

Subscription Agreements

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We have said it before – the “**credit cornerstone**” of a subscription credit facility is the limited partnership agreement (the “LPA”) – it is the primary contract, together with any side letters, governing the relationship between a fund and its investors. But does the LPA really mean anything if there are no investors subscribed to the fund? Enter the LPA’s most important sidekick, the subscription agreement.

While the LPA outlines the details of the relationship between a fund and its investors, the subscription agreement *creates* the relationship, i.e., the subscription agreement is the document that actually evidences: (1) the subscription of an investor to the fund for a limited partnership interest, (2) the investor’s capital commitment amount, and (3) the investor’s agreement to be bound by the terms of the LPA.

Contents of the Subscription Agreement

In its most simple form, a subscription agreement should always include the following key components: a page setting forth the investor’s identity and signature, pursuant to which the investor agrees to subscribe for a limited partnership interest in the fund for a specified capital commitment amount, and which is typically followed by a separate page with the general partner’s countersignature, evidencing acceptance of the investor’s subscription to the fund and its capital commitment amount. While the form of subscription agreement varies from fund to fund, the principal terms and the supporting disclosure documents found in subscription agreements tend to be similar and often include the following provisions:

- the “subscription agreement”, i.e., several pages of contractual language which outlines: (1) the terms and conditions by which the investor agrees to become an investor in the fund, (2) the agreement of the investor to be bound by the terms of the LPA, and (3) the agreement by the investor to make cash contributions to the capital of the fund, up to its capital commitment amount;
- an investor questionnaire, to be completed by the investor that provides, among other things, contact and notice details of the investor, wiring instructions, and other regulatory/legal information necessary for the fund to confirm compliance with the regulatory/legal regimes to which it is subject;
- a power of attorney, whereby the investor grants to the general partner a limited power of attorney to act on behalf of the investor with respect to its subscription in the fund; and
- numerous representations and warranties by the investor, including, without limitation, representations and warranties relating to the investor’s power and authority to enter in to the fund documents, the accuracy and completeness of the information provided in the subscription agreement, anti-money laundering and other regulatory compliance, and beneficial ownership.

Diligently “Diligencing” the Subscription Agreement

When “diligencing” a subscription agreement, the reviewing attorney is focused on: (1) who is subscribing to the fund and for what amount, and (2) confirming that the subscription agreement itself, on its face, is an enforceable contract. The investor signature page and investor questionnaire tells us what we need to know about the identity of the investor and its capital commitment amount. But confirming whether the subscription agreement itself is an enforceable contract takes us lawyers back to Contracts 101 – in order for any contract to be enforceable, there must be an offer and acceptance. The “offer” is evidenced by the investor’s signature page with its capital commitment amount, and the “acceptance” is evidenced by the general partner’s countersignature accepting the investor’s capital commitment to the fund. Diligence attorneys review to confirm that signature pages are in fact signed, dated and include a capital commitment amount. They also look to determine whether the subscription agreement sets forth any specific requirements for proper execution – this is oftentimes set forth in an introductory section outlining instructions for completion. If the introductory section specifies that ***all*** attachments must be properly completed and attached in order for the investor’s subscription to be accepted, the reviewing attorney will generally expect to see all completed attachments included.

Common Issues, From a Diligence Attorney’s Perspective

A diligence attorney’s review of subscription agreements is a critical component of any subscription facility. Oftentimes such reviews can be voluminous and time intensive, which means that the reviewer must be attentive to details and mindful of any curveballs that do come up during the review. A few common examples that reviewing attorneys should be aware of are briefly described below:

- *Proper Execution.* A diligence attorney does not investigate whether the investor signing a subscription agreement is in fact who they say they are, or whether they have the power and authority to enter in to the contract. However, the reviewer does review to determine that the subscription agreement is “properly executed”. This means confirming that the investor’s signature page is signed, dated and includes the proposed commitment amount, and that the general partner’s acceptance page is likewise signed, dated and includes an accepted commitment amount. A common issue that we see, occurs when the general partner’s acceptance page is dated *prior* to the investor’s signature page. One of the cardinal rules of contracts is that an offer must come before the acceptance (logically, you cannot accept something before it is offered). In these cases, the fund must provide updated signature pages showing the proper order of execution.
- *Complete Subscription Agreement.* As previewed above, it is the diligence attorney’s job to determine that the subscription agreement is *on its face* enforceable, which necessitates an understanding of what attachments are required in order for the subscription agreement to be considered fully executed and complete. For example, we sometimes see subscription agreements that require the investor’s signature page or power of attorney form to be notarized and/or witnessed. However, especially during the COVID-19 era, investors faced difficulties in completing these formalities and as a result, sponsors were waiving these requirements. In this scenario, a conversation is necessary between the diligence attorney and fund’s counsel to confirm that this formality was in fact, waived, and to further understand the impact (if any) on the enforceability of the subscription agreement.
- *Open for negotiation?* For ease of execution, funds typically have the same “form” subscription agreement that is provided to all investors. The form may differ slightly between different “types” of investors (i.e. U.S. vs foreign), but the idea is that this document generally is not up for material negotiation. Every once in a while, we will see hand-marked changes to the subscription agreement form. More often than not these kinds of changes are immaterial, but nonetheless, any changes must be reviewed and considered on a case-by-case basis to determine the impact on the subscription credit facility.
- *Which Fund?* Imagine this scene: its Friday night, and a team of diligence attorneys are tasked with over 1000 subscription agreements that need to be reviewed by Monday for a subscription credit facility closing that week. The team comes up with an organized plan to divide and conquer the review, and eagerly gets to work. About an hour into the review, one of the diligence attorneys makes an astounding discovery – some of the subscription agreements are to a fund that is not party to the credit facility as a borrower, guarantor, or pledgor. This is never a good scenario - the issue is that for an investor to be included in the borrowing base, rights to that investor’s capital commitment must be pledged to the subscription lender. If the fund is not party to the facility in some capacity (as a borrower, guarantor, or pledgor), there is no pledge. In this scenario, you will likely find a frantic fund’s counsel facing a subscription lender with two choices – not include the investor’s commitment in the borrowing base, or require the fund in question to join the credit facility.

- *E-Signatures*. Another post-COVID phenomenon is that more and more investors are executing their subscription agreements electronically. E-signatures are becoming generally accepted, but diligence attorneys run into issues when investors use e-signature platforms that omit the typical information required to confirm enforceability (i.e., a date and signature). Platforms like DocuSign are usually non-problematic, as the program typically populates a signature with the date provided next to it, or there is a separate signature certification page at the end of the document stating when and by whom it was signed. However, some e-signature platforms do not include a signature or date – they may just state “e-Signed by [Investor Name].” In cases like these, we can typically get comfortable if there is a separate certification page providing the signature date. If no such page is included, the subscription lender will likely require an updated signature page including the date. On a related note, we have also recently run into issues with e-signature platforms that provide a signature certification page, but in a foreign language, preventing the diligence attorney from confirming the execution date. We attempt to resolve this issue by requesting a translated page, or requesting the fund and investor to reopen and re-date the applicable signature pages. Ultimately, the issue of the acceptability of e-signatures generally turns on the subscription lender’s comfort level with e-signatures generally, the information provided by the e-signature platform, and whether e-signatures are permissible under the subscription agreement itself.

Conclusion

The good news is that more often than not, the discussion around and review of subscription agreements for purposes of a subscription credit facility is pretty uneventful. With that said, the subscription agreement’s function for the fund (and in turn, the subscription credit facility), should not be minimized – each is obsolete without the other and should be considered carefully.