

CADWALDER

ILPA's 'Principles 3.0' Hits the Press

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"Principles 3.0," the Institutional Limited Partners Association (ILPA) guidelines for private equity best practices, hit the press yesterday. Subscription facility-related provisions generally had been well-telegraphed. Specific recommendations included the following:

- Performance reporting during fundraising and over the life of the fund should cover returns with and hypothetically without the use of such facilities.
- The use of credit facilities with terms longer than one year should be subject to limited partners advisory committee approval.
- Subscription facilities terms should be disclosed or made available to LPs on request.
- LPs should be offered the option to opt out of a facility at the onset of the fund.
- At fund close, or at the facility close, material terms of the facility should be disclosed to all LPs.
- ILPA is working towards publishing a model LPA.

The subscription facility recommendations are but a subset in a comprehensive set of guidelines. The full publication is available [here](#). We expect to return to the topic with further analysis.

Player Profile: Spencer Goss

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Player Profile

FFF: How did you end up in fund finance?

If you worked for RBS in the fixed income space in the early 2000s, it was inevitable that you'd end up covering either funds or insurance companies. Fund finance seemed more interesting and something I could develop a decent understanding of, and so I chose to get involved.

FFF: How has the first half of 2019 shaped up compared to 2018?

2018 was a challenging year for the funds team of RBS as we were focussed on meeting our ring-fencing regulatory obligations. Having successfully achieved this, 2019 has been much more "outward"-looking, allowing us to re-engage with our clients and the wider market, presenting our growth ambitions for the sector as RBS International. Whilst the growth in subscription financing continues at pace, I seem to be having an increasing number of conversations around asset-backed/NAV-based financing across the private credit and private equity funds space which, being less commoditised, is an interesting development area for the sector.

FFF: Are there any emerging issues that might prove relevant for the fund finance markets?

Aside from the development of NAV-based financing, I think it will be interesting to see how alternative finance providers (insurers, asset managers) start to influence subscription finance terms and structures. As fund sizes get larger and borrower needs rise in tandem, whilst there are more banks operating in the space, some appear to be on-selling their risk and so it will be interesting to see how these buyers' structural needs interplay with borrower demands.

FFF: What do you think it takes to be successful in the fund finance industry?

Have an open mind, maintain an honest and open relationship and try to be consistent in approach. At least that's what I've heard successful people say at conferences.

FFF: If you could give the Fund Finance Association one piece of advice, what would it be?

In Europe it feels as though the FFA has really good engagement from the banking and legal community but is still lacking in genuine GP involvement. If the FFA marketing team can do anything to change that then I think we'd all benefit. The more voices and alternative views we hear on the issues we face can only be a good thing.

FFF: What do you like to do outside of the office?

It's not a particularly interesting answer I'm afraid, but might serve to secure me a hospitality invite, you never know....I enjoy watching football and cricket, going to gigs and the theatre, and my wife and I recently started ballroom dance classes. I've two left feet unfortunately, so can't see us on Strictly anytime soon.

FFF: Tell us two truths and one lie about yourself?

I'm related to Matt and Luke (from Bros – kids, ask your mum); I was born with six fingers on my left hand; my go-to karaoke song is *Burning Love* by Elvis.

FFF: Any fund finance predictions for the rest of the year?

Primarily the points I made earlier on NAV-based lending and alternative finance providers. In the short term, it feels like there's still great momentum in the sector, so I expect we'll all be kept busy.

PEI Article on Fund Finance

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Private Equity International published an article on June 19 titled “Fund Credit Lines: How to Compare Apples with Apples.” The article was submitted by guest writer Neil Harper, a former chief investment officer of Morgan Stanley Alternative Investment Partners and a former McKinsey & Company partner. Similar to prior press pieces, the article argues that subscription lines both cause investors to sit on excess cash for longer durations and make it harder for them to fund capital calls in a downturn. It also takes a very negative view on fund-level leverage. *Fund Finance Friday* will work on a considered response over the summer; both sides of these issues deserve equal play in the press. The article is available [here](#).

NautaDutilh on Luxembourg Fund Finance

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The Luxembourg office of NautaDutilh published a fund finance think piece titled “Towards A Mature Market for Fund Finance in Luxembourg.” The article lays out the framework for both subscription credit facilities and NAV facilities in the Luxembourg market while also addressing the requisite security packages in both types of facilities. A copy of the article is available [here](#).

WFF Hosts London Get-Together

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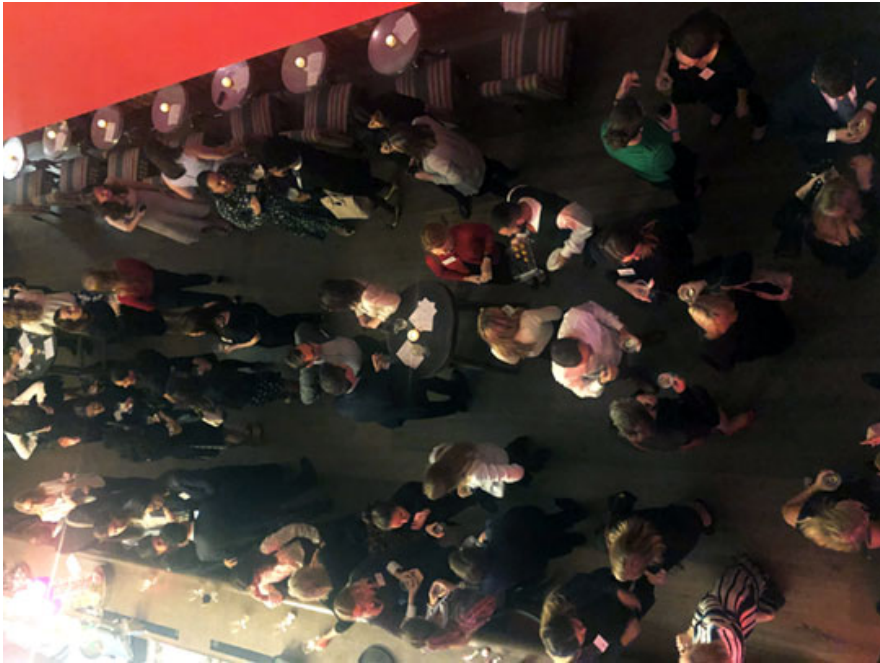
By **Chelsea Bruno** | Wells Fargo Bank, N.A.

WFF hosted a drinks, nibbles and networking event last week at the beautiful Ham Yard Hotel in SoHo. This was the second event hosted by WFF in London this year, and the event was well-attended by a mix of professionals from sponsors, banks and law firms. Following the networking portion of the evening, attendees were invited to a screening of the film “RBG,” a documentary released in 2018 which explores U.S. Supreme Court Justice Ruth Bader Ginsburg’s rise to fame.

WFF Europe will begin its “Wit and Wisdom” event series in London over the coming months, and will host its next large networking event in London in September/October.







Outside the Lines — 'An Army at Dawn'

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Outside the Lines



By Michael Mascia
FFA Board Member

I had lunch with Jonathan Gray, who leads East West Bank's fund finance business, early in 2019. He told me about how his father fought in Tunisia when the United States first entered World War II, and how he and his family recently have been traveling to North Africa and Europe to retrace his dad's steps. I was pretty captivated. (I'm trying to twist his arm to write a column about it.) I had been looking to do something around the 75th Anniversary of D-Day besides watching *Saving Private Ryan* for the 11th time so I asked for a reading recommendation. Jonathan suggested *An Army at Dawn* by Rick Atkinson. I had hoped to finish it by June 6th but needed the plane trip to and from London last week to get it done. It's not hard to fathom why it won the Pulitzer.

Atkinson is a hell of an author. The level of research he put into the book is astounding. He is also extremely confident in his military and political judgments. There is no hesitation at all in negatively critiquing the entire continuum from the battle tactics of battalion commanders to the strategy and political astuteness of Eisenhower, Patton and Rommel. I found the book more enjoyable when I accepted his critiques on their face; trying to analyze the maneuvers to confirm Atkinson's assessment was too time-consuming. There are times when Atkinson overdoses on the intellect. I'm not used to needing Google to follow an analogy. He has written a trilogy on World War II (*An Army at Dawn* is the first volume) and in May just released the first volume of an American Revolution trilogy titled *The British are Coming: The War for America, Lexington to Princeton, 1775-1777*.

The North Africa campaign is fascinating. The initial fumbling and insecurities of Roosevelt, Eisenhower and Patton somehow escaped my history lessons. One of my favorite passages is when Patton loses his mind with Major General Orlando Ward and screams at him to take the high ground at Maknassy: "I don't want any goddam excuses. I want you to get out there and get that hill. You lead the attack personally. Don't come back 'til you've got it." (That's sort of how Pat Quinn, Cadwalader's Managing Partner, talks to me.) And so Ward, a Major General in his 50s, leads 2,000 men from the very front, runs with the lead group of 8 men, and gets hit in the eye and nose from a shell fragment. Earning Patton's enduring loyalty? No, Patton fired him shortly thereafter ... I plan to follow the Atkinson trilogy on to Sicily and Normandy, but I am taking a break with some lighter reading first. The book is available on Amazon [here](#).

FFF is taking next week off. If you celebrate July 4th, I hope you have a good holiday.

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 E-SIGN 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.

