

Term Loan Solutions in Fund Finance

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Interest rates rise, demand exceeds supply and the fund finance market adapts to a changing landscape. As we seek depth and breadth of new liquidity in our market, we have often wondered how to bring more non-bank lenders into agented subline facilities as participants. This search for meaningful non-bank lending continues as banks, funds and their respective teams are working harder than ever to fill capacity in their facilities.

There may be an enticing solution in sight. Specifically, an opportunity may exist in attracting some insurance companies and institutional investors via a term loan tranche. A term loan is more attractive to certain insurance companies because it is fully funded on day one and doesn't require rapid deployment of capital over the tenor of the facility (as is the case in a committed revolver).

Adding a term loan tranche to an existing facility (or, perhaps more likely, closing a new facility with a term loan tranche alongside a traditional revolver) may help syndicators as they push forward to find ever more valuable pockets of capacity. The questions in structuring a term loan tranche are more business in nature than legal. Below are some issues parties should think through as they consider a term loan solution to bring in non-bank participant lenders.

- **Separate Tranches.** The term loan will need to be its own tranche, since the term loan will be fully funded on day one and the commitments of the revolver will vary with time. The market has experience with separate tranches. For instance, we accommodate lenders who cannot fund in an alternative currency with a special U.S. dollar-only tranche. In addition, it is routine for a temporary increase mechanic to have its own separate tranche, with only a subset of lenders being temporary increase lenders. The term loan tranche may be open to bank lenders, but the understanding is that the non-bank lenders, such as insurance companies, would not be in the revolver tranche.
- **Shared Collateral.** In marketing the idea to various stakeholders, it will be important to emphasize the *pari passu* rights of term loan lenders and revolver lenders to a single collateral pool for the lender group as a whole. The collateral would consist of the traditional subline collateral: the uncalled capital commitments of the investors. There would be a single senior lien securing the obligations of the two different tranches, with a common custodian (the administrative agent) administering the collateral pool for both tranches. The absence of multiple liens of different ranking most likely eliminates the need for an intercreditor agreement.
- **Right-sizing the Commitment.** As part of a day one checklist, parties should consider the relationship among (1) the term loan commitment size, (2) the revolver commitment size and (3) the size of the collateral pool (the uncalled capital commitments of the investors). The interesting challenge for term loan lending in a subline facility is that prong (3), the collateral pool, will decrease over time as the fund calls capital. This means that the loan documents will likely need to contain a coverage ratio covenant for the term loan whereby the term loan commitment must be under a certain percentage of the collateral pool (the revolving lenders are protected automatically via the mechanics of the borrowing base and mandatory prepayments for any borrowing base deficiency). If the fund trips the coverage ratio covenant, term loan lenders would likely want to see a mandatory prepayment to right-size the term loan to the collateral. Based on anticipated drawdowns, the funds and the term loan lenders may even try to match the amortization schedule of repayment to the decline in collateral pool so as to avoid for as long as possible tripping the coverage ratio covenant. In addition, the larger the term loan commitment is relative to the revolver commitment, the larger the possibility is for there to be divergent interests between the two lender groups, with revolver lenders focused on usage and unused fees. This will not be an area of concern for the term loan lenders, but they, unlike the revolver lenders, will need to think about how to structure a term piece that has guaranteed usage but decreasing collateralization over time. Some might object that, if the term loan lenders are protected by a coverage ratio of outstandings to collateral, they should not be concerned whether the term loan component is too large relative to the collateral pool. However, the term loan lenders, such as some insurance companies, place a high value on a dependable and consistent return stream from their lending. Even with covenant protection, certain insurance companies and non-bank lenders will still want to safeguard their expectations for a return revenue stream, which will in turn drive pricing and the requirement of prepayment penalties. Finally, the most decisive factor in right-sizing will be the borrower's preferences given their cost of capital (debt becoming comparatively more expensive compared to equity) and the size of the fundraise in the current environment. The addition of term loans may therefore occur in a cycle of modestly declining overall facility sizes.

- **Right-sizing the Tenor.** Once you answer “how much?”, the next question on the day one checklist of issues is “how long?”. The key question will be whether to have two different maturity dates for each tranche or to align such dates. Some insurance companies seek terms of three to five years for these type of investments. Bank lending, however, usually focuses on tenors of one or two years (more rarely these days, three years) due to the high capital charge subline commitments receive on their balance sheet. There are two approaches to this. The first is to keep maturities aligned and recognize that, as a practical matter, while extensions for a revolving facility are generally uncommitted, lenders routinely extend these facilities beyond the initial stated maturity date more often than not. In other words, a deal that is a “two-year deal” may easily hang around until year three or year four as a matter of course, which puts the tenor into the comfort zone for many insurance companies. Managers can get comfortable that revolvers, while extensions are uncommitted, do get extended routinely. The second approach is to have different maturity dates for different tranches contemplated on day one, recognizing the divergent interests of the two lender groups in usage, repayment and capital charges. When maturity dates differ, however, the parties will need to think through the successor to the original agent for the deal, as the original agent may want out of the deal once the revolver terminates or goes to zero. Likely the term loan lenders will want to have mechanics to retain the agent, replace the agent or to appoint one of their own as a servicer. It may make sense to have an agent successor agreement as a baked-in exhibit in the facility documents or, at minimum, enhance the existing agent resignation provisions to contemplate a third party acceptable to the borrowers and term loan lenders.
- **Ratings.** The administrative agent and the manager should have an early conversation with the ratings agencies on whether the term loan tranche (or the facility as a whole) will be rated, which will be essential for marketing the term loan tranche to certain non-bank lenders. Certain of the ratings agencies have provided exposure drafts for their rating methodology, so please consult counsel and the applicable contacts at the ratings agencies for further guidance.
- **Payments.** The fund and the term loan lenders will need to negotiate one of two options for ordinary course repayment: either an amortized repayment schedule or a bullet payment for the principal at maturity. From the term loan lender perspective, both approaches have their advantages. The bullet payment at maturity would give such lenders higher yields and a consistent revenue stream. On the other hand, the amortized repayment schedule would reduce outstandings over time as the collateral pool diminishes, which will be desirable from a credit risk perspective. With respect to mandatory prepayments, lenders will want to distinguish “ordinary” mandatory prepayments that result from a borrowing base deficiency vs. payments after an event of default. For ordinary mandatory prepayments, parties may want the borrower to have discretion over what outstandings to pay down (likely the revolver while the term loan stays in place given any prepayment penalties for the term loans). However, in an enforcement scenario, such payments would need to be pro rata according the commitments of each lender regardless of tranche. Finally and as already mentioned in passing, since the term loan is fully funded on day one, there will need to be prepayment penalties for paying the term loan tranche before its maturity to protect the investment expectations of the term loan lenders, with the possibility of the prepayment penalties rolling off after a certain date.
- **Rates and Pricing.** We may expect a pricing split between the term loan and the revolver, although we cannot yet say whether difference will be wide or kept close – say, to a 10 basis points difference. It’s also too early to determine whether parties would negotiate predominantly fixed or floating rates for a term loan component, although given the investment requirements of certain insurance companies, we would expect to see fixed rate term loans. Whatever the outcome, it will be important for agents to include syndication teams at an early stage in the business discussion to gauge the market reaction to differing rates and margins. Even if the syndicate of revolving lenders does not participate in the term tranche, they may be reluctant to approve differing economic terms they view as overly advantageous to the term lenders.
- **Divergent Lender Interests.** Parties will generally want to think through how to deal with a huge gap between utilization of the term loan and the revolver. The preference may be for a fund that expects to have higher utilization of the revolver than is typical, which would help even the utilization playing field between term loan lenders and revolver lenders. An ideal case may be a fund, perhaps a credit fund, that uses the line for leverage and will have a high revolver utilization. Alternatively, higher unused fees could balance the divergent interests of revolving lenders vs. term loan lenders.
- **Advance Collateral Planning.** The parties may want to consider a collateral flip from uncalled capital commitments to NAV collateral at a certain date late in the life of the fund, so that the term loan can remain in place without being paid down (that is, as the uncalled capital commitment pool declines, NAV collateral can step in to re-collateralize the term loan). This advance collateral planning, while desirable, would be document-intensive and at considerable expense, especially given the uncertain existence of the NAV collateral at the time of the initial closing of the facility.

- **Market Dynamics.** Historically, managers preferred revolvers because the pay-for-what-you-use flexibility lines up with fund borrowing needs. The current market environment changes the calculus. First, the deeply inverted term curve means pricing borrowings based on rates for intermediate tenors (3 to 5 years) may be more attractive compared to front-end floating rates than in the past. Second, events of the past few weeks may have borrowers looking more closely at locked-in term funding. Third, locking in a fixed rate may present a sweet spot that is high enough to attract certain insurance money, but low enough to be well clear of the cost of equity (the fund's preference hurdle).
- **As Always, Relationships Matter.** Smart managers can promise and deliver cross-sale services to banks and keep the revolver lenders happy and in place, which would allow more runway for the term loan to remain in place. In this instance, as in many others, a trusted lender relationship may serve the interest of the manager more than a cheaper option when picking an administrative agent to lead the deal.
- **An Opening to Securitization.** The term loan tranche (alongside other potential deal structures) may provide one possible path for the partial securitization of the product. A term loan can be easier to securitize than a revolver, given a term loan has a predictable revenue stream and no contingent funding obligations. If a term loan piece gains widespread adoption in the market, the network effect of having a broad base of term loans may make it easier to implement certain securitization mechanisms. There are a number of structures the market may use for securitization, and the term loan piece is just one of other possible avenues, but it's worth noting that implementing non-securitized term loan tranches now may be an incremental step toward a broadly securitized future.

This has been a busy and productive quarter for Cadwalader's fund finance practice. From our data and our conversations with market participants, we believe the product is extremely robust and demand is far outstripping supply. However, there is no denying that rising rates have posed some challenges on the supply side of the market and on fundraising on the demand side. While rising rates have led to challenges, they are also a source of opportunity in that higher yields are attracting new entrants into the market. With a term loan component, these new entrants may include certain insurance companies and other non-bank lenders as participants. In fact, we may be hitting a sweet spot where interest rates are high enough to attract some non-bank lender attention but not so high as to dampen usage for the product itself. While structuring a term loan component in a subline revolver presents complexities, we at Cadwalader are ready to help with any questions or opportunities. With some luck and hard work, we may be entering a golden age of non-bank participation.

FFF Sovereign Immunity Series – Part VII

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Fund Finance Friday: U.S. States Sovereign Immunity Series



Today we return with our seventh installment in the *FFF Sovereign Immunity Series*, in which we break down sovereign immunity in New Mexico, New York, North Carolina, North Dakota and Ohio.

For anyone wishing to refresh on what sovereign immunity is, and why we are so concerned about it in fund finance, please refer to the first installment in the series, which provides a helpful overview. All installments to date are copied below, for ease of reference.

- [Part I \(AL, AK, AR, AZ and CA\)](#)
- [Part II \(CO, CT, DE, FL and GA\)](#)
- [Part III \(HI, ID, IL, IN and IA\)](#)
- [Part IV \(KS, KY, LA, ME and MD\)](#)
- [Part V \(MA, MI, MN, MS and MO\)](#)
- [Part VI \(MT, NE, NV, NH and NJ\)](#)

As detailed in previous installments, sovereign immunity is a complex legal issue, and it is important to seek guidance from counsel when considering its implications. The analysis below is a high-level overview only, and it is prudent for lenders and funds to examine each individual state's statute on a case-by-case basis.

NEW MEXICO

New Mexico has statutorily waived contractual sovereign immunity for actions based on a valid written contract.

It is necessary for the plaintiff suing the New Mexico governmental entity to show that the contract is legally enforceable by showing that a valid contract exists; specifically, the plaintiff must show that there was an offer, acceptance, consideration and mutual assent. Breach of contract claims are barred if they aren't brought within two years from the time of accrual.

While it is clear that the State of New Mexico has completely waived sovereign immunity when it contractually binds itself to performance, it is worth noting that if the governmental entity curtailed its authority, or acted outside of its designated powers, in entering into the contract, then the contract cannot be enforced as against that entity.

No formal process of collecting a judgment based on contractual liability against the state is set out under statute; however, a similar enforcement procedure, a writ of mandamus, is generally authorized by the New Mexico statutes. Interestingly, punitive damages are not generally recoverable against a governmental entity absent a statute expressly authorizing such an award.

NEW YORK

New York has statutorily waived contractual sovereign immunity by vesting exclusive jurisdiction in the Court of Claims to hear claims brought against the State.

The Court of Claims rules of procedure are outlined by the Uniform Rules for New York State Trial Courts. Thus, a plaintiff enforcing against a New York governmental entity is required to follow these strict rules and to meet all of the required deadlines and notice requirements set out thereunder.

A breach of contract claim must be filed and served upon the attorney general within six months of the claim's accrual, or at least the service of a notice of intent to file a claim, in which case the claim may be filed within two years of the claim accruing. Orders made by New York's Court of Claims may be appealed to the appellate division of the supreme court of the department in which the claims arose.

NORTH CAROLINA

North Carolina has waived contractual sovereign immunity.

Under North Carolina law, whenever the State, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract if it breaches the contract.

Similar to other states, there must be a valid contract between the parties. If there is no valid contract between the parties, then the State cannot be held to have waived its sovereign immunity for contract claims. If a valid contract has been established, the State and local government, as applicable, are subject to a breach of contract suit in the General Court of Justice.

As with most states, certain exceptions do apply. For example, a waiver will not exist under certain equitable theories such as quantum meruit, which is an equitable remedy that provides restitution for unjust enrichment, if such services or agreements were not authorized by law.

NORTH DAKOTA

North Dakota has waived its sovereign immunity for breach of contract actions.

Article I, § 9 of the North Dakota Constitution provides in part: "*Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.*" The legislature passed Section 32-12-02 of the North Dakota Century Code, which provides that actions "*arising upon contract, may be brought in the district court against the state the same as against a private person.*" This statute applies to arms of the State and to implied as well as express contracts.

A fair amount of the case law interpreting this statute focuses on whether the action at issue is in fact one arising upon contract. Thus, as with other states, it's imperative for the plaintiff to show that a valid contract exists.

Based on statute and case law, North Dakota, as a governmental investor, would be unable to raise sovereign immunity as a defense to a contract claim in a commercial law transaction, provided that all of the necessary elements for contract formation had been met. A right arising under a Subscription Agreement (or other related documentation) isn't necessarily difficult to characterize and typically clearly creates a contractual right between the parties.

Similar to other states, a plaintiff is required to follow certain steps in order to successfully bring its breach of contract claim against the State of North Dakota. For example, the Supreme Court of North Dakota has strictly construed the relevant section of the North Dakota Century Code that requires the plaintiff to present the claim "to the department, institution, agency, board, or commission to which claim relates for allowance," by requiring the plaintiff to present its claim in writing and has even dismissed a contract claim because the plaintiff failed to do so. Thus, it is critical for any plaintiff seeking to bring a contract action against the State of North Dakota (as a governmental investor) to present its claim in writing to the relevant department.

OHIO

Contractual sovereign immunity in Ohio has been waived by statute. The Ohio Constitution, article I, section 16, provides that suits may be brought against the State, in such courts and in such manner, as may be provided by law. The General Assembly enacted the Court of Claims Act, which expressly waives sovereign immunity of the State of Ohio, its departments, boards, offices, commissions, agencies, institutions and other instrumentalities, and grants

consent to have the liability of such entities determined in a Court of Claims in accordance with the same rules of law applicable to suits between private parties.

CONCLUSION

In the next installment of our *FFF Sovereign Immunity Series*, we will discuss the sovereign immunity status of Oklahoma, Oregon, Pennsylvania, Rhode Island and South Carolina.

Registration Open for 7th Annual European Fund Finance Symposium

March 31, 2023

7TH ANNUAL



EUROPEAN FUND FINANCE SYMPOSIUM

JUNE 19, 2023 | QEII CONFERENCE CENTRE

Just a quick reminder that the Fund Finance Association has opened registration for the 7th Annual **European Fund Finance Symposium**, which will be held on Monday, June 19, from 9 a.m. to 7:15 p.m., at the QEII Conference Centre in London. For more information or to register, please click [here](#).

Fund Finance Hiring

March 31, 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](#).

Avardi Partners, a leading fund finance advisory practice, is looking to hire multiple candidates in London, from analyst to vice president. If you have up to eight years of experience in fund finance and are interested in joining our fast-growing firm, please get in touch. To apply, please visit [here](#).

Intesa Sanpaolo IMI CIB is looking for a VP role to join the Fund Financing desk at Intesa Sanpaolo Bank Luxembourg. The candidate will be responsible for the structuring and execution of FF deals, together with a fast-growing team. Visit [here](#) for more information and to apply.