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The Forgotten LPA Amendment

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A fund is a living, breathing organism that aims to achieve much more than being a vessel for a subscription credit facility. The limited partnership agreement ("LPA") of the fund may have to be amended, restated, supplemented or otherwise modified from time to time to: address changes in the regulatory environment or legal requirements; respond to requests from limited partners; reflect changes in the fund's investment strategy; clarify ambiguities in the LPA; allow for the sale or transfer of the fund's assets; optimize tax efficiency for the fund and its investors; or change carried interest or management fees. Whatever the reason for the amendment, syndicated credit agreements typically contain a covenant that requires the borrower to notify the administrative agent of an amendment so that the administrative agent may determine whether or not such an amendment is material and therefore requires lender consent. This article focuses on common covenant language – there may be some nuances and deviations from the typical process outlined below.

For a fund (and its counsel), the first step after an LPA amendment is drafted is to notify the administrative agent of the proposed amendment and request that the administrative agent determine whether or not the proposed amendment is a "material amendment." Although we are focusing on LPAs here, the covenant is generally broader and provides that no credit party shall alter, amend, modify, terminate, waive or change any provision of its constituent documents (which includes the LPA), any subscription agreement or any existing side letter without notice to the administrative agent.

Typically, a proposed amendment will be a "material amendment" if it (a) affects the debt limitations in the LPA or under the credit agreement; (b) affects the credit party's or investor's debts, duties, obligations, and liabilities, or the rights, titles, security interests, liens, powers and privileges relating to capital calls, capital contributions, capital commitments, uncalled capital commitments or any other collateral; (c) suspends, reduces or terminates any investor's unfunded capital commitments or obligation to fund capital calls; or (d) otherwise has a material adverse effect on the rights, titles, first priority security interests and liens, and powers and privileges of any of the lenders. The consent of the lenders and the administrative agent is

usually required within specific time periods if the proposed amendment is a "material amendment." Certain types of amendments may be expressly deemed not to be material under the credit agreement, and the consent of the administrative agent or the lenders may not be required. Such non-material amendments are usually limited to admission of new investors to the fund and to reflecting transfers of interests permitted by the credit agreement. However, written notice to the administrative agent of any such amendment is still generally required.

The credit agreement covenant may not be at the front of the minds of borrowers when a proposed amendment is considered that doesn't directly relate to the credit facility. Consequently, an amendment may be implemented without notice to the administrative agent. In such instance, the fund would be well advised to keep in mind Cadwalader partner Tim Hicks' article, ***Been There, Gonna Do That***, and note the distinction between a waiver and consent, which is aptly and succinctly summarized therein as "*a waiver is for the depravities already committed and a consent is when you need forgiveness for what you are about to do,*" and ask the administrative agent (and, if needed, the lenders) for a waiver.

Whether a waiver is granted, of course, will hinge on the materiality, from the lender's perspective, of the LPA amendment, and a borrower should be ready to see potential responsive revisions to the credit agreement. This brings the discussion full circle: The established process for obtaining lender consent prior to a material LPA amendment not only avoids surprises to the lender but can also spare the borrower from being caught off guard by unanticipated consequences for the credit facility.