

CADWALDER

# Getting the Balance Right – Lender Controls Over Eligible Investments in NAV Facilities

January 24, 2025



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## Introduction

NAV facilities operate by taking a portfolio of assets owned by a borrower and selecting which assets within that portfolio a lender is willing to lend against. This pool of approved assets becomes the “Eligible Pool” of assets, against which the financial covenants can be set. The lenders will likely undertake an extensive due diligence on such “day one” eligible assets and most facilities will have an ability to add further eligible assets during the term of the facility (provided they meet the relevant criteria and the lenders are happy with the relevant diligence). This structure regulates how eligible assets can be added to the pool of assets for which the lenders are happy they can rely on for credit support.

Once that Eligible Pool is created, it needs to evolve throughout the term of the facility. One of the points on this Eligible Pool that will be the most heavily negotiated is how eligible assets can be removed from the pool (so their value is no longer given credit for financial covenant purposes). Most NAV facilities will have a concept of an “Investment Event” (or similar) which will specify certain events which would cause an eligible investment to be removed from the Eligible Pool and then the financial covenants to be automatically re-tested when that asset is removed. If such tests are failed, then there will likely be a mandatory prepayment triggered to bring the facility back into covenant compliance.

## Events which trigger a removal

A number of the limbs of such an Investment Event are fairly settled and are not heavily negotiated (beyond agreeing a de-minimis level, where relevant). Clearly, these will depend on the class of underlying assets (the events which are relevant for a secondaries fund will be different to a PE buyout fund or a venture capital fund). These typically include: (i) a fall in investment value below an agreed threshold; (ii) an insolvency event at an asset level; (iii) a default of financial indebtedness owed at asset level; (iv) illegality/unlawfulness/reduplication (etc.) of the relevant investment documents; and (v) any material litigation at asset level. These are generally accepted items that go to the value of the underlying asset. Typically on the occurrence of one of these events, lenders would want to test the strength of the remaining pool of assets, to ensure they are suitably covered.

## Amendments to investment documents

Where the drafting often becomes more heavily negotiated is around amendments to the relevant investment documents that would (if not approved by the lender) cause an investment to be removed from the Eligible Pool. Lenders will (logically) argue that they have gone through an extensive diligence process on the relevant investment documents detailing exactly how the borrower holds that asset and exactly how returns should be realised from that asset. Once they are comfortable with this on day 1, borrowers cannot simply go out on day 2 and amend the investment documents.

## Flexibility required to manage a fund

This creates an inherent tension in the document. Borrowers will argue that they must be allowed the flexibility to operate their portfolio. In a large portfolio of assets, amendments to the relevant investment documents will likely be needed during the term of the facility. These may need to be done on tight time scales and, practically, deal teams may not be likely to remember the parameters on their amendment powers that a lender has put on them.

From a borrower perspective, the point is often raised that lenders have done diligence on the track record of the borrower to manage a portfolio and therefore the lenders should be willing to allow that fund to operate as it should (NAV lenders often receive some information on the investors in the fund, to investigate which investors have confidence in them and some NAV deals do still include a separate undrawn commitment ratio or liquidity covenant). NAV facilities will often include “Key Man” and similar provisions ensuring that the correct people remain in charge of the fund. For these reasons borrowers will negotiate to limit the scope of the amendments for which they will have to seek lender approval. Fears of hair triggers and constant requirements for lender consents hampering the operation of the fund, are legitimate points for a borrower to raise.

That said, for the reasons outlined above, lenders will insist on having some control over amendments to the investment documents relating to the assets that they have reviewed and are willing to give credit against. Term sheets will often include a reference to an Investment Event occurring “if amendments are made to investment documents out with agreed parameters” and the drafting is left for the long form documents stage.

### **Long form drafting**

Long form documents usually deal with this in two ways. Firstly, some documents try to include all of the relevant line items that require lender consent. This provides clarity, but inevitably means agreeing a long laundry list of items (each of which is kept open ended). There is often a time and cost implications to this. The other way is to start the list with a generic reference to an event that could impact the investment documents in an adverse way for the lenders and then to agree a shorter (but not conclusive) list of items that would constitute such an event. This allows for a shorter list without the lenders needing to explicitly cover all bases.

### **Who makes the determination**

It will often be a negotiated point as to who makes such a determination that there is an adverse impact on the lenders. Lenders will ask for this to be in their discretion (often “acting reasonably”); however, the practical implication of this is that all such documents would need to be sent to them for pre-approval, to make that determination. In order to give borrowers certain discretion over this, and to avoid unnecessary lender request, the discretion can sometimes be left subjective in the facility (rather than being solely in the discretion of the lender).

### **Amendments that are typically caught**

In terms of the actual amendments that would require lender approval, in general terms these are amendments which go to the: (i) pricing; (ii) order of payment; (iii) the process for receiving distributions from that investment; and (iv) anything that would impact the way in which the lenders would seek recovery under their anticipated enforcement strategy (that should line up directly with the diligence they have done prior to entering into that facility). As a general rule, it could be said that these should mirror the events that would require a borrower to go to its own investment committee to approve an amendment (though clearly this would not cover point (iv) above). Negotiations on this often need to go into detail about exactly what the requirements on the borrower will be going forward and lenders need to be willing to understand exactly what situations the borrowers may face when managing that portfolio.

### **Requirements on lenders**

Finally, where lenders have successfully argued that their sign-off is required on an amendment, they will also need to agree that they will approve those amendments (or not) within a reasonable time period after receiving sufficient information on that amendment. Borrowers could be frustrated if lenders hinder their ability to operate their existing pool of assets due to delays in this process.

## Wes Misson Chats to James Strobe About the Latest Global Legal Insights – Fund Finance

January 24, 2025



Ahead of the 2025 edition of the Global Legal Group Fund Finance 'Pink Book', Cadwalader's **Wes Misson** sits down with James Strobe to offer a preview of the highly anticipated ninth edition.

Watch the sneak peek of their conversation [here](#), and stay tuned for the full release next week!

# Make Your Voice Heard: LMA Fund Finance Intelligence Survey

January 24, 2025



Loan Market Association is excited to announce the launch of the LMA Fund Finance Intelligence Survey in collaboration with the Drawdown.

The fund finance market is rapidly gaining attention as its significance grows across the financial landscape. However, despite its increasing prominence, it remains a private and often misunderstood segment of the market. It is often described as a trillion dollar market, but the actual size of the market and its subsets is not clearly known – this perpetuates misconceptions around the market.

At the Loan Market Association, we are committed to **enhancing efficiency, liquidity, transparency and sustainability** in the market. We stated previously that we would work with our members to shine a light on the size, subsets and stakeholders in this market and that is what we are doing. **As the authoritative and independent voice of the EMEA loan markets**, we are launching the **LMA Fund Finance Intelligence Survey** – this is a key initiative designed, with the support of our members, to gather critical insights to drive a deeper understanding of the fund finance market. By engaging with private equity professionals, lenders, and advisers anonymously, we aim to uncover trends, challenges, and opportunities shaping this evolving sector.

**The data collected, which is anonymised and aggregated**, will culminate in the publication of **an annual, in-depth report, offering a comprehensive analysis of the fund finance market.**

This report will serve as an essential resource for the industry—helping all stakeholders navigate the market and informing strategic decisions.

Take part today and contribute to shaping a resilient future for fund finance. **At the LMA, we believe that every voice matters – make your voice heard.**

Click [here](#).

## 2025 Global Symposium: Preview Incredible Keynote Speaker Lineup

January 24, 2025

14TH ANNUAL



GLOBAL FUND FINANCE SYMPOSIUM

FEBRUARY 24-27, 2025 | FONTAINEBLEAU MIAMI BEACH

The Fund Finance Association is delighted to share more details on the fantastic lineup of keynote speakers for the upcoming 14th Annual Global Fund Finance Symposium, taking place February 24-27, 2025 at the Fontainebleau Miami Beach.

FFA is delighted to introduce the fantastic lineup of keynote speakers, beginning with **Joel Holsinger**; Partner, Portfolio Manager and Co-Head of Alternative Credit in the Ares Credit Group. Tuesday morning will feature a Fireside Chat with **Willy Walker**; Chairman and CEO of Walker & Dunlop and **Michelle Herrick**; Head of Commercial Real Estate at JPMorgan Chase, followed by another Fireside Chat with **Helen Quick**; Director of Capital Markets, at the Office of Strategic Capital, United States Department of Defense, and **Dyan Gibbens**; Senior Advisor at Defense Advanced Research Projects Agency (DARPA).

Wednesday is also going to be packed with fantastic fireside chats, featuring **Yann Robard**; Managing Partner at Dawson, and **Divesh Makan**; Founding Partner at ICONIQ Capital. The day will wrap up the conference sessions hearing from actor, producer and entrepreneur, **Ryan Reynolds**. These are all sessions that you won't want to miss!

### Details

February 24 - February 27, 2025

Fontainebleau Miami Beach

4441 Collins Ave.

Miami Beach, FL 33140

Full Agenda: [2025 Global Symposium Agenda](#)

Register [here](#).

## Future of Fund Finance | Europe - Next Week

January 24, 2025




We're looking forward to The Future of Fund Finance | Europe next week on 28 January at The Landmark Hotel in London. Cadwalader is proud to be a lead sponsor and have Partners **George Pelling** and **Nick Shiren** speaking at the conference, sharing their insights on key industry topics.

The full-day conference will provide the chance to gain the latest insights from leading issuers and investors as they examine how alternative funding structures are reshaping the fund finance market.

<p>THE FUTURE OF FUND FINANCE   EUROPE</p> <h3>George Pelling</h3> <p>The Spectrum of Structures in Fund Finance Tue Jan 28, 9:45 AM - 10:30 AM GMT</p>	
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George Pelling will be a panelist on "The Spectrum of Structures in Fund Finance." Learn more about what he plans to cover [here](#).

<p>THE FUTURE OF FUND FINANCE   EUROPE</p> <h3>Nick Shiren</h3> <p>Comparing Fund Finance Technology Under Different Regulatory Regimes Tue Jan 28, 10:30 AM - 11:15 AM GMT</p>	
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Nick Shiren will be a panelist on "Comparing Fund Finance Technology Under Different Regulatory Regimes." Learn more about what he plans to cover [here](#).

View the agenda [here](#).

View speakers [here](#).

## Fund Finance Hiring

January 24, 2025

Fund Finance Hiring

Here is who's hiring in Fund Finance:

**Fitch Ratings** is seeking an Director, Business Relationship Manager (BRM) - Fund & Asset Managers Group in New York. This role will be responsible for business development and providing both tactical and strategic support to the Fund & Asset Managers (FAM) Group. Learn more [here](#).

**M&T Bank** is seeking an Fund Banking Senior Relationship Manager to join its office in New York. This role will be responsible for an assigned portfolio of the most complex and or large dollar amount loan and/or deposit relationships with major businesses in the community. Learn more [here](#).

**MUTB-NY** is seeking an Fund Finance Account Officer- VP to join its office in New York. The VP will work through all aspects of the transaction lifecycle to help the team originate fund finance transactions, including both subscription finance and NAV based facilities. Learn more [here](#).