Global Legal Insights

Fund Finance

2017

First Edition

Contributing Editor:
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global legal group

FUND FINANCE association

Subscription line lending: due diligence by the numbers

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Introduction

Financial institutions wishing to participate in subscription line lending must take a fundamental and systematic approach to the due diligence that is required to underwrite and consummate a lending facility for a private equity fund. After all, the foundation of subscription line lending is the strength of the commitment of the investors to fund their capital commitments when called. The diverse pool of investors is the secret sauce of the subscription lending credit, and determining the strengths and weaknesses in their obligations is the key to successful participation in these markets.

A lender's due diligence should have two broad focuses: credit and legal. A close working relationship between lenders and counsel is critical to covering both of these bases; lenders will assess the overall credit quality of the mix of investors presented by the fund, and counsel will review the legal documents that make up its basket of collateral. If the contracts of all the investors and the fund do not provide sufficient comfort that the obligations of the investors to the fund will be enforceable, the credit quality of the investor pool will be meaningless.

Step One of due diligence: Review organisational chart and other organisational documents

The organisational chart of the fund is the place to start the due diligence review. The fund structure will drive many of the decisions that lenders will make in structuring the credit facility. The options for fund structure are almost endless, and lenders should not assume that the next deal will look like the last one. The fund's purpose and investment strategy, the makeup of its investor pool, and various other issues will drive the structure. Lenders – and their counsel – need to know and understand fund structure at the outset, since it will impact the rest of the due diligence process, and influence the loan documents once the facility is approved.

After reviewing the organisational chart, lenders should request the underlying documents for each key party on the chart.

The organisational and management documents of the various parties are among the most fundamental and important documents to review in connection with a capital call facility. These documents include: the limited partnership agreement or other operating agreement of each fund (referred to here as the LPA); the organisational documents of the general partner and other obligors, such as qualified borrowers (the Obligor Organisational Documents); and any management or investment agreement, usually between the fund and an affiliated investment manager (the Management Agreement). Generally speaking, the LPA sets forth the relationship between the fund, the general partner and the investors; the Obligor Organisational Documents determine the authority and the ability of the general partner and the other obligors to enter into the facility; and the Management Agreement governs the interaction between the management company and the fund.

Many of the lenders' rights under a capital call facility are derived from the provisions of the LPA, and lenders and their counsel must review and understand the provisions of the LPA. As the private equity capital call financing market has matured, many fund-side private equity lawyers have updated their form LPAs to include provisions that lenders and their counsel require for a private equity capital call credit facility. Older LPA iterations, however, may either be silent on some of those items or, worse still, expressly prohibit these rights or remedies.

Ultimately, the interrelationship of the funds and the structure of the credit facility will determine which provisions of the LPA are particularly relevant, and lenders and their counsel should review the LPAs with an understanding of those items.

While an exhaustive analysis of the relevant LPA provisions is not possible (and counsel should be engaged to review the operative relevant documents), lenders and counsel should keep the following in mind while undertaking a review:

- **Separate LPAs.** Each fund, including each alternative investment vehicle and parallel fund, will have its own LPA. Typically, the LPA for a fund starts out as a short form that is used to establish the fund in its chosen state or jurisdiction. In connection with the first closing of investors into a fund, the LPA is typically amended and restated to include, among other things, specifics about the capital commitments, the capital call process, and the ability of the fund to enter into credit facilities and pledge fund assets, as well as specific provisions addressing concerns raised by investors. The LPA is a living document that likely will change with circumstances over the life of the fund, including future closings of investors into the fund.
- **Borrowing.** The LPA should clearly permit the fund to borrow (and, to the extent funds will be jointly and severally liable under the credit facility, guarantee the obligations of the other funds covered by the credit facility). The LPA may include limitations on borrowings, including on the amount a fund may borrow, on the amount of time borrowings may remain outstanding under a credit facility, and on the permissible use of the borrowings. Each of these provisions should be reviewed and a determination made as to whether the credit agreement should expressly reference these limitations.
- **Capital commitments.** The LPA should expressly allow the fund (or the related general partner) to call capital to repay borrowings, to pledge the unfunded capital commitments of the fund's investors, to assign the right to make capital calls and to enforce the obligations of the fund's investors to fund their capital commitments. In situations where the LPA does not expressly permit this assignment, the fund should confirm with counsel that counsel will give a clean legal opinion on these issues or, in the alternative, that an amendment of the LPA may be necessary. If neither of those options is available, acknowledgments from the investors (especially the investors included in the borrowing base, if that is the intended loan structure) should be required whereby the investors acknowledge and consent to the pledge. Of course,

if the LPA expressly prohibits the assignment of the right of the fund and the general partner, the prohibition will need to be amended.

- **Waiver of counterclaim defences and setoffs.** Lenders and their counsel should review the LPA for a waiver of counterclaim, defences and setoff from the investors. The inclusion of this provision in the LPA (or in the subscription agreement, where it may also appear) gives additional comfort to the lender that an investor will not (or that a court will not permit an investor to) deduct amounts the investor believes it is owed by the fund from the investor's required capital contributions under the LPA and the subscription agreement.
- **Third-party beneficiary provisions.** LPAs typically contain a provision that expressly prohibits those not party to the LPA from having the benefit of the provisions of the LPA. Lenders and administrative agents should seek to have the credit facility carved out from that prohibition, so that they are third-party beneficiaries of the LPA. In the alternative, they should seek to have a carve-out from the provisions of the LPA governing, at a minimum, the right to call capital, the right to enforce remedies against defaulting investors and the right to pledge assets to secure borrowings of the fund. While a general partner typically assigns to the lenders the general partner's rights under the LPA (and the lenders step into the shoes of the general partner upon a default to exercise those rights), it is also useful to provide that the lenders are express third-party beneficiaries of the LPA, so that the lenders may enforce the provisions of the LPA separately and apart from the rights given by the general partner.
- **Investment period.** Generally, LPAs contain an investment period, during which the fund and the general partner have the ability to call capital from the investors for certain purposes. The review of the investment period should determine when capital calls are permitted and for what purpose. A lender will want the right to call capital to repay fund indebtedness at all times, whether before or after the termination of the investment period. Some LPAs (whether because they are older-vintage LPAs and based on previous iterations of an LPA, or because of investor negotiation or otherwise) do not expressly permit capital calls to repay fund indebtedness after the expiration of the investment period, but instead permit capital calls only after the expiration of the investment period for follow-on investments, payment of fund expenses and for investments that have been committed to prior to the expiration of the investment period. In those situations, many lenders find comfort if the definition of fund expenses includes reference to the repayment of interest on the fund's debt.
- **Investment period termination.** Lenders should review LPAs to determine in what circumstances the investment period may be terminated. One provision that may impact the investment period is the so-called key man provision, which provides that the investment period may be terminated or suspended if certain named individuals are no longer involved in the day-to-day operations of the fund. While an investor vote may reactivate the investment period under the terms of the LPA, the agreement may also provide that, in the period prior to that vote, capital calls are permitted only to the extent they would be permissible after the expiration of the investment period.
- **Excuse or exclusion provisions.** LPAs usually also contain excuse or exclusion provisions, which permit investors to be excused or cause investors to be excluded from making capital contributions for certain investments or in certain circumstances. Lenders should understand these excuse and exclusion provisions and account for

them in the credit facility, including by ensuring that the capital commitments of the excused or excluded investors are not included in the relevant borrowing base.

- **Overcall provisions.** LPAs may also contain overcall provisions, which limit the ability of the fund to call capital from its investors to cover shortfalls created by other investors' failure to fund their capital commitments when called. These provisions generally work in one of three ways: (1) a limitation based on a percentage of the original capital called from that investor; (2) a limitation based on a percentage of the capital commitment of the investor; or (3) a limitation based on the investor's *pro rata* share of the concentration limit of the fund in that investment.
- **Percentage limitations.** LPAs (or investors) may also limit the percentage of a fund's aggregate capital commitments or capital contributions that a single investor's capital commitment or capital contributions may comprise. For example, an investor's capital commitment may be limited to no more than 10% of a fund's aggregate capital commitments. Overcall and concentration limits restrict the ability of the lenders to seek capital on a fully joint and several basis among the investors, increasing the risk that an investor default may affect the lenders' ability to be fully repaid. Ultimately, the strength of the fund investors, the advance rates with respect to investors included in the borrowing base, and the number and aggregate commitments of the investors not included in the borrowing base, among other things, may help allay those concerns.
- **Remedies against investors.** LPAs should provide for strong remedies against investors that have failed to satisfy capital calls, in order to strongly deter investors from failing to fund capital, and also to provide a mechanism for addressing investor defaults.

Finally, LPAs often permit the general partner to engage an investment manager (usually an affiliate) to source and advise on potential investments. The role of an investment manager may be substantially broader, however. Under the Management Agreement, the investment manager may be delegated or assigned the right to call capital from investors, pledge the assets of the fund, and exercise remedies against defaulting investors. Lenders and counsel should review any Management Agreement to understand the precise role and powers of the investment manager. If an investment manager has been delegated or assigned the right of the general partner under the LPA, that entity should be included as a party under the applicable security agreement and, potentially, the credit agreement, in order to cover each entity or person that has rights in the collateral securing the private equity capital call facility.

Next Step: Review investor subscription agreements for material information about the investor and its investment in the fund

Subscription agreements are generally form agreements entered into by each investor in a limited partnership. Typically, an investor will subscribe to a fund as a limited partner, although an investor may also subscribe as a member or other equity holder. No matter how an investor subscribes to a fund, the subscription agreement will provide key information regarding the investor, which a lender should confirm in performing a diligence review. By executing a subscription agreement, an investor is agreeing to its rights and obligations in a fund's LPA, and is making representations and warranties to the fund, including confirmation that it is qualified to invest in the fund.

Investors typically must fill out an investor qualification statement or other investor questionnaire, confirming that the investor is qualified under applicable laws to invest in the fund, and providing supplementary information and appropriate representations required by the sponsor. Lenders and counsel should review subscription agreements for material information about the investor and its investment in the fund:

- **Legal name of the investor.** The legal name of the investor should be provided in the subscription agreement. Occasionally, investor lists provided by a fund manager include abbreviated names, which lenders should cross-check with the subscription agreement and confirm with the fund manager, to ensure the list is consistent with the subscription agreements.
- **Capital commitment amounts.** The amount of capital committed by the investor is provided in the subscription agreement, and the list of investors provided by the fund manager typically indicates the total commitment pledged by each investor. This commitment amount on the list of investors should be verified by checking the investor's subscription agreement, and any discrepancies should be addressed by the fund manager.
- **Acceptance of pledges.** The general partner of the fund should explicitly accept the capital commitment pledged by an investor. In the absence of an executed subscription agreement confirming the investor's subscription in the fund, the lender should follow up with the fund manager to confirm that the general partner has accepted the investor and to request a copy of a fully executed subscription agreement. Without general partner acceptance, the investor commitment may not be enforceable.
- **Parallel or feeder funds.** A fund may occasionally have parallel or feeder funds that may be parties to the credit being extended by a lender. A subscription agreement should identify to which fund the investor has pledged its capital commitment. Sometimes, an investor may have more than one subscription agreement if it is investing in multiple funds that will be borrowers under a credit agreement.
- **Subscription agreement review.** Lenders and counsel should perform a general review of the subscription agreement to ensure that there are no provisions in the subscription agreement that may be adverse to a lender, such as any limits to an investor's obligations to fund its commitment. These are more often found in side letters.

Remember to check for and review side letters

A side letter is an individual agreement between an investor and a fund that alters the general terms of the investor's investment in the fund by superseding some of the applicable terms in the LPA or subscription agreements, or by adding additional terms to such agreement between the fund and the investor. Certain investors require side letters because of regulatory or tax requirements that are specific to such investor. Other investors, particularly investors with large capital commitments, may request special economic or other benefits as a condition of their investment.

Due diligence review of side letter agreements should focus on terms that could adversely affect the lender's rights to payment under a credit facility with the borrowing fund. Terms in side letters that restrict an investor from funding, or that limit its obligations to fund, capital commitments are of particular concern. The most commonly found provisions that could affect an investor's obligations to contribute its capital to a fund include:

- **MFN provisions.** Most Favoured Nation provisions specify that the fund agrees to give the investor the best terms it makes available to any other investor. Lenders should be certain to review all agreements to determine which side letters provide the most favourable terms and whether other side letters, as a result of their MFN provisions, automatically adopt the more favourable terms. MFN provisions will often specify exceptions or will limit their application. For example, they may: restrict the time that an investor has to adopt provisions from another side letter; provide that an investor must accept all provisions of a negotiated package of provisions; or limit adoption of certain terms of another investor's side letter that are specific to such investor's tax, legal, regulatory or policy requirements.

- **Capital commitment size.** Certain investors seek to maintain a minimum amount of voting power within a fund. To accommodate these investors' needs, side letters provide that the amount of an investor's total commitment will be determined by the total amount of capital commitments provided to the fund or in comparison with other large investors' capital commitments. Typically, the side letter will require that an investor's capital commitment be maintained no lower than a determined percentage of the total size of the fund, up to a certain amount.
- **Investment policy exceptions.** Different investors have policy considerations when committing capital into a fund, and will require side letters to memorialise their policy exceptions. Typically, but not exclusively, government pension funds will have state-specific restrictions on contributing capital for investments in companies that directly or indirectly do business with certain countries or certain industries that may be politically controversial. These concerns can be addressed in the loan documentation by, among other things, providing for the exclusion of such investor's capital commitment from the borrowing base calculation for loan requests that are based on investments in such excepted investments.
- **Transfers to affiliates.** Most side letters will allow an investor to transfer its interests to its affiliates. These transfers are typically subject to the satisfaction of the general partner of the fund and the general partner's subsequent consent to the transfer, however. The transfer provisions will also typically provide that satisfaction by the general partner will be determined by, among other things, the general partner's reasonable determination that the affiliate transferee is financially capable of committing capital to the fund. Transfer provisions in the side letter may also accommodate circumstances in which state legislation may trigger the transfer provisions of the limited partnership agreement and, under such circumstances, deem the general partner to have consented to such transfer.
- **Sovereign immunity.** Government entities, such as public pensions and sovereign wealth funds, may have immunity from contract claims and other lawsuits unless they waive their immunity. Sovereign immunity provisions may provide for a waiver or may reserve the rights of such investors to waive their immunity. Some jurisdictions may not permit waivers of sovereign immunity except through legislation. Other jurisdictions waive sovereign immunity if an investor is engaging in "commercial acts". Lenders should be mindful of different jurisdictions' sovereign immunity laws and how they may affect an investor's obligations to contribute capital to a fund.
- **Pay-to-play.** As a response to corrupt practices in the use of placement agents in connection with governmental investors, state legislatures and other regulatory agencies have begun to restrict or ban the use of such placement agents to limit "pay-to-play" abuses that have resulted from their use. Pay-to-play schemes typically result in the payment to place agents or other intermediaries by a fund to steer investments to the fund, which can sometimes violate laws or regulations, particularly when the

investor is a government entity. Typically, side letters will provide a representation from the fund that it has not used a placement agent to obtain the investor's investment, and that no payments were made to any employee, affiliate or advisors of the investor to obtain an investment. Different jurisdictions will vary in the remedies available in the event of a pay-to-play violation, but these remedies could be as severe as providing the investor the right to cease making capital contributions.

- **Overcall and concentration limits.** Overcall provisions (discussed above in the context of LPAs) limit the amount an investor is obligated to fund to cure the shortfalls created by another investor's failure to fund its called capital commitment. Concentration limits restrict a single investor's total capital commitment or capital contribution to a percentage of the aggregate capital commitments or capital contributions of all investors. Like an overcall provision, a concentration limit could restrict a lender's expectations that the commitments of all investors are available to repay an extension of credit under a loan facility.
- **ERISA.** ERISA regulations restrict how much of an interest an employee retirement pension plan can own in any class of equity interests in a fund before the fund is considered a "plan asset" under ERISA. If the fund is a plan asset, the manager of the fund is deemed a fiduciary of each ERISA investor in the fund, which would require the fund manager to comply with additional regulations under ERISA that could significantly curtail its investment strategies. Investors may have provisions in side letters that provide them with the right to exit a fund in the event that the fund is deemed a plan asset.

Evaluate creditworthiness of investors and consider requesting guarantees from creditworthy affiliates, if appropriate

Lenders should confirm the credit ratings of each investor. On occasion, an investor in a fund may be an affiliate or subsidiary of a more creditworthy entity. If, after its diligence on the creditworthiness of the investor, a lender is concerned with the investor's ability to contribute its capital to the fund, the lender should request a guarantee from a more creditworthy affiliate, ideally in the form of a guarantee agreement that ensures that the more creditworthy affiliate will be obligated to contribute capital to a fund in the event its affiliate investor is unable to make the requisite contribution. Creditworthy entities may balk at these guarantees, however, and may agree only to provide comfort letters affirming the relationship of the entities to the investor or their acknowledgment of the investor's obligation. Jurisdictions differ on the enforceability of these letters, and a lender should consider whether (and to what extent) to include an investor in its borrowing base calculations, depending on the amount of support that its more creditworthy affiliate is willing to give.

Additional due diligence: Review private placement memorandum, financial statements, SEC filings; conduct UCC and other searches

Lenders should consider reviewing other materials that can help assess a given fund's creditworthiness and enhance the credit and risk analysis of the underwriting process.

- **Offering or private placement memorandum.** While the offering or private placement memorandum is not executed by any investor in the fund and is not a source of any of the obligations, rights or privileges associated with an investor's investment in the fund, lenders will typically include a review of this memorandum as part of their initial due diligence because it provides a broad overview, in plainer language, of the fund's business, objectives, strategies and material terms. The memorandum, part of the marketing materials provided to potential investors, typically includes the fund's investment strategy and objectives; the past investment performance of the general partner or investment manager or advisor; a broader discussion of the fund's applicable market; the management structure of the fund; key and/or material terms of an investor's investment in the fund; risk factors associated with an investment in the fund; and certain legal and tax considerations for investors considering investing in the fund.

- **Financial statements and communications.** If the fund is already operating, lenders should review available financial statements of the fund and request copies of communications sent to investors. Similarly, once they provide a fund with a subscription credit facility, lenders commonly require that they be provided copies of all financial reporting and other communication provided to investors by the fund, general partner, investment manager or investment advisor.

SEC filings

The Dodd-Frank Wall Street Reform and Consumer Protection Act obligates the manager or investment advisor of certain funds to make particular filings with the SEC, which are also a valuable source of information for lenders both before and during the term of a subscription facility. In particular, the SEC requires that fund managers register as investment advisors under the Investment Advisors Act, unless exempt from registration under either the private fund exemption or the venture capital fund exemption (both of which apply to domestic fund advisors). The private fund exemption is available to managers that manage only private funds (defined as having either 100 or fewer beneficial owners, or beneficial owners all of which are qualified purchasers) and that have no more than $150m under management in the United States. The venture capital fund exemption applies to funds that represent to their investors that they pursue a venture capital strategy and meet certain technical requirements.

Private fund managers and venture fund managers must file a Form ADV annually and are subject to SEC examination. The form includes extensive information regarding: the advisor; its business, business practices, personnel and clients; and the people whom it controls and who control it. In addition, the form requires disclosure of the disciplinary history of the advisor and its personnel for the previous 10 years.

- **Uniform commercial code searches.** At an absolute minimum, lenders should order UCC searches from the applicable governmental authority in each jurisdiction in which a pledgor of the subscription facility's collateral is organised to confirm that there are no intervening liens on said collateral.
- **Other information searches.** Lenders often will conduct searches of other public and governmental filings, databases, and records, including non-UCC lien searches (that is, tax and other liens), bankruptcy filings, judgment filings, litigation filings, PATRIOT Act filings, and certificates of status/standing and qualification to do business. These searches are all part of a comprehensive risk and credit analysis.

Request standard loan closing documents

In addition to reviewing the organisational documents of the fund and its agreements with its investors, lenders typically require that certain standard loan closing documentation be delivered in connection with any closing of a subscription credit facility. Very generally, these deliveries serve to confirm that the fund, and those of its affiliates that are party to the various loan documents, have the power and authority to enter into and perform under the documents, and that the documents have been duly authorised and executed. In particular, a lender will typically require:

- **a standard secretary's or closing certificate** by the fund and each applicable affiliate, which includes, among other things, resolutions and/or consents of the fund and the applicable affiliates, whereby the fund and its applicable affiliates are authorised to enter into the loan documents and perform thereunder;
- **copies of all the organisational documents of the fund** and the applicable affiliates, along with a representation and warranty that such organisational documents have not been modified or amended in any manner;
- **incumbency certificates** for each person who is authorised to execute the loan documents on behalf of the fund and its applicable affiliates; and
- **certificates of good standing or status** from the applicable governmental authority in the fund's and applicable affiliates' respective jurisdictions of formation or organisation.

Conclusion

As these summaries of the various due diligence tasks illustrate, subscription lending is a document-intensive endeavour. Lenders and their counsel look to build a complete structure of legal agreements to give lenders a clear path to realisation of the underlying basis of their credit: the unfunded capital commitments of the fund's investors. While due diligence involves quite a bit of work, these facilities are so strong, and the credit so diverse, that no major subscription credit facility lender has had to enforce its rights in a default scenario. This is a testament to the inherent strength of this lending product. As long as lenders and counsel dot the i's and cross the t's in the due diligence process, it should stay that way.

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The authors acknowledge with thanks the contribution to this chapter of:

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