

Fund Domicile Selection: Tradition, Evolution and Market Forces

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Elon Musk made headlines earlier this year when he shifted Tesla's incorporation from Delaware to Texas. This was in reaction to a Delaware court's striking down his pay package—a high-stakes case of taking your ball and playing elsewhere. Some commentators expressed surprise at the Delaware ruling since Delaware courts have typically deferred to the decisions of management and shareholders, especially when they are in agreement (the shareholders approved the pay package). This got me thinking about a key foundation in fund finance that we rely on every day but often take for granted: domicile selection for funds.

The conversation around fund domicile selection has grown more nuanced in recent years, though the fundamental calculus remains largely unchanged. While emerging jurisdictions periodically attempt to position themselves as alternatives, the gravitational pull of traditional fund domiciles remains powerful, driven by factors that newer entrants struggle to replicate.

Delaware: The Power of Network Effects

Delaware's continued dominance in U.S. fund structuring tells us much about how the fund formation market values certainty and efficiency over marginal innovations in other jurisdictions. The sophisticated Chancery Court system, combined with an extensive body of partnership and limited liability company law precedent, creates a legal infrastructure that other U.S. states have found nearly impossible to replicate. This advantage compounds as each new decision further deepens the precedential framework that funds and their counsel rely upon. The market's familiarity with Delaware structures creates powerful efficiencies in fund formation and finance.

When a credit facility references Delaware partnership law concepts, even newer concepts such as a Delaware partnership series, lenders and their counsel can rapidly assess the implications without the friction that novel jurisdictional questions introduce. This efficiency translates directly into cost savings and execution speed—advantages that become more pronounced as transaction complexity increases. In addition, fund counsel are accustomed to giving Delaware legal opinions covering key issues in the transaction, such as due formation and capacity to enter into the loan documents. Perhaps less obvious, the comfort and ability of borrowers to deliver a variety of representations in loan documents rests upon legal predicates ultimately derived from foundational Delaware statutes and case law. On the lender side, the due diligence of collateral is done in the shadow of Delaware law, where the courts will enforce bargains struck between investors and funds in the limited partnership agreement in a way that even third parties can predict with great accuracy.

Texas and Florida: Challengers with Challenges

Recent years have seen other states attempt to compete for fund business. Texas and Florida, in particular, have made noteworthy efforts through targeted legislative reforms and tax policies. However, these initiatives highlight why displacing Delaware remains challenging. While a favorable tax environment or modernized digital asset provisions might appeal in isolation, fund sponsors consistently prioritize the comprehensive certainty that Delaware's legal system provides. It's possible, however, that future innovation, such as tokenization of fund interests, may provide an opening for challenger jurisdictions.

Cayman Islands: Adaptive Resilience

The Cayman Islands' evolution as a fund jurisdiction presents a masterclass in adaptive regulation. Initially chosen for its tax neutrality and regulatory flexibility, Cayman has maintained its position by consistently modernizing its legal framework while preserving the core advantages that attracted funds in the first place. Recent regulatory pressures, particularly around transparency and economic substance, have tested this adaptive capacity. Cayman's response has been sophisticated—implementing necessary compliance frameworks while minimizing operational friction for funds. The introduction of enhanced AML requirements and beneficial ownership reporting could have threatened Cayman's efficiency. Instead, the jurisdiction has turned regulatory compliance into a strength, with a deep reserve of service providers efficiently managing these requirements. Emerging competitors, particularly Singapore with its Variable Capital Company structure, have attempted to challenge Cayman's offshore prominence. However, these efforts underscore how much of Cayman's advantage lies in its accumulated market experience. Fund finance lenders have decades of experience with Cayman vehicles, resulting in standardized approaches to everything from security interest perfection to regulatory compliance representations and covenants.

Luxembourg: The European Sophisticate

Luxembourg's position in the fund landscape illuminates how regulatory access can trump traditional efficiency considerations. The jurisdiction's role as a gateway to European markets has only grown in importance post-Brexit, with the EU marketing passport becoming even more valuable for global managers. The sophistication of Luxembourg's fund regime reflects a deliberate strategy of regulatory innovation within established parameters. The Reserved Alternative Investment Fund ("RAIF") structure exemplifies this approach—offering efficiency while maintaining regulatory credibility. This balance has proven particularly attractive to institutional managers who value both speed-to-market and regulatory robustness. The very popular SCSp retains its position as the jewel in the crown in the Luxembourg fund product stable, owing to its familiarity to sponsors, tax-transparency and ability to access the AIFMD marketing passport by appointing an authorised AIFM. Recent developments in Luxembourg have focused on enhancing its position in growth areas like sustainable finance and digital assets. These initiatives demonstrate Luxembourg's understanding that maintaining its position requires constant evolution. However, the jurisdiction has managed this innovation while preserving the stability that institutional investors and lenders value.

Practical Implications for Fund Finance

For fund finance professionals, these jurisdictional dynamics have significant practical implications. Documentation for Delaware vehicles benefits from decades of market standardization, allowing rapid execution of even complex financing structures. It's a luxury we take for granted every day that we document complex and nuanced facilities without the governing law of the fund (Delaware) ever being a question for significant risk analysis. Let's hope it stays that way. Cayman vehicles require additional regulatory compliance provisions, but these have become well understood and efficiently managed. (We all remember closing deals in our pajamas during the pandemic where the final point was the compliance covenant with the Cayman Private Funds Act—which these days are happily in the rearview mirror). Luxembourg structures demand greater attention to regulatory overlay, particularly around AIFMD compliance but, again, the market has developed standard approaches to these requirements. Credit analysis across these jurisdictions increasingly focuses on substance and compliance capabilities rather than pure structural considerations. This shift reflects both regulatory evolution and market maturity. Lenders now regularly evaluate factors such as economic substance compliance and regulatory reporting capabilities alongside traditional credit metrics. There are other jurisdictions worthy of discussion—Ireland, for example—but this article has focused on the three most popular options for fund formation.

Looking Forward

The Cadwalader partners will see you in Miami in February, where we will have comprehensive data on fund domicile selection in 2024's year in review. The future of fund domicile selection likely involves evolution within established jurisdictions rather than dramatic shifts to new locations. The network effects that reinforce the position of traditional fund domiciles are, if anything, growing stronger as regulatory complexity increases. Emerging jurisdictions may find niches in specific market segments, but wholesale shifts seem unlikely. For fund finance practitioners, this suggests a future of incremental adaptation rather than fundamental change. Documentation and credit analysis will continue to evolve, particularly around regulatory compliance and sustainability considerations. However, the fundamental frameworks that have developed around Delaware, Cayman and Luxembourg vehicles will likely remain the market standard. The real innovation in fund domiciles may come not from new jurisdictions but from how traditional jurisdictions adapt to emerging market demands. Whether addressing digital asset custody, sustainability requirements or new forms of fund democratization, the established jurisdictions' ability to evolve while maintaining stability will likely determine their continued dominance.

Questions and Answers on Capital Call Securitization – An Idea Whose Time Is Now

December 13, 2024



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Securitization of sublines continues to be the hottest of hot topics in fund finance. Whether it could be done, how to do it, and how to overcome certain real and perceived challenges were topics of countless articles and conversations among practitioners and their clients for quite some time, but that all changed in 2024 when we truly saw the dawn of the securitization era for fund finance. We at Cadwalader have been working on a number of transactions that sit at this intersection of securitization and fund finance this year. Earlier this quarter, the market sat up and took notice when the first broadly syndicated, publicly rated securitization of sublines hit the market with the Capital Street Master Trust Series 2024-1 transaction.

An important topic of conversation with our clients has been how structured products play into the capital call market and how to best structure these bespoke solutions to meet the needs and business prerogatives of each client. As we usher in the era of securitizing sublines, new ideas and possibilities abound.

In this week's *Fund Finance Friday*, we follow up our [primer on capital call securitization](#) piece with an overview of some of the different approaches that can come into play in a securitization of subscription facilities.

The key here is that structured products have a number of different, *ahem*, structures that can be utilized and each one has its own particular advantages and can meet different needs. To that end, we believe it is time to start the discussion on the shape of things to come, and by shape we mean the variety of different structures that parties can use in their securitization deals.

Q: What type of structure did the Capital Street deal use?

A: The first broadly syndicated, publicly rated securitization of sublines was a first-of-its-kind deal but the securitization technology was not novel. The deal utilized a securitization structure that is a methodology that is typically followed in credit card receivables securitizations. Those deals pool the assets and look at the relevant assets solely as a pool and not at all on an individual basis.

Q: Are there any drawbacks to this structure?

A: While it is a structure the market knows well, it begs the question as to whether it is the best structure for a subline securitization, which is essentially a pool of loans. Some market participants may be better off considering a structure that relies on CLO methodology, which, rather than treating this pool of loans as a collective pool, would instead allow for a more bespoke and individual loan evaluation in assembling the structure. The ratings approach for this structure

would likely follow a CLO methodology as there is no separate “non-CLO” ratings methodology. We do note that a CLO would require an additional layer of structure to address revolving loan mechanics, which we discuss below.

Q: What type of structure should a lender put in place if it is trying to manage its balance sheet?

A: There are several different types of securitization structures, which can be deployed based on the needs of the applicable parties. Key to these transactions is understanding the needs and motivations of the parties to a securitization so that the structure can adequately address them. We start here with a structure that is intended to help a bank manage its balance sheet in structuring the deal. One type of structure that does that is with respect to a specific loan being originated (*i.e.*, making that loan itself qualify for securitization capital treatment). To put this structure in place requires a bankruptcy remote, special purpose borrower that was formed solely for the purpose of acquiring capital call rights and incurring indebtedness secured by them.

Q: Are there any drawbacks to this structure?

A: This structure works well if you are starting from scratch. However, if a bank has an existing pool of capital call loans that have been structured as recourse debt of the fund, this structure may not work because it would require amending and updating to a securitization structure that could be cost and/or credit prohibitive.

Q: How do you solve for this?

A: If that is the case, a better approach would be to take this pool of loans and sell them into a bankruptcy remote, special purpose borrower (equitized by a third party) that finances the capital call loans as a pool (which financing could be in the form of a bank warehouse product or a capital markets securitization). In both cases any involved financing bank could then qualify for securitization capital treatment, which decreases capital hold requirements and might allow for additional pricing flexibility.

Q: What about a CLO structure?

A: CLOs have a few attractive advantages to consider. First, the reinvestment period provides the issuer significant time to benefit from the financing structure. In addition, the CLO market is now well conditioned to reprice liabilities, so the cost of funds can be reduced opportunistically. This is different from the master trust and it is an advantage in an emerging asset class because pricing could improve over time at lower attachment points.

Q: What are the potential drawbacks or concerns regarding a CLO structure?

A: One feature that differentiates subscription facilities from the collateral normally found in CLOs is that sublines are usually 100% revolving loan facilities. Unless a subline is structured to include sizable term tranches, Capital Call CLOs will need to manage significant daily funding activity within their portfolio. That means access to liquidity will be paramount to maintaining their rating. Over the years, CLOs have solved this issue with various mechanics including cash collateralization of unfunded amounts, bank-provided swingline loans and even revolving notes issued to entities with high short-term ratings. All of these approaches have their advantages and work in certain circumstances but one of their drawbacks is that they make the transaction more expensive. The most efficient long-term approach could ultimately mirror the syndicated lending market where revolving and term exposures are split into tranches and sold separately.

Q: Is there anything else that readers should keep in mind as it relates to these different structures and approaches?

A: One additional note about nomenclature for these types of facilities: when we talk about a “securitization,” it is the issuance of tranchised indebtedness backed by a pool of receivables. It does not require the issuance of ABS securities (which is beneficial for U.S. risk retention; unfortunately EU/UK risk retention is another story for a future article), and the indebtedness can (and often is) evidenced by loans or repurchase agreements. These loans can serve as warehouses for future securities issuances but often do not and exist as stand-alone financings.

Looking Forward

Whatever structure the market selects, there are a number of issues that will need to be addressed in order to transform the product from a novelty to a flow product that can be scaled. The challenges to securitizing sublines have not gone away; rather, the market has shown that they can be overcome and deals can be done. These factors include duration, velocity of capital calls, replenishment and reinvestment, and ratings criteria. Each deal will have to consider these factors (and others!) in determining the right structure for that particular transaction.

As we move into this era of securitization of sublines, solutions in the form of structured products abound. The key to the success of any deal is balancing the business and other objectives of the parties against the reality of the relevant underlying capital call loans and other considerations that will vary deal to deal. The good news here is that the options are plentiful and many bespoke solutions exist. We are excited to brainstorm with our clients and provide solutions as they navigate this intersection of securitization and fund finance.

Almost There: Fundraising Nears the 2024 Finish Line

December 13, 2024



By **Chris van Heerden**
Director | Fund Finance

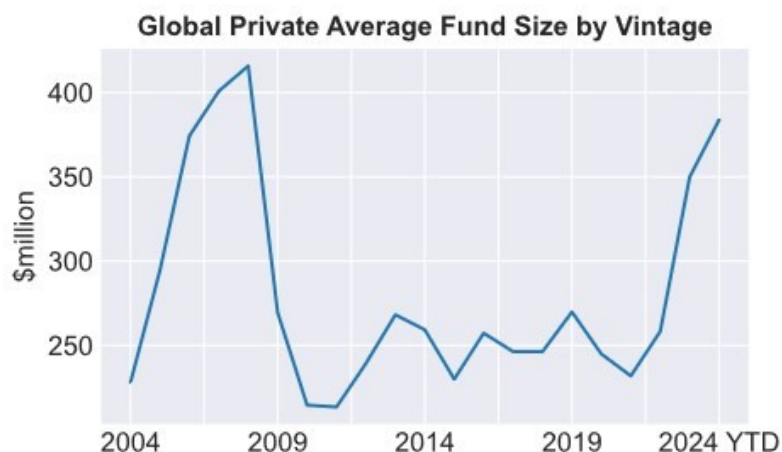
Fundraising across private funds will close lower in 2024 but the year-to-date total now exceeds \$1.0 trillion, according to the latest data from Preqin. Closing the year above a trillion dollars in new commitments confirms the durable role of private fund allocations in institutional investment portfolios amid a challenging environment.

Coming into 2024, higher interest rates, uncertainty around valuations, and a constricted exit environment meant distributions would remain under pressure. Despite these limitations, LPs continued to allocate incremental new capital to private market strategies.



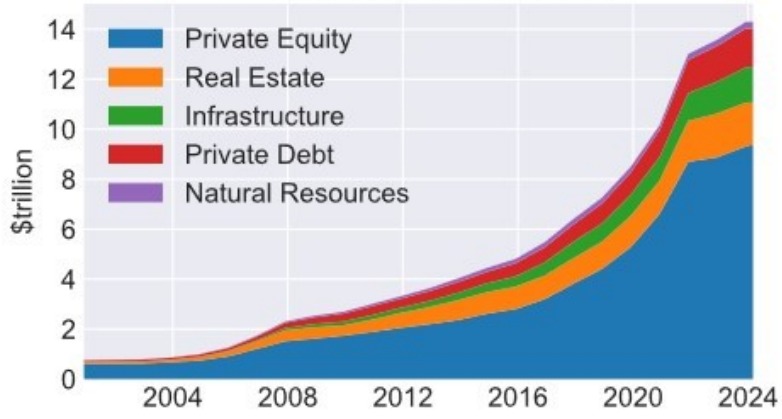
Source: Preqin.

Resilient fundraising benefited a limited number of sponsors. Average fund size returned to pre-GFC highs. The YTD average fund size of \$384 million illustrated the challenge for first-time sponsors or strategy specialists to get a fund off the ground.



As the fund finance market matures, we see the AUM chart rising in significance compared to fundraising. The addressable NAV market now surpasses \$14.3 trillion and continues to grow steadily. Lenders that can attach at both the capital commitment and the asset level are best positioned to follow the direction of travel. Fundraising numbers are continually revised as new fund closings come to light, which means full-year totals will end higher than the YTD annualized numbers currently suggest.

Global Private Aggregate AUM



Congratulations to Our New Partners, Special Counsel and Counsel!

December 13, 2024

CADWALADER

Congratulations to Our New
Partners, Special Counsel and Counsel!

Cadwalader announced its lawyers who have been elevated to partner, special counsel and counsel, effective January 1, 2025.

"We're delighted to announce our new partners, special counsel and counsel," said Pat Quinn, Cadwalader's Managing Partner. "This is an extraordinary group of lawyers who have consistently demonstrated the highest standards of legal excellence, client service and commitment to our firm's values and culture. We congratulate each of them and look forward to their continued success at Cadwalader."

New partners include:

Kate Foreman, Capital Markets (New York) – Kate focuses on commercial mortgage-backed securities (CMBS) transactions. She represents issuers, underwriters and loan sellers in a variety of public and private CMBS transactions and has represented placement agents in connection with re-securitization transactions. Her regulatory experience includes preparing registration statements for new and repeat public issuers, preparing public transaction periodic reporting filings and engaging in extensive discussions with the SEC on related issues. Kate earned her B.A. from Northwestern University and her J.D. from the University of Chicago Law School.

Andrea Nixon, Capital Markets (New York) – Andrea represents financial institutions and other capital market participants in repurchase, warehousing, financing and other secured lending facilities backed by residential, commercial and multifamily mortgage loans, single-family rental properties, mortgage servicing rights, servicing advance receivables, excess servicing spread, student loans and other esoteric asset classes. She has also represented investment banks, financial institutions and other market participants in their roles as underwriters and purchasers in connection with the private offering of mortgage-backed securities and other esoteric assets. Andrea earned her B.S. from Cornell University and her J.D. from William & Mary Law School.

New special counsel and counsel include:

Sulie Arias, Special Counsel, Real Estate (New York) – Sulie advises financial institutions on a broad range of real estate finance matters, including the acquisition, financing, refinancing, development and disposition of commercial properties, including office, retail, industrial, multifamily and mixed-use properties, as well as undeveloped land on a local and national basis, and spanning all segments of the marketplace. Her practice includes single-lender and agented, multi-lender construction and permanent loans, bridge loans, mezzanine loans, as well as leverage financing. Sulie earned her B.B.A., *cum laude*, from Bernard M. Baruch College, and her J.D. from St. John's University School of Law.

Irina Gonikberg Dolinskiy, Counsel, Corporate (New York) – Irina's practice is concentrated in the area of corporate law, with an emphasis on mergers and acquisitions, corporate finance and corporate governance. Irina represents clients in variety of transactional matters, including public and private mergers, acquisitions, divestitures, restructurings, joint ventures, and other M&A transactions. Prior to joining Cadwalader, Irina was an associate at Weil, Gotshal & Manges in New York City and has also practiced at several Florida firms. Irina earned her B.A., *magna cum laude*, from University of Central Florida, and her J.D., *magna cum laude*, from New York Law School.

Stephanie Katz, Counsel, Capital Markets (New York) – Stephanie's practice is primarily in real estate securities, focused on representing investment banks and financial institutions in commercial mortgage-backed and CLO securitization transactions. She also has experience representing purchasers and sellers in the acquisition and disposition of commercial real property and representing landlords and tenants in the negotiation of office and retail leases. Stephanie earned her B.A. from Barnard College and her J.D. from the University of San Francisco School of Law.

Ryan Leverone, Special Counsel, Corporate and Commercial Finance (New York) – Ryan represents lenders and borrowers in a wide variety of domestic and cross-border financing transactions, including working capital financings for operating companies, NAV facilities, asset-based loans, acquisition financings, management fee facilities, note purchases, loan workouts, repurchase financings, bankruptcy exit financings and other complex transactions. Ryan also represents financial institutions in the purchase and sale of debt on the secondary loan trading markets, including bespoke participation arrangements. Ryan also focuses on emerging technologies impacting financing transactions and law practice. Ryan earned his B.S. degrees from Florida State University and his J.D. from the University of Virginia School of Law.

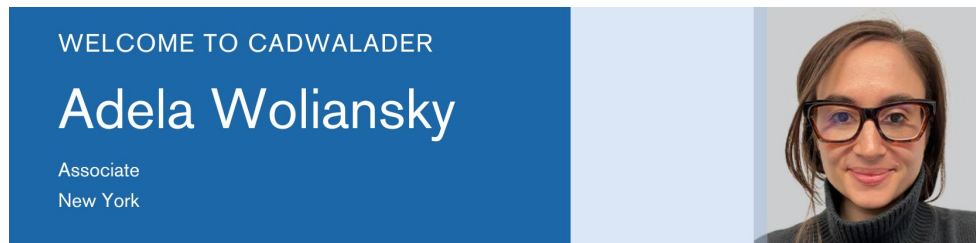
Samuel Mann, Special Counsel, Global Litigation (Charlotte) – Sam represents financial institutions, *Fortune* 500 corporations and other companies in a range of federal and state litigation, arbitrations, enforcement actions and regulatory inquiries. His diverse experience includes securities, M&A, antitrust, commercial, insurance and bankruptcy litigation, as well as internal investigations and pre- and post-transaction anti-corruption due diligence. Sam also represents clients in connection with government inquiries, including on matters before the Securities Exchange Commission, Commodity Futures Trading Commission and European Securities and Markets Authority. Sam earned his B.A., *summa cum laude*, from Washington & Jefferson College, and his J.D., *magna cum laude*, from William & Mary Law School.

Clay Talley, Counsel, Fund Finance (Charlotte) – Clay represents administrative agents, lead arrangers and lenders across subscription-based lending finance transactions, including NAV-based facilities, hybrid facilities, umbrella facilities and various other types of fund financing facilities. He assists in negotiating complex agreements, reviewing diligence documentation and various other items from the beginning life of the facility to termination. Many of these transactions include foreign jurisdictions and are multi-currency facilities. Clay earned his B.S. from Lehigh University and his J.D., *cum laude*, from University of Louisville Brandeis School of Law.

Evan Weller, Special Counsel, Capital Markets (Charlotte) – Evan focuses on commercial mortgage-backed securities. He represents investment banks and financial institutions in their roles as issuers, underwriters, placement agents and loan sellers in both public and private offerings of mortgage-backed securities. Evan earned his B.S. from the University of Wisconsin-Madison, his M.B.A. from Olin Business School and his J.D. from Washington University School of Law.

Welcome Adela Woliansky to Cadwalader

December 13, 2024



Please join us in welcoming Adela Woliansky to Cadwalader.

Adela Woliansky joins the Fund Finance team as an associate in New York. Adela comes to Cadwalader from Goldman Sachs where she worked as in-house counsel to their investment banking division supporting leveraged finance and equity capital markets. Previously she worked at a global law firm as a Banking and Finance associate. Adela received her LL.M. from New York University and her LL.B. from the University of Melbourne.

Learn more about her [here](#).

Fund Finance Hiring

December 13, 2024

Fund Finance Hiring

Here is who's hiring in Fund Finance:

Goldman Sachs is seeking a Vice President for an origination role. This individual will play a key role in sourcing and managing new business opportunities, fostering client relationships, and driving strategic initiatives within the team. Learn more [here](#).

Goldman Sachs is hiring Analysts and Associates for underwriting roles. These individuals will focus on evaluating, structuring, and managing credit transactions, collaborating with cross-functional teams to deliver tailored financing solutions. Learn more [here](#).

East West Bank is currently seeking a SVP - Relationship Manager for our Private Equity business in the Eastern U.S. This individual will work with the Managing Director and other relationship team members in sourcing new business, structuring and underwriting loans, and managing relationships with a variety of private capital firms. Learn more [here](#).

Cadwalader, Wickersham & Taft LLP is seeking a Private Fund/Debt Financing Associate Attorney with at least three years of experience working on transactions that provide debt financing solutions for fund sponsors and fund investors, including collateralized fund obligations, rated note feeders and NAV facilities. This position will work across all three of Cadwalader's US offices, and candidates can sit in Charlotte, NC, New York, NY, or Washington, DC. Learn more [here](#).

Cadwalader, Wickersham & Taft LLP is seeking a Securitization/Structured Finance Associate with a minimum of three years of substantial experience in securitization, structured finance, structured products, corporate and/or real estate. CLO, CMBS, Repo and other ABL finance experience is also a plus, but not required. Candidates must have excellent academic credentials and solid law firm work experience. Learn more [here](#).

MUFG Bank is seeking an Vice President to join its EMEA Fund Financing Credit team in London, United Kingdom. The VP will play a crucial role in managing credit risk across a diverse portfolio of fund finance transactions, including Subscription Finance, NAV Finance, Hybrid facilities, and Fund FX. Learn more [here](#).

East West Bank is seeking an SVP - Relationship Manager. This individual will work with the Managing Director and other relationship team members in sourcing new business, structuring and underwriting loans, and managing relationships with a variety of private capital firms. Learn more and apply [here](#).