April Showers Bring… Umbrella Facilities?

April 5, 2019 | Issue No. 23

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We have noticed a recent uptick in requests for umbrella subscription credit facilities, and the topic was given some air time at the FFA conference in Miami last week. As such, and given the rainy spring weather, we thought it would be a good time to refresh on umbrellas. Below is a brief overview of a classic subscription umbrella facility, followed by some pros and cons to lenders.

An umbrella facility is effectively multiple subscription lines of credit for various funds managed by a single investment manager that are governed by a single set of deal documents. The funds can differ in asset class, vintage, strategy, investor base, etc. as each family of funds (each a "Fund Group" – typically comprised of a main fund and related parallel funds and alternative investment vehicles) is subject to a separate tranche (each a "Sub-Facility"). Other funds (such as parallel funds and alternative investment vehicles) related to a Fund Group may become part of that Fund Group under such Fund Group's Sub-Facility, while unrelated funds may become a Fund Group under a new Sub-Facility. The number of Sub-Facilities could be endless and could even have separate maturities and be amended over time. The Sub-Facilities are usually not cross-collateralized or cross-defaulted. They do not share a borrowing base. The Borrowers under each Sub-Facility are severally liable to the other Sub-Facility Borrowers and are only obligated to repay their obligations under their own Sub-Facility. Within each Sub-Facility, however, the Borrowers in a Fund Group are jointly and severally liable for the obligations under such Sub-Facility and subject to full cross-collateralization and cross-default. Each Sub-Facility has its own standalone borrowing base reflective of only the investors in the related Fund Group.

These are complex but interesting creatures. On one hand, you have a uniform set of documents that applies to completely different sets of funds. On the other hand, you maintain complete separateness for each set of funds. The representations and warranties, covenants, events of default, conditions precedent to each borrowing, sharing of fees and expenses, and other obligations set forth in the loan documentation are typically applicable to each Sub-Facility on a standalone basis. The facility provides for borrowings by each Fund Group to only be secured by the collateral specific to such Fund Group, and thus limited by the borrowing base of such Fund Group. Liabilities not related to a specific borrowing and not otherwise attributable to a specific Fund Group are generally borne by the Fund Groups pro rata based on fund size or the maximum amount that each Fund Group is able to borrow at the time such liability is incurred (or otherwise as determined in good faith by the fund manager).

Some pros of the umbrella structure:

- Efficiency – one set of documents to govern multiple facilities. Easy and speedy to add/remove Fund Groups without having to negotiate new documents. Attractive to managers as it permits them to operationally monitor and comply with one set of documents.
- Limits the cost and time (in theory) of doing multiple transactions.
- Where customization across different types of funds is not necessary, this can be a great option.
- Provides lenders the opportunity to be the one-stop shop or program administrator for financing a fund manager by housing all or many of its funds under one umbrella.
- Often booked by banks as one deal and one commitment rather than multiple deals. This may make it simpler to administer internally and easier to toggle commitments across multiple funds as and when needed in lieu of increasing/decreasing the size of separate deals.
- Provides predictability and uniformity of reps, covenants, reporting, exclusion events and defaults across all funds of a single manager.
- Best utilized for the same bank group where syndicated but flexibility to tranche different bank groups for certain Fund Groups could be accomplished without the need for a separate deal.
- Could combine committed and uncommitted facilities into one and utilize both term and revolver mechanics.

Some cons of the umbrella structure:

- One size fits all. Sometimes different funds require different structures. Umbrellas can make this challenging or at least cost prohibitive to bake in ultimate flexibility for every conceivable scenario.
- High upfront costs to negotiate and draft the master agreements. This can, however, be spread out across the Fund Groups and may well be less expensive than separate deals.
- The documents can grow stale over time as regulations or the market change, requiring either amendments to update or less than "market" documents for certain items.
- Certain events are awkwardly separate when governed by the same facility agreement. For example, lenders may have to lend to one fund group while the others are in default. Often, there is negotiation to provide limited cross-defaults at the manager and/or GP level to mitigate this concern. Also, cross-exclusion events may be used to deal with the issue on the investor level, as investor cross-over is quite common for funds managed by the same sponsor.
- Inability to adjust pricing or other common elements that differ deal-to-deal. This can be updated via amendment, reset clauses or even be governed by annexes or supplements that provide different terms per Fund Group (but adds complexity).
- May be impossible to envision all necessary and future jurisdictions. For example, what if in three years we need to add a Mauritius entity that no one saw coming?
- Different bank groups per Fund Group adds administrative complexity. Also raises voting right and confidentiality issues among other concerns.

Are these the most interesting facilities in the world? Well, that's probably a stretch even for a fund finance junkie. Try an SMA/commingled mixed umbrella on for size with a hybrid conversion feature.

We don't always see umbrella facilities, but when we do, they prefer to come in batches. Last year, Cadwalader closed 13 umbrella facilities. Thus far in 2019, we have closed or are currently working on eight umbrella facilities. Trend or coincidence?

Let us know what you are seeing.

Stay dry, my friends.

Who’s in Front? Structuring Letters of Credit in Europe

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The Loan Market Association form, which is used as the basis for lending and facility mechanics in most European fund financings, contemplates a letter of credit structure where the issuing bank fronts the letter of credit on behalf of the other lenders.

As with other finance markets in Europe, including the leveraged loan market, subscription line lenders are becoming increasingly hesitant to take on the role of fronting issuing bank. In fact, more often than not, the usual LMA letter of credit provisions are amended in one way or another to remove the fronting aspect. Although there are variations on a theme, two main methods of dealing with the letter of credit mechanics are emerging.

The first, and perhaps most straightforward, is to remove the letter of credit provisions entirely and replace them with the LMA ancillary lender concept. This allows a lender to issue a letter of credit bilaterally but with the benefit of the transaction security and, if properly tracked through the document in line with the LMA form, the pro rata sharing between lenders (of commitment obligations and entitlement to repayment) should be preserved.

Although a seemingly straightforward solution, this option has several limitations: an individual lender must be willing to offer its commitment for use in the "ancillary" letter of credit, and there needs to be a lender with sufficient available commitment to issue a letter of credit of the size the borrower requires. Borrowers may also consider it a drawback that the ancillary facility is not committed (at least not on the basis of the LMA language, though this can be adjusted).

The second option that has emerged (which is where we see more variation) is to establish a structure where the day-one (or original) issuing bank issues a single letter of credit with a schedule annexing the participations of the various lenders in the letter of credit. The letter of credit provides that, although issued by the original issuing bank, recourse to the issuing bank is limited to the amount specified in the schedule and that the beneficiary must separately claim from the other lenders in the amounts set out in the schedule.

Again, at least from the lender perspective, this seems a straightforward solution but it also has limitations and, if not properly drafted, can cause issues with the pro rata sharing mechanics. For example, either appropriate adjustments need to be made to the pro rata mechanics or each lender must agree to be an issuing bank and participate in the letter of credit on a proportionate basis.

Issues also arise with respect to the ability to regulate a beneficiary making a claim against some but not all of the lenders and with lender transfers during the term of the letter of credit (which may require the letter of credit to be re-issued with an updated schedule of lender participations). Some lenders, when acting as the original issuing bank, also require exculpatory provisions from the other lenders regarding the beneficiary and underlying transaction to which the letter of credit relates.

A variation on the second method is to have each lender issue its own letter of credit for the amount of its participation, which can solve some of the lender-side issues but at the same time exacerbates others, particularly the risk of a beneficiary claiming against some but not all lenders. It also requires a beneficiary to be willing to receive a number of separate LCs, which borrowers and beneficiaries may find unappealing.

In the absence of a clear alternative to the LMA provisions, there are often variations on these two options, but the key themes of any structure should be that (i) there is no actual or quasi-fronting (for example, quasi-fronting can sometimes arise in the context of the "deemed loan" mechanic seen in some documents) and (ii) pro rata sharing must be preserved or appropriately addressed in the facility mechanics.

FFF Next Gen Announces Next Event in London

April 5, 2019 | Issue No. 23

The Fund Finance Association’s Next Generation young professionals initiative is hosting its next event, titled “NAVigating Fund Finance Facilities,” on Thursday, May 2, in London. The event will start at 5 p.m. and include a substantive panel on NAV-based facilities followed by a networking reception. It will be held in the offices of Vinson & Elkins LLP at 20 Fenchurch Street. Confirmed speakers include Murtaza Merchant, Partner at MV Credit; Ivo Keltner, Associate General Counsel at Bluebay; Ian Wiese, Director at Investec; and Charlotte Lewis-Williams, Senior Associate at Vinson & Elkins. To register, click **here**.

Also Coming Up: San Francisco Fund Finance Event

April 5, 2019 | Issue No. 23

Cadwalader, Simpson Thacher and the Maples Group are co-sponsoring a fund finance event in San Francisco on May 15. The format of the event will be more casual, without a formal panel, and there will be introductory remarks on the state of the market followed by cocktails and hors d'oeuvres. The event will be in a private room at Wayfare Tavern, 558 Sacramento Street, starting at 6 pm. To register, click **here**. There is no charge to attend.

Fund Finance Hiring

April 5, 2019 | Issue No. 23

Fund Finance Hiring

- Silicon Valley Bank is continuing to expand in New York, and the team is looking for an additional Managing Director. If you are excited about a leadership role in a key market at the center of the SVB global platform, please reach out to Tim Hardin (thardin@svb.com) or see more about the role **here**.
- SVB is hiring for a Vice President in **Santa Monica** and **Silicon Valley**. Both positions fall under Regional Manager Wibke Pendse.
- ANZ is looking for an Associate Director to join its FIG Research & Analysis (FIG R&A) team in London. The role focus is on the fund sector, with key responsibilities pertaining to providing high-quality analysis and end-to-end relationship credit management to support funds financing initiatives with asset managers, including capital call facilities, associated FX structures and debt-related products to funds. FIG R&A works closely with relationship managers and risk to support credit decisions. For further information or to submit an application, please contact either Natalya Lyzanets (**Natalya.Lyzanets@anz.com**) or Shani Unantenne (**Shani.Unantenne@anz.com**)
- If you have an opportunity you would like posted on *Fund Finance Friday*, email us at **fund-finance-friday@cwt.com**.

On the Move–Fund Finance Tidbits

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On the Move

Mike Breaux has joined Stifel as Director of Fund Banking. He previously served as Senior Vice President at Square 1 Bank, a division of Pacific Western Bank.

In Case You Missed It–Recently in FFF

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We can pack some serious substance into our Friday publication—not necessarily everyone's peak time for absorbing a nuanced discussion on complex financial products. Here's a recap of original substantive pieces from recent issues for easy reference:

Funds with Benefits? Moving to a Balanced Lender Assignment Approach for Irish 110 Companies
The preservation of a lender's right of assignability is often pitted against perceived tax issues of Irish 110 Companies. We take a deeper look.

Side Letters: A Round-Up of Common Issues for Lenders
We identify the considerations for lenders in reviewing side letters.

Economic Substance – Should a Lender Care? A Cayman Perspective
We give an overview of the Cayman Islands economic substance legislation as it applies to fund finance transactions.

Mexican Capital Call Facilities
While most of the per se Mexican subscription lending to date has been completed solely by local banks in Mexico, we are seeing some material crossover via the joinder of such vehicles to U.S.-based facilities. This market has the potential to make an impact on the U.S. market soon.

"Nothing to see here...move along" or "Something's happened...let's stop and look"
We delve into a potential inconsistency in how events of default are addressed in LMA-based fund finance facilities in Europe.

The Intersection of Overcall Limitations and the Investor Default EOD Trigger
We illustrate the link between the Cumulative Default EOD threshold and an overcall limit in the LPA, and how the overcall limit should inform the appropriate Cumulative Default EOD percentage.

Who (When) You Gonna Call?
We review change of control provisions as these relate to indirect entities, such as an investor's holding company.

E-Signatures? E-Sign Me Up!
The enforceability of contacts executed by electronic means is largely addressed by ESIGN and UETA. We touch on e-signature questions that arise in the fund finance context.

Cadwalader Fund Finance Market Review
Highlights the Cadwalader Fund Finance market review as published in the LSTA and GLG's International Comparative Legal Guide for Lending and Secured Finance.

April Showers Bring…Umbrella Facilities?
We refresh on umbrellas with a brief overview of a classic subscription umbrella facility, followed by some pros and cons to lenders.

Who's in Front? Structuring Letters of Credit in Europe
Subscription line lenders are increasingly hesitant to take on the role of fronting issuing bank. Although there are variations on a theme, two main methods of dealing with the letter of credit mechanics are emerging.

Show Me the (Manager) Money
Greater attention is being paid to how the management company is financed in the LP diligence process. Lenders likewise are focusing on any vehicle upon which the GP/manager/affiliated investor relies for funding.

(Over) Call Me, Maybe
We break down the numbers on the prevalence of overcall limits in fund documents based on our representations over the past two years.

Please Don't Ignore My (Over)call
An overview of overcall limitations and the implications for facility structure.

The Irish Collective Asset-Management Vehicle
A review of the ICAV, its use in capital call facilities, and dialing in on its application in an umbrella fund structure.

Political Contributions Cease Funding Rights

A look at cease funding rights tied to political contributions negotiated in side letters by state pensions and other municipal investors in the United States.

Navigating Capital Call Facilities

In the standard capital call facility, uncalled commitments are the lender's primary source of repayment. Fund performance and investor behavior, however, can become interrelated. NAV and asset coverage tests are among the contractual protections that can give comfort to lenders.

Problems with 'Promptly'

We highlight the inherent uncertainties of many terms that are frequently used to describe time periods allowed for performance and summarize guiding principles toward accuracy and certainty.

Spotlight on GP-Led Secondary Transactions

GP-led secondary transactions have become a more frequent approach to unlocking liquidity for both GPs and investors. We review the four most popular types of GP-led transactions and related considerations.

ERISA in Fund Finance

A high-level overview of ERISA and its implications in Fund Finance.

Capital Commitments in the Form of Investor Loans in the U.S.

We review enforceability considerations for investor commitments structured as loan commitments rather than as equity capital commitments.

Joint and Several Liability

The intersection of private equity, cannabis and fund financing appears inevitable. Form credit agreements, however, so far have been limited in considering relevant use of proceeds restrictions or restrictions on qualified borrower joinders.

Waiving Goodbye to Sovereign Immunity in the European Market?

Financial institutions operating in the European fund finance market are increasingly having to familiarize themselves with sovereign or state immunity laws and how these laws interact across multiple jurisdictions. Waivers of sovereign immunity, while helpful, are not always perfect.

Divide and Conquer: New Delaware 'Division' Law Creates Potential Issues for Fund Finance Lenders

Delaware legislation permits an existing LLC to divide into two or more separate and distinct LLCs and allocate assets, rights and liabilities among the new entities. We summarize relevant considerations for loan documents.