



## **FFA Releases Statement on Market Disruption**

**April 10, 2020 | Issue No. 72**

The Fund Finance Association this week hosted a call with representatives of its major event sponsors. Following the call, the FFA released a statement summarizing what its constituents are seeing in the market, addressing many of the narratives in recent press reports and providing suggestions for best practices for managing the challenges in the market. The statement is available on the FFA website [here](#).

## 'Fund Finance Friday: Industry Conversations' — Podcast with Matt Posthuma of Ropes & Gray (15 Minutes)

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Industry Conversations

Cadwalader's Mike Mascia connects with Matt Posthuma, a Partner in Ropes & Gray's fund formation group, in this week's podcast edition of *Fund Finance Friday: Industry Conversations*. In the podcast, Matt gives an update on how the disruption is impacting fundraising in the real estate space, the state of real estate fund operations and capital call activity from his vantage point, and Investor performance on capital calls.

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## Issuing EINs an Issue for International Entities

April 10, 2020 | Issue No. 72



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As part of the routine “know-your-customer” onboarding process, lenders are required to obtain the employer identification number (“EIN”) and other tax and beneficial ownership information from borrowers and guarantors to their credit facilities. Yet borrowers and guarantors formed in foreign jurisdictions, such as the Cayman Islands and Luxembourg, have recently had difficulty obtaining an EIN because the Internal Revenue Service has shuttered many of its offices in response to the COVID-19 outbreak. We have heard reports that the IRS is not currently providing EINs to any foreign entities, and has not given a timeline for when it may begin to do so again (after calling the IRS, we were unable to verify if it might be issuing such EINs if applied for by mail). This is a widespread issue that could delay foreign borrowers and guarantors in their attempts to join credit facilities. As a workaround to permit their joinder now without any delay, certain lenders have become comfortable with marking the EINs as “Applied For” in their internal onboarding forms and requiring the EINs to be provided only when the IRS eventually issues them.

# Fund Finance: Cayman Private Funds Law — To Covenant or Not To Covenant?

April 10, 2020 | Issue No. 72



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The Private Funds Law, 2020 of the Cayman Islands (the Law) came into effect on 7 February 2020 and heralded a new regime for the registration of certain closed-ended funds (Funds) with the Cayman Islands Monetary Authority (CIMA). The advent of the Law has led to discussion on whether to include an express covenant and event of default (or any other related provisions, such as conditions precedent and subsequent) relating to the Law into credit agreements.

## The Law

Existing Funds and those Funds launched between 7 February 2020 and 6 August 2020 have until 7 August 2020 to register with CIMA (the Transitional Period). All Funds created prior to or during the Transitional Period are required to be registered with CIMA if they have previously received capital contributions from investors for investment purposes or in order to receive such capital contributions after the Transitional Period. From 7 August 2020, all new Funds have 21 days after the acceptance of capital commitments from investors in which to register with CIMA before being able to receive capital contributions "for the purposes of investments."

It is nuanced, but there is a perceived risk (open to interpretation) were a lender to seek to enforce their security after the Transitional Period but prior to a Fund being registered that either: (i) an investor could seek to use the fact that the Fund is not registered as a reason to delay funding a capital call (this point may become more acute if investors start to suffer from liquidity issues due to the current COVID-19 crisis – see below) on the basis that it may not technically be in compliance with the Law, or (ii) a contribution from investors to discharge debt owed to a lender may be deemed unenforceable as the original debt was used by the Fund "for the purposes of investments" (and in order to accept such a contribution the Fund needs to be registered under the Law).

## To covenant or not to covenant?

Cayman Islands counsel are working with sponsors to analyse which of their entities are within the scope of the Law and to register in-scope Funds by 7 August 2020. Lenders seeking to reduce the potential for argument about the enforceability of their security to call capital are closely examining the traditional compliance with laws and affirmative covenants in their credit agreements alongside the event of default mechanics. Dependent on the structure of the Fund concerned and the nature and number of the Funds' investors, below are the options:

- change nothing – existing compliance with laws covenants, such as those found in APLMA, LMA or LSTA loan agreements, are often broad and robust and would cover the compliance with the Law. The related event of default usually contains a cure period offering the Fund the time to register with CIMA. This has generally been the approach adopted in the Asian markets to date; or
- have an express affirmative covenant and related event of default provision on the Law – in so doing, the parties are focused on ensuring registration and any risk security that could be deemed unenforceable falls away.

Alternatively, evidence of registration with CIMA could be included as an additional condition precedent to funding or a condition subsequent (to be satisfied within a certain number of days prior to the end of the Transitional Period), which are potentially more commercially palatable solutions than negotiating the covenant and event of default options.

### **COVID-19 a factor?**

Upon the Law coming into effect, commentators noted the evolving use in certain markets of express covenants and events of default with generous cure periods of up to 30 days for breach of the Law. In addition, evidence of registration in a form acceptable to the lender was, in general, requested to be provided in reasonable time post-registration.

In recent days, lender appetite is evolving in line with the mounting concern over the international economic environment. Cure periods are ebbing away rapidly and evidence of registration of Funds is being sought between 15 to 30 days ahead of the 7 August 2020 deadline for registration under the Law. Some lenders are advocating for immediate events of default for non-registration and deeming such non-registration as a material adverse event. In addition, lenders are requesting they receive copies of any notice issued by CIMA in relation to any breach of the Funds' registration terms under the Law.

### **Conclusion**

The position of lenders and sponsors on the point is fast evolving in line with the changing economic landscape. The expectation is that, from 7 August 2020, all new Funds will register at launch, and we may therefore see the express covenant and event of default wording relating to the Law relax again, with only the requirement for evidence of registration from CIMA on or promptly after closing remaining.

## Cadwalader Fund Finance Chapter Published

April 10, 2020 | Issue No. 72

*The International Comparative Legal Guide to: Lending and Secured Finance 2020* was published this week by Global Legal Group (the same publisher that produces the Pink Book) in conjunction with the LSTA. Mike Mascia and Wes Misson submitted the chapter on Fund Finance. The chapter gives market data from the transactions we worked on in 2019 and provides a high-level look at the year in review. It was, of course, written prior to the market disruption. The article is available [here](#).

## Private Equity International Podcast

April 10, 2020 | Issue No. 72

*PEI* this week hosted a podcast with editors from its various publications in the buyout, private debt, real assets and secondaries spaces. They discuss the article they published on LP defaults, and state that they have not been able to identify the particular investors who have purportedly defaulted, nor have they uncovered reports of other investor defaults. At the 15-minute mark, there is discussion on the fund finance market. The discussion covers NAV-based facilities and the impact on credit availability resulting from the drop in asset values. There is also discussion around the bandwidth of fund finance providers being stressed with many financing requests. Other topics discussed throughout the podcast include the availability of assistance for private equity portfolio companies under the Cares Act, the level of communication between GPs and LPs, the impact of loan level defaults on the CLO market, and the forecasted increase in tenant lease defaults. The subscription-required podcast is accessible [here](#).

## COVID-19 Resources

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Looking for more on the Paycheck Protection Program, the Fed's lending programs or the CARES Act? Cadwalader maintains a compendium of COVID-19 resources available [here](#).

## Recommended Reading

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*Dealings: A Political and Financial Life* is the autobiography of legendary investment banker Felix Rohatyn. While it is primarily focused on his business dealings and public service, the book opens with the story of how, at 12 years old, Rohatyn and his mother barely escape German-occupied France on a ship to Casablanca and ultimately arrive in New York. He joins Lazard shortly after college and quickly finds his way into its mergers and acquisitions group. The book then details all of his major deals, including the acquisition by Lazard of Avis, the representation of Harold Geneen and the building of the great ITT conglomerate, effectively steering New York City out of imminent insolvency in the late 1970s and representing the board of RJR Nabisco in the "Barbarians at the Gate" leveraged buyout. The book ends with his four-year stint as the American ambassador to France and his ultimate return to Lazard, where his career had commenced some 50 years earlier. The book is available on Amazon [here](#).