

FUND FINANCE FRIDAY

Subscription Finance Loan Agreement Series – Part 4

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By Tom Armstrong
Senior Attorney | Fund Finance

Continuing our series on subscription credit facility agreements, this week we focus on the suite of documents entered into in connection with a subscription financing. We also consider the fund documentation that must be reviewed by lenders and their counsel. These documents are usually set out in a facility agreement in the definitions of the terms “Finance Documents” and “Fund Documents” (or similar).

The term “Finance Documents” should include almost all documents entered into between the finance parties and the obligors and will include the facility agreement, security agreements, fee letters, obligor accession agreements, and (to the extent relevant) hedging agreements. As will be discussed later in this series, the security agreements will include, at the least, security over the fund’s rights in relation to the capital commitments of its investors and security over bank accounts into which investor capital is paid. Any additional guarantees or powers of attorney granted by the obligors in favour of the finance parties should also be included as Finance Documents.

The “Fund Documents” that are relevant to a subscription credit financing will depend on the type of obligors that are entering into the financing. Most commonly, obligors will be limited partnerships, whose powers, activities and governance are set out in a detailed partnership agreement. Other types of entities will have different formation documents. Lenders and their counsel must diligence the fund structure carefully to ascertain which entities are relevant to them and what documentation must be reviewed. In addition to the formation documents of borrowers and guarantors, it is usually also necessary to review the formation documents of any general partners, GPCOs and managers to ensure that those entities also have the powers and authorities necessary to enter into the financing.

In addition to obligor formation documents, the documents under which investors commit to provide capital to a fund are central to a subscription financing. These documents (which usually include a subscription agreement or equivalent and, if there are additional terms agreed upon between individual investors and a fund, also a side letter) must be carefully reviewed by

lenders' counsel and covered by the terms of the financing documentation. Finance parties must be satisfied with the terms of those documents, including, in particular, the identity of the investor, the subscription amount, any limits on an investors' commitment as a percentage of the overall fund, excuse rights, overcall limitations, dispute resolution provisions, immunity provisions, drawdown mechanics and any borrowing or security limitations.

Any offering or investment memorandum will also be relevant to a lender. Although this is not a contract which is executed by the investors, it is a central part of the marketing documentation provided to investors, and they will have invested in a fund partly on the basis of its contents. As such, it is important that finance parties are satisfied with it.

In addition to the obligors' formation and investor commitment documents, any separate documents dealing with the operation and management of the fund must also be reviewed. Frequently, day-to-day management of a fund will be delegated to a manager, and this entity may be granted powers to borrow and grant guarantees and security on behalf of a fund and, crucially from a lender's perspective, may have been delegated the power to make and enforce investor capital calls. Any management agreements must be reviewed, and the documents, and the manager itself where appropriate, will need to be covered by the Finance Documents.

Finally, if a fund has any investors of particular importance to a lender, or that have committed to provide a substantial percentage of the total capital commitments, a lender may insist that those investors enter into investor letters. Under such a letter, the investor expressly acknowledges the subscription financing and the related security.

All of the above Fund Documents must be reviewed by finance parties' counsel to ensure that the subscription financing can be entered into by the fund, that the appropriate entities enter into the finance documentation, and that robust and enforceable security is provided to the finance parties. In addition, the Finance Documents must include representations and warranties and undertakings, including: that all relevant Fund Documents have been disclosed, are in full force and effect and are binding on the obligors and investors, are true and accurate, and are being complied with. There is often a debate as to whether any offering memorandum or similar should be included as a Fund Document in the representations and warranties, given that it is a marketing document and often not in itself legally binding once the full partnership agreement or similar has been completed. Given the reliance that will be placed on it by investors, we would generally recommend that it is.

Subscription financing requires a substantial amount of documentary due diligence and that a broad range of fund documents are covered by the terms of the Finance Documents. When lending against the right of a fund to call for capital contributions from investors, it is crucial that a lender fully understands the nature of the investors' commitment. This requires knowledge of the structure of the fund, the terms on which investors commit to the fund, the relationship between the fund and its management, and the ability of a fund to provide robust, enforceable security. All of these elements must be reflected in the Finance Documents generally and particularly in the subscription facility loan agreement.