsel and Chief Compliance Officer; and
- Sonia McMillan, Managing Director at Amber Infrastructure, based in New York, responsible for expanding Amber's investment activities in North America.

Cath Carver, Executive, Client Coverage NAB Corporate & Institutional Banking (C&IB), who has global leadership responsibility for NAB's relationship banking team for large corporate clients and financial institutions, welcomed the attendees with opening remarks.

After discussing their career paths, the panelists focused on how what constitutes an infrastructure asset has changed. Historically, infrastructure was defined as assets needed for the movement of people and physical goods. The list of assets that fall into the category has expanded well beyond hospitals, roads, bridges, and airports, and the focus is no longer just on transportation and fossil fuels. There are now a whole host of assets that retain the fundamentals of infra in that they are a resilient asset class that serve a critical purpose, and they include infrastructure to deliver data and services as well as energy transition and much more.

Likewise, there has also been a shift from greenfield projects where you start from nothing and build something to build something new, to more of a brownfield approach where sustainable ways can be used to enhance existing infrastructure. One example the panelists gave was how owning a coal plant and coal site can be attractive as they can serve a purpose and be decarbonized by adding solar panels. Ultimately, infrastructure can address climate change and contribute to decarbonization.

The conversation naturally turned to ESG. One panelist noted that they had all been “doing ESG” their entire career, but they just didn’t call it that. With respect to market trends, there seem to be divisions as to which “letter” there is a focus on. According to the panelists, the “G” – as in governance – is going to get a lot of attention with a focus on risk management. One panelist discussed the ESG-related procedures at her institution and throughout the investment process – from evaluating a deal to managing it to the exit. She mentioned that all deals going to investment committee must go through an extensive ESG screening process for each factor to highlight any red flags that have to be addressed in the memorandum for the investment committee. Moreover, investment teams are asked to run downsize scenarios to model what an asset looks like in a decarbonizing world to the year 2050. They viewed this as a critical part of the deal approval process, and it speaks to the appetite of LPs who are asking for more and more information and evidence that ESG is being considered and risks are being mitigated. In addition, investors are sophisticated and acutely focused on greenwashing. It is no longer enough to indicate ESG factors were considered; instead, investors want to see benchmarks with real progress. There was a note that Europe is focused on the “E” – as in environmental – and the metrics can be quite specific. In the United States, by contrast, there is also focus on the “S” – as in social – with a lot of focus on DEI initiatives.

In terms of ESG metrics, the panelists discussed how 10 to 15 years ago, it was a bit of a “check the box” exercise. That is very much not the case now where third parties are being engaged to validate a company’s ESG story. It is the expectation of the panelists that this validation of the optimization and reporting shows that real outcomes will be required.

The panelists were in agreement that this is an exciting time to be in the infrastructure space. Looking ahead to the next 3-5 years, they expected the infrastructure space to remain on a rapid course for change, even in terms of defining what infrastructure is. There was also a discussion that this will create a real opportunity for banks to further develop ESG financing. While it was hot in 2021, the interest has cooled somewhat, and some of the panelists believe that it could come back and create big opportunities for lenders who figure out how to offer these products and operate in the space.

The panel concluded with career advice. The panelists noted that there was a sense that infra is a small community where, much like fund finance, everyone is in it together, no matter which side. The audience was encouraged to learn from one another and to be kind. One panelist gave the sage advice to seek advice and be open to unsolicited advice and to take from that unsolicited advice what serves you. Another panelist noted the importance of having a positive work environment where people feel enriched and fulfilled, adding that having a good time at work and finding power and purpose in your work really stems from these relationships, where you can appreciate the smart people with whom you get to exchange ideas.

Fund Finance Hiring

March 17, 2023

Fund Finance Hiring

Barclays has an opening for a new Legal Vice President to join its growing Corporate Banking Legal team in New York. Basic qualifications include a minimum of five years' experience working in commercial lending at a law firm and/or in-house. For a more detailed description of the role and information on how to apply, please visit **here**.