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The Global Subscription Credit Facility and Fund Finance Markets – Key Trends and Forecasting 2016

Cadwalader, Wickersham & Taft LLP

Michael C. Mascia

Wesley A. Misson

Introduction

Despite numerous headwinds, the Subscription Credit Facility (each, a "Facility") and related Fund Finance markets continued their outpaced growth in 2015, building upon and continuing a market trend in place since at least 2010. Similarly, Facility credit performance remained pristine, and no loan losses or write-downs from last year have become public. This chapter summarizes the key trends in the Facility and Fund Finance markets in 2015 and forecasts developments for the coming year.

Credit Performance

To our knowledge, there were no payment events of default in the Facility or related Fund Finance markets in 2015. None of the Lenders from the 50+ banking institutions in attendance at the 6th Annual Global Fund Finance Symposium hosted by the Fund Finance Association on March 2, 2016 in New York (the "2016 Global Conference") reported a loss or payment event of default last year. Similar to 2014, we were not consulted on any funding delinquencies by limited partners ("Investors") on their capital calls ("Capital Calls"), other than a few by high net worth and family office Investors ("HNW Investors") that were subsequently remedied. While this positive credit performance has to a large extent become a baseline expectation in the Facility market, it does bear noting that this perfect credit performance extended to our hybrid and asset-level facilities last year, which are underwritten at significantly higher risk profiles. Interestingly, however, we have seen a significant rise in technical defaults caused by covenant breaches, predominantly around borrower reporting obligations. While we think this trend is simply a function of portfolio growth and the increase of newer private equity funds (each, a "Fund") borrowing their first Facility, it bears watching. Several active Lenders in the market are adding post-closing Fund training sessions with the aim to reduce these occurrences.

Resilient Growth

The year 2015 included a number of macro challenges to the Facility Market: drastic reductions in oil and commodity prices; significant disruptions and volatility in the public equity markets; a reported 24% drop in the total number of Funds closed in 2015 compared to 2014; and a growing Investor preference for separately managed accounts ("SMAs"), which are more challenging to lend to than traditional commingled fund vehicles.[1] Yet, despite these challenges, the Facility market marched onward, with many of the major lending participants ("Lenders") reporting portfolio growth in the 10% to 30% range for 2015. This growth was driven by the same factors that have been driving the market for some time. There are still Funds being introduced to the Facility product, and market penetration has been and remains a primary growth driver, especially in the middle market buyout space. Further, many Lenders have been upwardly adjusting their maximum hold positions, leading to larger availability for the larger Funds currently being formed. Similarly, Lenders have developed concepts to lend against the uncalled capital commitments of Investors that have historically been excluded from Facility borrowing bases ("Borrowing Bases"). These structural evolutions have extended Borrowing Base availability later into Fund life cycles, further extending the market. Finally, asset-based lending to fund-of-funds and secondary Funds secured only or primarily by their underlying fund interest investments has increased considerably. The fund-of-funds and secondaries sub-market is rapidly maturing to near consistent structures. This growth, combined with the huge fundraising success of secondary Funds in 2014, created extensive leverage financing activity in 2015 as well.

Structural Evolution

Partnership Agreements. Facility structural evolution was more muted in 2015 compared to prior years. The increasing concentration of Funds with the top-tier Fund formation law firms has been a significant positive for the Facility market, as these firms are intimately familiar with lending requirements and tend to produce bankable Fund limited partnership agreements from the outset. This positive trend on the collateral side of Facility structure has somewhat reduced the prevalence of asset-level mitigants, such as net asset value covenants, periodic clean downs and covenants to call capital.

Hurdle Requirements. One structural evolution that appears to be gaining traction across the market is "Hurdle Requirements" for including certain Investors in a Borrowing Base. Despite potential enforcement issues for certain sovereign wealth Fund, Texas and other historically challenging Investors, Lenders are more frequently gaining comfort including such Investors with solid credit profiles where the Fund is managed by a top-tier sponsor and the Investor pool is diverse.[2] The concept, often referring to such Investors as "Hurdle Investors", generally requires the Investor to have net funded at least 50% of its capital commitment before being eligible for inclusion in the Borrowing Base. Although this approach does not solve potential legal enforcement issues, Lenders gain comfort via the funded Capital Calls that the Investor's substantial skin in the game strongly incentivizes its further Capital Call funding.

Shadow Borrowing Bases. Another interesting trend is that of "Shadow Borrowing Bases". Many of the regional banks in the United

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States have done an exceptional job of lending to smaller Funds over the years, but the sponsor's new Funds require Facilities larger than the regional bank wishes to deliver bilaterally. The Fund sponsor, valuing the relationship and frequently the perceived simplicity of a coverage ratio-style Borrowing Base afforded by these regional banks, awards them the mandate, tasking them with syndicating material Lender loan commitments. The traditional "subscription" Facility style Lenders, in order to participate, underwrite the Investor pool according to their more traditional included Investor/designated Investor/concentration limit formula, but do it on a shadow basis not conscripted in the credit documentation. In a static pool, this would of course be simplistic. But it does create interesting issues and approval standards with respect to new Investor closings and Investor transfers.

HNW Investor Facilities. During the past two years, we have experienced a notable uptick in the establishment of Facilities for Funds comprised mostly or exclusively of HNW Investors. This trend has emerged not only for middle-market sponsors but also for some of the largest sponsors in the market today. While traditionally challenging for Lenders to include HNW Investors in a Borrowing Base, certain Lenders are now viewing the diversity and granularity of the Investor pool in many cases to be a credit positive. For Funds where the HNW Investors invest indirectly through managed platforms of brand name wealth management institutions, comfort with the managed platform and some level of negotiated look-through rights or bespoke exclusion events related to the platform are often present. Many such Facilities remain bilateral and are generally smaller ($150 million or less) in size. However, we have recently seen some relative "giants" in terms of Facility size, where two or more Lenders have been required to participate. While we expect the overall impact of HNW Facilities to remain small in 2016, we forecast this as an area of continued growth.

Fund Performance

Fund performance in 2015 continued to be a factor driving overall Facility growth. Happy Investors are certainly expected to fund Capital Calls and seek to invest additional capital into new Funds. The most telling trend is that Investors are reaping the benefit of hefty distributions at record rates. The year 2015 marked the fifth consecutive year that Investors received more from Fund distributions than they funded via Capital Calls.[3] The net cash flows to Investors over that five-year period have exceeded $300 billion – equal to more than one-and-a-half years' worth of fund raising during that same period.[4] In fact, according to data presented by Preqin at the 2016 Global Conference, 94% of all Investors today have a positive view of Fund investment.

Legal Updates

Case Law Update. Other than the infrequent dust up that has occurred between an Investor and a general partner,[5] we are not aware of any substantial new case law relevant to Facilities in 2015. In fact, the often-cited *In re LJM2 Co-Investment, L.P.* and *Iridium* cases remain good law in Delaware and stand for the proposition that capital commitment funding obligations are enforceable for debt repayment in spite of a Fund bankruptcy or bad faith modification of Investor funding obligations.[6]

Making Bail-In. In January of 2016, new European "bail-in" rules became law and the ripple effect is making its way into Facility documentation, both in the U.S. and in Europe. Affected financial institutions, including European banks, under the new rules are subject to "bail-in" where certain of their unsecured liabilities could be subject to cancellation, write-downs, or conversion into equity in order to recapitalize the affected institution. Credit agreement language will require other Lenders and the borrowers to acknowledge and accept the potential application of the bail-in legislation.[7] Since banks are infrequent Investors in Fund borrowers today given the current regulatory regime, including the Volcker Rule,[8] we do not anticipate that the new "bail-in" rules will have a significant impact on collateral or the credit outlook for Facilities.

2016 Market Forecast

While we do expect the rate of Facility growth to slow in 2016 as compared to the previous three or four years, we continue to forecast growth in Lender portfolios in the 10% range year-over-year. There are simply too many factors supporting continued growth that outweigh a more pessimistic view. The number of Funds in the market is at an all-time high at 2,651.[9] The record levels of cash distributions made to Investors since 2013 will require them to re-up with Funds at meaningful levels to come close to maintaining their asset allocations, and as a result we are hard pressed to forecast a meaningful decline in 2016 Fund formation. If these Funds come anywhere close to their projected aggregate target for 2016 fundraising of $946 billion,[10] then 2016 could prove to be very solid from a fundraising perspective. But even assuming the recent macro level economic uncertainties materially slow fundraising, we think the Facility market will still show somewhat uncorrelated growth. There is a reported $1.34 trillion in dry powder available at the start of 2016, which is up from the $1.2 trillion level last year and marks the third consecutive annual increase since 2012.[11] Assuming a Facility market size of $300 billion in Lender commitments (our reasoned but unsubstantiated estimate), this still only yields a global advance rate of approximately 23%. Most Lenders have an average blended advance rate of closer to 30% across their portfolios, which suggests there is still ample room for Facility growth via penetration into new Funds. When you combine this likelihood of market expansion with Lenders getting increasingly comfortable lending to SMAs, lending to all HNW Investor Funds, extending Borrowing Bases and lending against Fund net asset value or investment assets, we think 2016 will continue its growth trend. Thus, market growth, while materially more modest than the eye-popping numbers sustained the last few years, should approach double digits once again in 2016.

Conclusion

Despite uncertainties in the macro landscape, the Facility market appears poised for another solid year in terms of portfolio growth in 2016. While Facility structures have been trending moderately in favor of Fund borrowers, we continue to believe that the credit profile of market-structured Facility transactions forecasts well for Facility performance in the coming year and we do not forecast any systematic or widespread default or loss occurrences.

Endnotes

1. *See*, 2016 Preqin Global Private Equity & Venture Capital Report ("2016 Preqin Report"), p. 19. Note: Preqin cautions that data as of the 2016 Preqin Report publish date was preliminary and this percentage is likely to decrease when final reporting has been completed.
2. We note that Texas state Investors are the most common subject of this trend as local law may not provide a complete waiver of contractual immunity.
3. $475 billion was returned to Investors in 2015 alone according to data presented by Preqin at the 2016 Global Conference.

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4. *See*, 2016 Preqin Report, p. 43.
5. *See*, *Wibbert Investment Co. v. New Silk Route PE Asia Fund LP et al.*, case number 650437/2013, in the Supreme Court of the State of New York, County of New York. Wibbert sought to avoid making a Capital Call seven times alleging fraud on the part of New Silk, but, according to the last publicly available reports, ultimately funded its capital commitment in order to preserve its status as a limited partner in the Fund.
6. *See*, *In re LJM2 Co.-Investment, L.P.*, 866A. 2d 762 (Del. Super. Ct. 2004) and *Chase Manhattan Bank v. Iridium*, 307 F.Supp 2d 608, 612-13 (D. Del. 2004); local counsel should be consulted for non-Delaware jurisdictions, which often have similar case law: *see Advantage Capital v. Adair* [02 Jun 2010] (QBD) Claim no. HQ10X01837 (Order for breach of contract granted in favor of private equity fund that sued a limited partner for repudiation under English law).
7. Each of the LSTA and LMA have published form language for syndicated credit agreements regarding European "bail-in" acknowledgment.
8. The aggregate level of bank Investor commitments has reduced by an aggregate of nearly 56% since 2011 according to numbers presented by Preqin at the 2016 Global Conference.
9. *See*, Preqin 2015 Fundraising Update ("Preqin 2015 Update"), p. 2.
10. *See*, Preqin 2015 Update, p. 2.
11. *See*, 2016 Preqin Report, p. 13.

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Mike has represented the lead arrangers in many of the largest subscription credit facilities ever consummated. He has been lead counsel on numerous hybrid facilities, and is one of the few attorneys in the United States with experience in both subscription credit facilities and CLOs. Mike represents lenders on leverage facilities to secondary funds and other credits looking primarily to fund assets for repayment. Many of his transactions are cross-border in nature, and he is well-versed in the nuances of multi-jurisdictional transactions.

Mike is the founder of the annual Subscription Credit Facility and Fund Finance Symposium and is a founding member and the Secretary of the Fund Finance Association. Mike is recognized as a Leading Lawyer in the area of Banking and Finance in the *International Financial Law Review*'s IFLR1000 Legal Directory in 2015.

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Wes has served as lead counsel on many of the largest and most sophisticated fund financings ever consummated, notably having assisted more than 35 banks as lead or syndicate lender during the past two years with transaction values totalling in excess of $25 billion. Many of the transactions he advises on are precedent setting, carrying unique structures and complex international components – whether that be foreign limited partners or funds, multi-currency advances or foreign asset investment.

Wes has been recognized as a "Rising Star" in the US in the area of Banking and Finance in the *International Financial Law Review*'s IFLR1000 Legal Directory, and is also a frequent speaker and an accomplished author in the area of fund finance. He has worked extensively with financial institutions to develop form agreements for fund finance transactions, many of which are the dominant forms used in the market today, and to educate bankers, internal legal counsel and credit officers on hot issues and trends affecting the fund finance market.

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