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FUND FINANCE FRIDAY

Subscription Finance Loan Agreement Series, Part 15: Information Undertakings

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In common with many other LMA facilities, subscription/capital call facilities include standard information covenants relating to provision of general financial information (in particular, annual and quarterly accounts), provision of compliance certificates and other specific “information” covenants covering other matters. However, they also differ from other LMA-based facilities in a number of respects. This article in our series seeks to summarise the main areas of difference and the considerations which apply in particular to this part of the subscription/capital call facility.

Before noting the differences, let’s start with something that is pretty similar. This is the requirement to produce audited or unaudited accounts of the various obligors on a periodic basis, and here the subscription/capital call facility is very similar to other LMA facilities in that annual audited accounts (sometimes consolidated) will be required to be produced within a period of usually somewhere between 120 and 180 days after the financial year-end, with quarterly (unaudited) accounts being required to be produced within a period of somewhere between 30 and 45 days after the end of the financial quarter to which they relate. Compliance certificates will also be required to be produced alongside the production of the annual or quarterly accounts.

After that, the terms of a subscription/capital call facility start to diverge. Because the issue of what investor commitments remain available for repaying the facility is so fundamental to these facilities (and because of the number of situations in which a change in the level of that availability can occur), it is quite normal for lenders to request certification particularly in respect of investor commitments at much more frequent intervals than, say, the requirements for financial information to be updated in a leveraged finance facility. So, in addition to the production of compliance certificates with the annual and quarterly financial statements, lenders will very often ask for additional certificates to be produced on every occasion on which there is a utilisation or a change in the level of availability. That can mean that the borrower has to produce certificates whenever an investor is excused, withdraws, defaults on its commitment or pays in any part of its commitment, because all of those events will change the level of the available commitments of investors. Where the subscription/capital call facility is based on the concept of an investor borrowing base, then the compliance certificate will often be combined with (or even replaced by) the production of a borrowing base certificate. The “borrowing base” model may also create additional circumstances in which a fresh certificate is required – for

example, on a change in the ratings treatment (or equivalent) of any particular investor. All of this creates an obvious strain on the resources of any borrower, so we would expect some negotiation of these requirements, particularly around the frequency with which certificates are required and/or the level of materiality needed to trigger the requirements.

Moving on to the more “general“ (*i.e.*, non-financial) information covenants, again, a number of these are very specific to these types of facilities and are aimed squarely at ensuring that the lenders have as much current information as they need to assess the level of the investors’ commitments, the likelihood that they will honour those commitments if called and the ability to enforce their security over the investor commitments if things turn out that way. So, the covenants will almost always include general requirements that information provided to investors generally also be provided to the lenders under the facility (although this is often negotiated so as to impose some sort of “materiality” on such requirement). They will also often include a requirement that the lenders are informed of (and even receive copies of) all drawdown notices served on investors, as well as notice of any changes or amendments made to any underlying fund documentation (although this is also often the subject of a negotiation as to what is or is not a “material” amendment). The covenants will also cover any factors directly affecting the investor base, including transfer, withdrawal and/or addition of investors, as well as information on any excused or defaulting investors and information on any investors exercising or claiming rights of set off or counterclaiming in respect of their commitment obligations. Finally, covenants will be included to ensure that, if it comes to it, the lenders can properly and quickly enforce their security. These covenants will consist of (a) requirements for updates when they occur to any investor’s contact details; and (b) where the investors have included additional conditions (for example, in side letters) as to the information a drawdown notice must contain or as to the format of any drawdown notice covenants covering the provision of the information required to enable the lenders to comply with any such conditions if they need to issue drawdown notices under the security.

All of the above will be in addition to other more “standard” information covenants that one would expect to see and which are common to a number of other LMA-based facilities – for example, requirements on the borrower to provide information on legal proceedings or other claims or judgments against the fund borrower and other fund parties such as the general partner or manager (as applicable) and general requirements for the fund borrower to provide any information relating to any potential default.

In reviewing and negotiating information covenants, lenders should consider all of the factors referenced in this article but also should be aware that there is a balance to be struck in negotiation between what is necessary and the extent to which the imposition of such covenants imposes additional administrative demands on the borrower.