

CADWALDER

In the News: (Potentially) Taking Revenge Through Tax

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As we power through what remains of this quarter, working to get deals closed before quarter end next week, you may have noticed some additional (and new!) blacklining in the tax section of your credit agreement thanks to a bill that is currently in the Senate. We are seeing new terms coming into credit agreements to include certain language in the tax provisions that wasn't there before.

In our last *Fund Finance Friday* for the quarter, we dive into what's driving these eleventh hour comments, how they are being dealt with, and who bears the risk of this so-called "revenge tax" when it comes to your fund finance deal.

This is a very live and developing issue with changes occurring just yesterday afternoon that we are watching very closely. Here we will dig into the issues but note that yesterday afternoon Treasury Secretary Scott Bessent asked House and Senate Republicans to remove the revenge tax on the basis that the U.S. had reached a "joint understanding" with G-7 allies that would exclude U.S. companies from certain taxes imposed by other countries in exchange for removing Section 899 from the amendments to the Internal Revenue Code contained in One, Big, Beautiful Bill. Notwithstanding this, the bill remains before the Senate this morning and indeed still contains the revenge tax. We know our clients and readers are watching this issue closely and so we are digging in here with the latest.

Last month, the U.S. House of Representatives passed the bill, which includes the addition of proposed Section 899, which is being referred to as the "revenge tax." Section 899 imposes increased tax rates on governments, business entities, and individuals that impose so-called "unfair foreign taxes" on U.S. tax payers and their subsidiaries. Essentially, it is a response to unfair taxes that works by increasing the rate of tax that would be applicable to certain taxpayers that are related to a foreign jurisdiction. The draft bill describes a number of taxes that lawmakers have determined to be unfair taxes and it gives the Treasury Secretary the authority to designate additional unfair taxes. Section 899 has potentially far-reaching consequences and in our particular corner of the world there are consequences for foreign banks and lenders making loans to U.S. borrowers, foreign investors in debt funds and other investment vehicles, and these rates would apply to foreign investors that are making certain investments in the U.S.

The genesis of all this dates back to discussions among the members of the G-20 and the Organization for Economic Cooperation and Development (the "OECD") that led to an agreement allowing foreign countries to change their tax rules to impose a global minimum tax rate of 15% on multinational corporate groups with annual revenue over EUR 750 million. This framework, known as "Pillar Two" allowed each member country to enforce this global minimum by taxing local subsidiaries on income earned in other countries. (For example, if a multinational group had subsidiaries in both Germany and the Cayman Islands, and the Cayman Islands did not tax the income of the Cayman sub, Pillar 2 would call for Germany to step in and impose what is called a "top-up tax," taxing the German subsidiary on the income of its Cayman sister subsidiary in order to ensure that the group was subject to a 15% tax on all of its income, no matter where it was earned.) Some lawmakers object to the extraterritorial effect of this tax on U.S. multinational companies. Section 899, which was written by House Republicans and supported by the President, is designed to respond to this extraterritorial taxation.

Yesterday, Treasury Secretary Bessent took to X and other social media platforms and said that as a result of the deal he cut with other members of the G-7, "OECD Pillar 2 taxes will not apply to U.S. companies, and we will work cooperatively to implement this agreement across the OECD-G20 Inclusive Framework in coming weeks and months." He noted that "[b]ased on this progress and understanding, I have asked the Senate and House to remove the Section 899 protective measures from consideration in the One, Big, Beautiful Bill."

As you may recall from social studies, a bill becomes a law after it is approved by both the House of Representatives and the Senate and it is signed into law by the president. The bill is now sitting with the Senate and the Senate Finance Committee released its version of the bill on June 16th and Section 899 remains a part of it. The Senate draft

gives the president some extra power when it comes to serving up revenge in that it gives the president discretion to double taxes on corporations and citizens of countries that impose unfair foreign taxes on U.S. entities and individuals.

So how does all of this factor into your credit agreement? First, keep in mind that Section 899 is only going to be relevant where there are lenders that are non-U.S. entities in the deal. In a deal with a U.S. lender these negotiations will not come up because Section 899 would not apply. However, it is possible that a borrower and a U.S. lender may determine to include provisions addressing the revenge tax in their credit agreement if the parties were anticipating that a non-U.S. lender would come into the deal through syndication.

So what do unfair foreign taxes and revenge taxes have to do with fund finance? Lenders are in the business of making loans to earn a profit and they expect to have to pay taxes on the interest, fees, and other income they earn for making a loan. They want it to end there and have other costs of doing business covered by the borrower (just the way that someone who purchases something in a store pays for the item and pays the sales tax as well). To that end, generally speaking, the tax provisions in a credit agreement provide that whatever taxes a lender has to pay that are directly attributable to the loan as a cost of doing business (other than the income tax mentioned above) will be passed on to the borrower. For example, a country may impose a withholding tax on interest payments that a borrower that is making to a lender in another jurisdiction. While it is the lender's responsibility to pay the tax, the laws of the country may require that the borrower withhold amounts in its country before sending the payment to the lender in another country. This helps ensure that the tax gets paid. The Lender is then expecting the Borrower to pay the taxed amount over to the Lender or otherwise gross them up.

As it relates to Section 899, there are a couple of different philosophical perspectives. It is currently not law but it is definitely something parties are aware of. A borrower may take the position that it is an existing day-1 tax that should be factored into the pricing of the deal. On the other hand, given that it is not currently the law, many lenders believe they should not bear the risk of it and they should be covered or indemnified by the borrower under change in law provisions under their credit agreement which have the borrower cover unanticipated costs of a lender if the law changes during the course of the deal.

Going back to taxes a lender may need to pay in a foreign jurisdiction, the rate of tax will vary country by country and will be determined by the presence and terms of any tax treaties. Treaties will determine the tax rate and whether there needs to be withholding at all. For example, interest paid by an English borrower to a U.S. lender is not generally subject to withholding due to a tax treaty between the countries. With this background in mind, **Indemnified Taxes** under a credit agreement are the taxes where the borrower will gross-up the lender. On the other hand **Excluded Taxes** are those taxes which are excluded from the gross-up.

We are seeing a few approaches by fund borrowers and lenders in our deals. In some cases, the borrower will seek to shift the entire risk and burden of the tax to the lenders by adding the taxes imposed or collected pursuant to Section 899 to the definition of Excluded Taxes. Tax obligations pursuant to Section 899 can also be a carve out from Indemnified Taxes the way that Excluded Taxes are. This means that any tax that the lenders may need to pay as a result of Section 899 will not be grossed up by the borrower. Some lenders are accepting that construct.

In other cases, the parties may decide to split the impact of the risk where there is a foreign lender in the deal through a bespoke arrangement whereby the parties share the cost - meaning that the borrowers are only responsible for part of it. And there are still deals being worked out where borrowers are making comments that lenders are flat out rejecting and it will be interesting to see how this is resolved as time runs out on quarter end.

Section 899 still needs to pass the Senate before it becomes law and it could evolve further before that happens. For example, the Senate's draft expressly exempts portfolio interest from increased rates while the House bill was less clear on that point. If the portfolio interest exemption survives final passage, that would substantially blunt the effect of Section 899 for most non-bank lenders.

There is still concern that if this were to be enacted into law it could deter certain foreign investment into the U.S. Those in favor of Section 899 generally take the position that the provision will rarely be enforced because its existence will motivate countries that impose "unfair taxes" on U.S. taxpayers to repeal those taxes or put in place exemptions for U.S. companies.

We will continue to follow this as it develops.

For more on the substance of this bill and this subject, please see our tax team's newsletter BrassTax [here](#).

Letter of Credit Refresher

June 27, 2025



By **Katie Clardy**
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Many subscription credit facilities will provide for the issuance of letters of credit in addition to the funding of loans. A letter of credit is an irrevocable undertaking for the payment of money issued by a bank at the request of a borrower in favor of a third-party beneficiary. The inclusion of letter of credit flexibility in loan documents provides borrowers with an instrument for future business with third-parties while avoiding, at times, the need to negotiate a “new” loan or guaranty.

This article will discuss the typical mechanics and elements of letters of credit under a subscription credit facility.

In transactions that include letter of credit optionality, borrowers may submit a request for a letter of credit, which will include a borrowing base certificate and a letter of credit application. Typically, the loan documents will contain language that all letters of credit will be in a form satisfactory to the letter of credit issuer and consistent with the terms of the letter of credit application. The conditions precedent for a letter of credit are usually identical to a standard borrowing request: i.e., a bring down of the representations and warranties in the credit agreement, confirmation that no event of default or potential default has occurred or will occur as a result of the letter of credit, confirmation that the principal obligations will not exceed the available commitment, and confirmation that the letter of credit liability will not exceed the letter of credit sublimit (if applicable).

Letters of credit under subscription credit facilities are usually standby letters of credit, meaning that a third-party beneficiary may draw on the letter of credit on demand. If a letter of credit has been issued to a third-party beneficiary and the third-party beneficiary draws on the letter of credit, the letter of credit issuer will provide the requested funds. The loan documents will include language that the borrower has authorized the lenders to disburse directly, as a borrowing or loan, the drawn amount under such letter of credit, plus all interest and fees due to the letter of credit issuer. As a result, both (i) the aggregate amount of the undrawn stated amount of all outstanding letters of credit and (ii) the aggregate amount drawn under letters of credit for which the letter of credit issuer and the lenders have not yet received payment or reimbursement will be considered as part of the letter of credit liability and a principal obligation under the subscription credit facility.

Most syndicated subscription credit facilities will require that all lenders participate in letters of credit on a pro rata basis, sharing in all rights and obligations resulting from the letter of credit, including (i) the right to receive any reimbursement of the amount drawn under the letter of credit, (ii) the right to receive fees that are payable under the terms of the subscription credit facility, and (iii) the obligation to pay any unreimbursed drawing under a letter of credit. However, some syndicated subscription credit facilities may permit the lenders to determine prior to the issuance of each letter of credit whether to participate in such letter of credit and the amount or percentage of its participation therein.

Letters of credit under subscription credit facilities are customarily secured by the collateral on the same basis as loans. The expiration date of a letter of credit is normally twelve months after the date of issuance with the ability to renew and with the limitation that no letter of credit will expire on a date that is more than twelve months after the maturity date. Most subscription credit facilities will require that any letter of credit that expires more than thirty days past the maturity date will be cash collateralized on or prior to the maturity date. Borrowers may also cash collateralize letters of credit to reduce the letter of credit liability below the available commitment or the letter of credit sublimit (if applicable). Typically, subscription credit facilities require that letters of credit be cash collateralized with the proceeds of capital calls funded to a cash collateral account separate from the subscription facility collateral account. A segregated cash collateral account allows the borrowers to have access to their subscription facility collateral accounts (absent a default or cash control event) while the lenders retain cash collateral related to the letter of credit liability on a segregated basis. Upon the expiration of all letters of credit and after all obligations related to the letters of credit, including the letter of credit liability, are fully paid, the balance of cash held in the cash collateral account shall be returned to the borrowers.

FFA University Fall Slate in the United States

June 27, 2025



Cadwalader is once again proud to sponsor FFA University! The Fund Finance Association has expanded its FFA University offerings in the United States this fall to increase access and reach more members of the Fund Finance community.

Registration is now open for FFA U 2.0, an intensive, full-day training session taking place in person in New York City—and, for the first time, in Charlotte.

Below is a full summary of the new and improved FFA U game plan for this year:

FFA U 1.0 FFA U 1.0 will be November 19, 2025. The event is targeted for new fund finance bankers and other creditors, lawyers and fund treasury professionals or for professionals that work in an adjacent business vertical that would benefit from a greater understanding of Fund Finance. The substance will cover closed end private equity fund structures, the suite of fund finance products and their facility structures, with a deep dive on subscription facilities, term sheets and credit agreements and current investor issues. The all day event will be virtual.

FFA U 2.0 For the last three years, FFA U 2.0 has sold out the week that registration opened. This year will feature bigger event spaces that accommodate more attendees, and two sessions instead of one, one in New York and one in Charlotte.

New York The New York FFA U 2.0 will be September 9, 2025 at the Marriott Marquis in Manhattan. The space can hold up to 300 students and the program is designed for mid-level fund finance bankers, lawyers and treasury professionals - think 3 to 10 years experience - or for folks expanding beyond subscription finance or some other adjacency into NAV and related products. The agenda will be finalized soon, but it will include sessions on lending to Secondaries Funds, NAV Loan underwriting, the Ratings process, collateralized fund obligations and their financial models, and underwriting Fund Sponsors for GP and Management Fee facilities. There will also be an in depth case study focused on structuring a complicated NAV loan, which will involve small group work.

Charlotte The Charlotte 2.0 will be October 28, 2025 at the Revelry North End. The agenda will be similar to that in New York and after the event, there will be a reception hosted by Women in Fund Finance and the NextGen affinity group.

Registration is open and more information is available on the FFA's website [here](#).

Happy FFFourth!

June 27, 2025

Whether you're heading to the beach or the pool, enjoying a bike ride or hike, or gathering with friends and family for a backyard barbecue, we hope everyone in the U.S. has something fun planned to celebrate Independence Day next week.

Fund Finance Friday will be back on July 11th.

Fund Finance Hiring

June 27, 2025

Fund Finance Hiring

Here is who's hiring in Fund Finance:

Goldman Sachs is seeking an Asset & Wealth Management, Private Bank, Capital Call Finance, Associate in New York. This position is responsible for applying strong analytical and technical skills to evaluate the credit and risk implications of complex lending transactions, advising clients and structuring tailored credit solutions that align with the Bank's risk parameters, performing in-depth due diligence on private equity sponsors and funds, maintaining accurate financial models and borrowing base certificates, and ensuring underwriting standards and documentation align with internal policies. Through close coordination with Credit Risk Management, Private Wealth Management teams, and banking regulators, this position will help manage a high-quality loan portfolio while ensuring compliance with all monitoring and reporting requirements. Learn more [here](#).

SouthState is seeking an Private Capital Solutions Relationship Manager out of Winter Haven, Florida. Under the direction of the Head of Private Capital Solutions (PCS), this position is responsible for supporting the new client development and relationship management activities for the PCS group. Responsibilities include: client portfolio management, sales support for new client opportunities, risk management and underwriting of new and existing client opportunities and cross-functional support for new client onboarding. Learn more [here](#).

Barings is seeking an Senior Associate to join its Portfolio Finance team out of Boston. The role will support the underwriting, execution and oversight of investment-grade, senior secured loans to asset managers and the investment vehicles across a range of asset classes, including private equity, private credit, and real estate debt. The Senior Associate will support the Portfolio Finance platform, working closely with Portfolio Managers, Directors, Structuring Leads and external partners. Learn more [here](#).

ATLAS SP is seeking an experienced Associate to join its growing Fund Finance business. The candidate will also have the opportunity to expand generalist background across other ABS asset classes. The ATLAS Fund Finance team provides financing to private equity funds and other asset managers through structured credit facilities, including subscription credit facilities, NAV lending, and GP/LP financing. The Fund Finance team is looking for a motivated and experienced Associate to help support the origination, structuring and execution of new Fund Finance credit facilities, as well as surveillance and maintenance of existing Fund Finance credit facilities. Learn more [here](#).

Apollo's AASP Risk team is seeking an Associate or Director (depending on experience) to report to the Head of Counterparty & Fund Finance and act as one of the primary risk managers for the Private Credit Finance business ("PCF") and Fund Finance transactions. This will include supporting the buildout of the PCF portfolio by partnering closely with the PCF team on all stages of the investment and ongoing portfolio monitoring process, building out second-line risk management reporting and monitoring, and forming credit recommendations on new and existing opportunities. This unique role requires a credit investor mindset as the team evaluates transactions. Learn more [here](#).

Cadwalader, Wickersham & Taft LLP is seeking associates with three to six years of relevant experience for its Fund Finance practice in New York, Charlotte or London. Qualified candidates will have experience in syndicated lending, commercial lending, leverage finance, fund formation, CLOs, asset-based lending, NAV financings or acquisition financings. Candidates must possess excellent academic credentials and solid legal experience. Selected candidates will get extensive interaction with preeminent bank, asset manager and lending clients. If interested, please reach out to Margaret Cart at Margaret.Cart@cwt.com.