

CADWALDER

Hurdling Into the Borrowing Base

September 27, 2024



By Clay Talley
Counsel | Fund Finance

As was briefly touched upon in a prior Fund Finance Friday article “[Borrowing Base/Coverage Ratio Approaches in Subscription Finance Facilities](#),” a subscription facility which uses the borrowing base approach looks at each investor’s commitment to fund and the administrative agent and/or lenders deciding the level of credit that will be given to such commitment for those investors (the “[Borrowing Base](#)”). In certain instances there may be investors that are initially excluded from the Borrowing Base (“[Excluded Investors](#)”) due to certain side letter provisions (i.e., cease funding rights or sovereign immunity), lack of creditworthiness or other legal issues, whereby the lender is concerned about including such investor’s capital commitment in the Borrowing Base and its ability to ultimately be able to call capital on such investor.

As the borrowers will want to include as many investors as possible in the Borrowing Base to maximize their borrowing capabilities, one compromise has been to include certain Excluded Investors in the Borrowing Base (the “[Hurdle Investors](#)”) once such investor has funded a certain portion of its commitment (typically in the 40%-50% range) (the “[Hurdle Condition](#)”). In some instances, lenders may also include additional Hurdle Conditions for any Hurdle Investors, such as fund investments maintaining a certain level of percentage of cost to fair market value ratio in order to add additional protections for including these Hurdle Investors in the Borrowing Base.

By allowing an Excluded Investor to be treated as a Hurdle Investor upon satisfying the Hurdle Condition, this allows for a potentially greater Borrowing Base. Upon satisfaction of the Hurdle Condition by the Excluded Investor, such investor is then typically treated as either (i) a designated investor during such time and would typically then be included in the Borrowing Base at such advance rate (typically 65%), or (ii) can be treated separately at its own advance rate. Additionally, the Hurdle Investors may also receive the benefit of a higher concentration limit (i.e., the preset limits of such Hurdle Investors unfunded capital commitments as a percentage of the aggregate investor base unfunded capital commitments included in the Borrower Base) so long as the Hurdle Conditions are satisfied, thereby allowing for a greater amount of such Hurdle Investors unfunded capital commitments to potentially be included in the Borrowing Base.

Lenders become comfortable with such Hurdle Investor concept based upon the fact that once these investors have funded a significant portion of their capital commitments, it is less likely such investors would walk away from funding additional capital commitments due to the punitive nature of a typical limited partnership agreement for a defaulting limited partner (i.e., the investor’s interests could be sold and such investor will no longer be an investor in the fund, the investor could forfeit distributions, etc.) as the investor will have sufficient “skin in the game” and will likely continue funding their capital contributions.

It is important to note that lenders will typically want to make sure that these investors are only Hurdle Investors at such times as the Hurdle Condition is satisfied. What this means is that lenders will want to consider if recallable distributions should be taken into account when determining if the required commitment amounts have been funded in order to satisfy the Hurdle Condition. This is to avoid instances where the investor has initially satisfied the Hurdle Condition but subsequently receives a recallable distribution, which results in the investor’s funded commitments no longer satisfying the Hurdle Condition, and thus could negate the protection of the investor having sufficient “skin in the game” for lender’s to treat such investor as a Hurdle Investor. If recallable distributions are not taken into account, it could be interpreted that such investor will be a Hurdle Investor on an ongoing basis upon the initial satisfaction of Hurdle Condition.

When the facility includes syndicate lenders, such lenders will want to confirm if there are any approval rights to the inclusion of such Hurdle Investors. Certain credit agreements will only require the funding threshold noted above to be met, while others may also require: (i) approval by the administrative agent for Hurdle Investors; (ii) a pre-approved list of investors as negotiated by the administrative agent and the borrowers; or (iii) approval by all lenders or lenders holding a certain pro rata share of the lender commitments (typically approval by lenders holding above 50% of the lender commitments in the aggregate). The syndicate lenders will also want to determine whether the definition for amending either the Hurdle Condition or Hurdle Investor will require approval by: (i) all lenders; (ii) lenders holding a certain percentage of aggregate commitments; or (iii) only the administrative agent. The syndicate lenders will also want to confirm that the credit agreement requires the borrowers to provide compliance certificates confirming whether

such Hurdle Conditions have been satisfied or not, the intervals at which such compliance certificates should be provided, and that any such compliance certificate will require the borrowers to provide their calculations demonstrating satisfaction of such Hurdle Conditions.

This is a very broad overview on the concept on how Hurdle Investors and Hurdle Conditions work in connection with the Borrowing Base. There are numerous variations on the requirements lenders might impose for satisfaction of Hurdle Conditions and the above is not intended to be an exhaustive list. As always, if there are any issues or questions that arise in connection with Hurdle Investors or any other concepts discussed herein, we here at CWT are always happy to assist in providing any such guidance.

Meet Our 2024 Finance Forum Speakers

September 27, 2024



Meet Your Speakers on October 23 | Charlotte, NC

Derek Dillon

Apollo

Brendan Jordan

ATLAS SP Partners

Charles Manna

Bank of America

Aryeh Landsberg

Barclays

Matthew Winkler

Benefit Street Partners

Rahul Nalgirkar

Bank of Montreal

Aman Sareen

Brookfield Asset Management

David Bouton

Citigroup

Matthew Klein

CrossHarbor Capital Partners

Michael Criscito

FTI Consulting

Phillip Titolo

Hunter Point Capital

Joe Geoghan

J.P. Morgan

Rene Theriault

KKR

Darren King

Merchants Capital

Michael Vasseghi

Morgan Stanley

Parker McKee

Société Générale

Adam Behlman

Starwood Mortgage Capital

Timothy Becker

Wells Fargo

Sara McGinty

Ares Credit Group

Noiel Brill

Audax Private Debt

David Sklar

Bank of America

Ginny Chiarello

Barings

Lisa Szpytko

Blackstone

Paul Vanderslice

Bank of Montreal

Joseph Alala

Capitala Group

Thomas Archie

Citizens Bank

Michael Mascia

EverBank

Derek Li

Goldman Sachs

Peter Walgren

Jefferies

Christopher Kosonen

J.P. Morgan

Scott Waynebern

Limekiln Real Estate
Investment Management

David Fanger

Moody's

Scott Bynum

Mudrick Capital Management

Laurie Lawler

Société Générale

Melissa Band

Vårde Partners

Mike Romanzo

Wells Fargo

Stefanos Arethas

ATLAS SP Partners

Leland Bunch

Bank of America

Francisco Covas

Bank Policy Institute

Ted Goldthorpe

BC Partners

Matthew Laurino

Blue Owl Capital

Zachary Cohn

Brookfield Asset Management

Ben Love

Churchill Asset Management

Jason Miller

Citizens Bank

John Sciales

Evercore

Adam Zotkow

Goldman Sachs

Thomas Cassino

J.P. Morgan

Fred Perreten

KBRA

Kelly Rocchio

M&T Bank

Kwasi Benneh

Morgan Stanley

Brian Gilbert

Pinnacle Financial Partners

Vicky Du

Standard Chartered

Kristine Jurczyk

Vista Credit Partners

The countdown to the 2024 Cadwalader Finance Forum has begun!

We are thrilled to once again provide you with direct access to thought leaders and top executives serving as featured faculty for the finance industry's pre-eminent event on Wednesday, October 23 at the JW Marriott in Charlotte.

You will not want to miss this exceptional opportunity to enjoy time with a wide cross-section of representatives from private debt and equity funds, bank and non-bank fund finance lenders, credit risk transfer specialists, restructuring advisors, rating agencies, CRE lenders, CLO managers, B-piece buyers, and an array of bank business lines drawn from a diverse list of institutions.

You can learn more about the event and register [here](#).

Fund Finance at the ABA – Technical Legal Issues

September 27, 2024



By **Leah Edelboim**
Partner | Fund Finance



The American Bar Association Business Law Section hosted its fall meeting in San Diego earlier this month. For those readers not familiar with this event, this is a massive gathering of business law professionals from around the world. It includes more than 50 continuing legal education programs and other discussions and events that involve public officials and business law practitioners with about 4,500 attendees from more than 25 countries and more than 300 speakers leading those sessions or serving as panelists.

The ABA Business Law meetings are a chance for lawyers to convene and discuss the latest business law trends and developments. These events bring together lawyers from firms, in-house counsel, government regulators, judges and other leading business law practitioners. What makes these meetings different than a number of other meetings and conferences that take place in the fund finance and overall lending space is that they are a chance for lawyers to discuss the really substantive and technical legal aspects of our practice.

The Fund Finance Subcommittee of the American Bar Association is chaired by Elizabeth Tabas Carson, who is a partner at Sidley Austin, and Flora Go, who is a partner at Paul, Weiss and head of their Fund Finance Group, serves as the Vice-Chair for the subcommittee. Linda Filardi of Flagstar Bank founded the Fund Finance Subcommittee and now chairs the Asset Based Lending Subcommittee. Liz and Flora orchestrated two fund finance-related presentations at the meeting.

The first fund finance related presentation was at the subcommittee meeting where members of the Fund Finance Subcommittee and Asset Based Lending Subcommittees gathered. Brent Shultz, a fund finance partner at Haynes and Boone, and I presented at that meeting and, along with Liz and Flora, led a discussion that covered important legal issues in fund finance deals, thorny issues for negotiation, and technical legal issues relevant to the latest structures in the space, including items such as priority concerns and creation and perfection of security interests in deals with complex structures. We also had a lively discussion with much engagement from the audience on what the future holds for fund finance and even discussed where we may see AI come into the space. It was really delightful to hear super-seasoned and longstanding legal experts in secured transactions give their take on some of these really pressing issues.

The continuing legal education fund finance presentation was a panel discussion focused on NAV facilities and titled “Asset-Based Financing Solutions in Fund Finance: Structuring, Risk Management and Other Practical Considerations.” The panel of industry experts included Liz and Flora, as well as Matthew Hays, a partner at Latham & Watkins and global vice chair of the firm’s Structured Finance & Securitization Practice; Tess Virmani, Deputy General Counsel, Head of Policy at the LSTA; Genevieve Weiner, a restructuring partner at Sidley Austin; and Richard Wheelahan, Co-Founder of Fund Finance Partners.

In this excellent and very comprehensive presentation, these experts provided an introduction to asset-based finance, a look at the state of the market and how we have seen a rise in the popularity of asset-based finance. This panel took a deep dive into NAV facilities and similar asset-based financing solutions utilized by asset managers and investment

funds. They had a robust and substantive discussion about typical uses of these facilities, business rationale for them, and who is lending and investing in these deals. Their discussion also included a number of case studies which was excellent. The panel also hit on common structures and key structuring considerations, diligence and underwriting, reporting and monitoring, enforcement and restructuring considerations, as well as a look at the investor landscape and other real world considerations.

It was particularly interesting to hear a really well-rounded discussion that included perspectives from fund finance lawyers as well as a bankruptcy expert, a securitization expert, and a structuring expert. What made this presentation particularly valuable was the very technical legal considerations that the panel addressed and the thoughtful discussion of legal risks that certain structures may pose and the way that various legal protections can be used to mitigate that risk. Kudos to these experts for such an excellent panel discussion.

What We're Reading

September 27, 2024

NAV Financing: The Champion of the Fund Finance Market?

Michael Peterson and Shiraz Allidina, Managing Directors of Citco Capital Solutions, discuss the rise of NAV financing, the ins and outs of its recent scrutiny, and what the future has in store in a recent article in Preqin. Read it [here](#).

DFF Event Recap

September 27, 2024



This week the FFA's Diversity in Fund Finance ("DFF") group participated in its annual event partnering with Baruch College's Financial Leadership Program. For the last seven years, DFF has brought together a community of fund finance bankers and lawyers to present the ABC's of Fund Finance, providing an introduction to the fund finance industry and various career paths.

The students are part of Baruch's Financial Leadership Program, led by Marietta Bottero. This phenomenal program is dedicated to the professional development and advancement of high-potential juniors and sophomores interested in careers in finance. The program's mission is to increase recruiting for Baruch's diverse and talented students into top financial analyst programs across industries. The event was well received by both the professionals and students, providing a great opportunity for learning and networking. The students were particularly engaged and asked a lot of questions that showed their knowledge and preparation, both about the fund finance industry and about market events and banking and finance in general.

If your organization is interested in supporting this program or recruitment, or if you are interested in joining DFF please reach out to Natasha Puri.

FFA U 2.0 Coming Soon

September 27, 2024



Join the Fund Finance Association for an intensive full-day training session in-person in New York on October 17, 2024. Cadwalader's **Wesley Misson** and **Brian Foster** will be presenting at the FFA University 2.0, along with other industry leaders.

FFA U 2.0 is designed for mid-level bankers and lawyers transacting under U.S. law and will cover advanced issues in subscription facilities, NAV loan structures and issues, Collateralized Fund Obligations and the PE business model.

A complimentary networking reception sponsored by Cadwalader, Wickersham, & Taft LLP and KBRA will follow.

Event Details:

Location: Manhattan - Whitman Ballroom, 28 Liberty Street, New York, NY 10005

Date: Thursday, October 17, 2024

Time: 9:00 AM - 5:00 PM EST

Networking Reception Details:

Location: Cadwalader, Wickersham, & Taft LLP Office, 200 Liberty St, New York, NY 10281

Date: Thursday, October 17, 2024

Time: 5:30 PM - 7:00 PM EST

Register [here](#) and see the Agenda [here](#).

Last Chance to Register for WFF EMEA Annual Networking Drinks Reception

September 27, 2024



WFF EMEA is thrilled to announce that Cadwalader, Wickersham & Taft LLP will join Goldman Sachs and Simmons & Simmons as an event sponsor for the upcoming EMEA Annual Networking Drinks Reception!

A big thank you to the event sponsors, WFF EMEA Committee Members and WFF members' immense supports for making this event possible! The registration page will close at the end of the week.

Women in Fund Finance EMEA looks forward to hosting an evening of networking over drinks and canapés, at Frameless, immersing ourselves in multi-sensory art experience.

They are excited to gather and celebrate the successes and collaboration amongst the Women in Fund Finance community before the year-end sprint! This event is open to both men and women.

Event Details

Date: Wednesday, October 23rd, 2024

Time: 6:00 PM - 10:30 PM

Location: Frameless | 6 Marble Arch, London W1H 7AP

Drinks and canapés will be provided.

Please note, registration is open on a first-come, first-served basis. If this event becomes oversubscribed, Women in Fund Finance reserves the right to limit each firm's number of attendees, in order to allow for participation from all of our sponsor firms.

FFA Event Reminder: The Power of Wishing Out Loud

September 27, 2024



We are thrilled to invite you to an exciting workshop with Lisa M. Ong, PCC, CPA, a renowned executive coach and consultant specializing in inclusion, diversity, equity, accessibility, and belonging. Lisa, an award-winning speaker, will guide us through essential strategies for navigating career paths, enhancing visibility and influence, networking effectively, and overcoming workplace challenges.

This workshop is designed to provide you with valuable insights and practical tools for building resilient professional relationships and thriving in today's dynamic work environment.

Event Details:

Date: Wednesday, October 9th, 2024

Time: 5:30 PM - 8:30 PM EST

Location: Crédit Agricole Offices – 1301 Avenue of the Americas, New York, NY

Event Description:

This is a workshop for those who struggle with self-promotion and standing out. Join Lisa as she guides individuals on a journey toward unlocking the secrets to professional advancement. Whether aiming for a managerial role, seeking higher responsibilities, or striving for recognition, this session will provide essential insights and practical strategies for climbing the career ladder. Don't miss this opportunity to learn from one of the leading experts in the field and elevate your career.

We are excited to announce that we are doing a raffle. Please bring your business cards to be entered into a raffle to win a one on one workshop session with Lisa!

Please note that registration is open on a first-come, first-served basis. If this event becomes oversubscribed, Diversity in Fund Finance reserves the right to limit each firm's number of attendees to allow participation from all of our member firms.

Register [here](#).

WFF Americas: 3rd Annual Charlotte Panel and Networking Event

September 27, 2024



Women in Fund Finance is thrilled to invite you to the 3rd Annual Charlotte Panel and Networking Event. Join us as we celebrate the successes and collaboration within the Women in Fund Finance community.

The evening will feature an insightful panel discussion moderated by Lindsay Trapp from Dechert LLP, followed by a networking opportunity within the fund and subscription finance community over drinks and hors d'oeuvre!

Date: Tuesday, October 22nd, 2024

Time: 5:30pm - 8:00pm ET

Location: Barings | 300 S Tryon St Ste 2500, Charlotte, NC 28202

For more information about this program or Women in Fund Finance, please contact info@womeninfundfinance.com or visit Women in Fund Finance.

Please note, registration is open on a first-come, first-served basis. If this event becomes oversubscribed, Women in Fund Finance reserves the right to limit each firm's number of attendees, in order to allow for participation from all of our sponsor firms.

Fund Finance Hiring

September 27, 2024

Fund Finance Hiring

Here is who's hiring in Fund Finance:

Coller Capital is seeking a Senior Associate, Investments, in New York. The key purpose of this role would be to participate in and contribute to all aspects of the deal process with responsibility for all primary quantitative and qualitative analysis of portfolio companies and funds. Learn more and apply [here](#).

L Catterton is seeking a Treasury Associate in Greenwich CT. The individual in this role would be the primary oversight for all fund and SPV level financing arrangements for all L Catterton Funds and more. Learn more details [here](#).

Bridge Bank is seeking a Portfolio Manager, AVP, in Boston, MA or San Jose, CA. This role would be responsible for an assigned portfolio of loan and/or deposit relationships. Learn more and apply [here](#).

Wells Fargo & Company is seeking a Fund Finance Analyst in London who will collaborate within integrated deal teams to drive the origination, structuring, and execution of fund finance transactions for top-tier financial sponsors and asset managers worldwide. If interested, you can apply [here](#).

Société Générale is seeking an Analyst who will be for supporting the origination and execution of Capital Call Financings and work with the portfolio manager to ensure efficient and timely management of annual credit reviews, monitoring of credit performance and industry trends. If interested, you can apply [here](#) or reach out to Laurie Lawler at Laurie.Lawler@sgcib.com.

M&T Bank is seeking a Commercial Relationship Manager in Boston, MA. This role would be responsible for an assigned portfolio of loan and/or deposit relationships with major businesses in the community. Learn more and apply [here](#).