CADWALADER

FUND FINANCE FRIDAY

Coming Down the Homestretch

December 4, 2020 | Issue No. 105

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Thinking about (Non-Fund) Arrangements for the Holidays and Dinner with the In-(PF)Laws

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By Derek Stenson
Partner | Conyers

By Michael O'Connor
Partner | Conyers

As mentioned in the most recent edition of *Fund Finance Friday,* the Cayman Islands Monetary Authority ("CIMA") has recently issued its Statement of Guidance on Non-Fund Arrangements (the "SOG").

If you are having a busy December and want to think less about Cayman issues, you can do so – the SOG doesn't introduce any substantive changes to how the market has been operating and classifying entities since the coming into effect of the Private Funds Law ("PF Law"), and it won't have any material effect on the way transactions have worked where the issue is of relevance.

All information is good information, however,* and those who have been involved in discussions on transactions about whether and why certain entities are classified as non-fund arrangements may be interested to see the views CIMA holds on the various categories.

**Not a real saying, but when in Rome!*

What do lenders need to know about the SOG and what aspects are applicable to fund finance?

The SOG is essentially CIMA's high-level views on what type of vehicles are likely to meet the categories of non-fund arrangements listed in the Schedule to the PF Law (and any vehicle that falls within one of these categories is not required to register with CIMA under the PF Law). It is important to note that the SOG does not, and is not intended to, provide definitive views on each and every vehicle, and so the position remains as before: that each entity must be examined in its own right and merits for whether its intended purpose and effect is a "private fund" or it is a "non-fund arrangement."

Most of the categories in the SOG will be of little relevance to fund finance (insurance vehicles, debt issuance vehicles, securitization vehicles, etc.), but some of the categories (most notably, holding vehicles and proprietary vehicles) do have relevance to certain vehicles that arise in private equity structures. The additional detail in this regard is to be welcomed, and while it will not answer every question in each case (and so is unhelpful to be included here in the abstract), it will provide some concepts within which certain vehicles can clearly be classified.

While the SOG is relatively new, the market reaction to date has been that the guidance contained in it is broadly in line with what was expected and is consistent with how such vehicles have and continue to be classified by Cayman Islands practitioners.

Do lenders need to ask any additional questions of borrowers?

Our advice to lenders to date has been that where a Cayman Islands credit party is not registered with CIMA, this should be queried, and this advice remains the same. In instances where a non-fund arrangement arises in a borrower's structure, our advice continues to be that the borrower's Cayman counsel should confirm which category of non-fund arrangement is applicable (and, in our experience, this has become customary). The SOG provides additional detail and will be of use in any discussions where clarity is sought between borrower and lender counsels in seeking to finalize transaction due diligence but, aside from enlightening such conversations, the SOG should not pose any more transaction steps for lenders or borrowers to concern themselves with.

‘Fund Finance Friday: Industry Conversations’ — LIBOR Transition Update with Cadwalader’s Jeffrey Nagle (10 Minutes)

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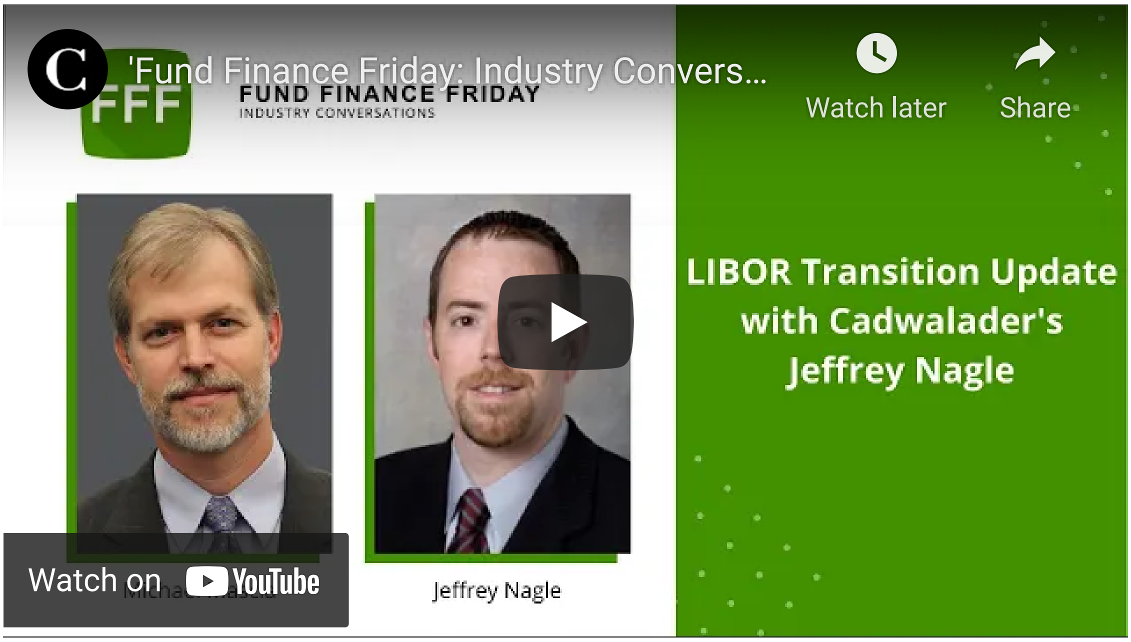
In today’s *Fund Finance Friday: Industry Conversations*, Jeff Nagle of Cadwalader’s LIBOR Preparedness Team joins Mike Mascia and gives a plain-English summary of what a fund finance banker needs to know about this week’s LIBOR transition updates from the ICE Benchmark Administration and the U.S. and UK regulators.

If you cannot access the video below, please **click here**.



Diversity in FF – Career Panel and Next Meeting

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By Natasha Puri
Vice President, Financial Institutions North America | Lloyds Bank

This week, the Diversity in Fund Finance group had its second career panel event with **PENCIL**, the NYC-based non-profit whose mission is to provide New York public school students with access to relationships and opportunities with business professionals. After our first participation in the organization's career panel series in the summer, PENCIL invited us again to its virtual programming.

Kevin O'Hara, Director at Lloyds Bank, Gregory Paul, Business Development Director at Morgan Stanley, and Albert Tan, Partner at Haynes and Boone, participated in the virtual career panel focused on various career topics, including the importance of affinity groups. Kevin began his career at Standard Bank South Africa in securitization and predictive modelling before transitioning to Lloyds, where he is part of the Sponsors & Structured Finance team. Greg started as an analyst in MS's Corporate and Institutional Solutions group before moving into its Private Wealth Management Division. Albert has been at Haynes and Boone for 26 years and serves on the firm's Board of Directors and as Co-Chair of the Fund Finance Practice Group. The unique background of each panelist was well-received by the students, who were able to learn and ask questions and obtain general advice as they think about their future. The students appreciated the honest thoughts and varying backgrounds that each panelist had to offer to the session. We look forward to our continued partnership with PENCIL for more volunteer opportunities in 2021.

A friendly reminder that the Diversity in Fund Finance group is also holding an open committee meeting on Friday, December 11 at 12:30 p.m. EST. If you are interested in learning about our group, want to be part of planning future events and would like to join the meeting, please email **Michelle Bolingbroke** or **Natasha Puri**.

Appleby Reviews Emerging Trends Identified at the FFA Virtual Symposium

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Appleby recently published an overview of emerging trends discussed during the Fund Finance Association's Virtual Symposium with regard to the European, Asian and global fund finance markets. The trends highlight the role that ESG policies continue to have, emerging alternatives to the Cayman exempted limited partnerships in Asia, and developments for diversity and inclusion within private equity firms and law firms. Click **here** to read the full article.

Mourant’s Top ‘Take-Aways’ from the Fund Finance Virtual Symposium

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Read **here** for Mourant’s top take-aways from the Fund Finance Association's 2020 Virtual Fund Finance Symposium, which featured panels from across the globe to discuss market trends with a focus on European, Asia-Pacific and global perspectives.

Brickfield Article on 2020 Hiring

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Brickfield Recruitment has posted an article on its website discussing the state of the fund finance market in 2020 from a recruitment perspective. The article covers the global perspective and looks at trends in the U.S., UK, Europe and Asia as well as anticipating 2021. To review, click **here**.

Fifth Installment of Wildgen Fund Finance Webinar: ‘2021 Banking Perspectives’

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Tune in to the fifth session of Wildgen’s Fund Finance Webinar Series hosted by Michael Mbayi. Michael is joined by industry leaders Richard Braham (Commonwealth Bank of Australia), Sarah Elliot (National Australia Bank Limited), Nick Mitra (Natixis), and Julie Thick (J.P. Morgan) as they discuss several market perspectives for 2021, including for the U.S., Europe and Australia.

Register for the webinar **here**.

FFA Announces European FFA University

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The Fund Finance Association has announced the first edition of its European FFA University Program. The full-day event is scheduled for Thursday, February 4, 2021, from 9 a.m. to 6:30 p.m. London time. Similar to its U.S. counterpart, the European program sessions will be designed for fund sponsor treasury teams, bankers and lawyers looking for an in-depth training opportunity. Registration information, event pricing and the detailed agenda will be forthcoming. Save the date!

Private Equity Increasingly Navigates Liquidity Challenges with NAV Solutions

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The Drawdown has published an interview with Doug Cruikshank, the head of fund financing and Hark Capital at Aberdeen Standard Investments. *The Drawdown* editor Alice Murray's discussion with Cruikshank highlights the liquidity challenges faced by private equity firms in 2020, focusing in particular on the evolution of the NAV facilities market. The article also addresses the importance of flexible financing solutions in the context of COVID-19 and forecasts the impact that a new wave of the virus would have on private equity and fund finance. To read the full article, click **here**.

Appleby Article on Offshore NAV Considerations

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In its most recent "Offshore Business Update," Appleby published an article that looks at the common local law issues that arise in NAV financings and provides a jurisdiction-by-jurisdiction guide covering Bermuda, BVI, Cayman Islands, Guernsey and Jersey. The article is available **here**.

A General Overview of Portfolio Finance – ‘17Capital: Strength in Numbers’

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While most banks offer fund finance options through subscription credit facilities, which are primarily geared toward the earlier stages of a fund’s term, there are now a growing number of lenders offering a different kind of finance option for later in a fund’s life in the form of preferred equity or NAV finance called "portfolio finance." Portfolio finance is an asset-based form of finance available to an owner of a portfolio of private investments that want to raise capital based on their projected cashflows from that portfolio. To learn more about the basics and where 17Capital managing partner Pierre-Antoine de Selancy thinks the portfolio finance market is headed, **click here**.

Best Named Rising Star by Super Lawyers

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Cassandra Best of Cadwalader's fund finance team in New York has been named to the New York Metro Edition of *Super Lawyers* as a "Rising Star" based on her excellent work for her lender clients, her commitment to diversity and inclusion, and her contributions to the Fund Finance Association's Next Gen Network.

Congratulations, Cassandra!

Outside the Lines: A Conversation with Doug Fischer, General Counsel of Greenlane Holdings, Inc.

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Outside the Lines

By Katie McShane
Associate | Fund Finance

By Doug Fischer
General Counsel | Greenlane Holdings, Inc.

In 2019, the U.S. legal cannabis industry generated an estimated $13.2 billion in sales across all medical and adult-use state markets, according to cannabis analytics firm New Frontier Data. Arcview has estimated that cannabis sales are expected to climb to $46.8 billion by 2025. This staggering growth is clearly attractive to many investment funds who are eager to get in on the action and many law firms, including Cadwalader, have active cannabis finance advisory practices.

Despite broad investment interest, cannabis remains illegal at the federal level, meaning that many investment funds and banks are hesitant to partake for fear of violating anti-money laundering laws.

Reform does appear to be coming: as of November 2020, cannabis is legal in 35 states and in D.C. for medical and/or recreational purposes, while Canada fully legalized marijuana in 2018, and Mexico looks to follow suit.

This week, we invited Doug Fischer, General Counsel of Greenlane (NASDAQ: GNLN), (arguably) the first ancillary cannabis business to do an IPO on a major U.S. exchange, to discuss this booming industry and some of the associated risks.

Fund Finance Friday: Welcome, Doug, and thank you for "joining" us today. Before jumping into the main discussion, could you please tell us a bit about yourself, and, in particular, how you found your way from Cadwalader to where you are today?

Doug Fischer: My practice at Cadwalader was mostly in the white collar space. Within that practice, I spent a good amount of time working on anti-money laundering matters and controlled substances regulation, both of which are quite relevant to working in the cannabis industry. Around 2013, I saw investor interest in the cannabis industry growing rapidly and recognized an opportunity to apply my knowledge to a new, entrepreneurial space that I truly believe in. I set out to learn more about the industry and develop the right professional network. Cadwalader partner Jodi Avergun was an amazing mentor as I pursued that opportunity. During my time at Cadwalader, my colleagues and I (Jodi, Ira Schacter and others) were fortunate to work with a few clients that were ancillary to the cannabis industry. Working with those clients confirmed my beliefs that cannabis was about to go mainstream and that I would enjoy working in the industry. In 2017, I left Cadwalader to join a cannabis regulatory technology startup that had been a client. I stayed at that position for about a year and a half before moving into my current role.

Could you tell us a bit about Greenlane and your role there as GC?

Greenlane is the leading global platform for the development and distribution of premium cannabis accessories and lifestyle products. Our offerings include vaporizers, glass, child-resistant packaging, rolling papers and lifestyle goods. We distribute both Greenlane's owned brands and third-party brands to over 11,000 retail locations. Greenlane's owned brands include Pollen Gear child-resistant packaging, the K.Haring Glass Collection by Higher Standards, Marley Natural, and VIBES rolling papers. Additionally, we're the distribution partner of choice for many other industry-leading brands, including PAX Labs, Storz & Bickel (Canopy-owned), Cookies, Grenco Science and DaVinci. We also own and operate Higher Standards retail stores in New York City's Chelsea Market and Malibu, California, as well as Vapor.com and VapoShop.com, two industry-leading, direct-to-consumer e-commerce platforms in North America and Europe, respectively.

Like most GCs in heavily regulated industries, compliance is a top priority. I view compliance as both a challenge and an opportunity. Obviously, it's a lot of work to keep up with regulations that shift almost daily. But each novel situation also presents an opportunity – Greenlane gains a big business advantage every time we figure out how to engage in new activities or bring new products to market compliantly. M&A is another priority. There's a rapid consolidation taking place in the cannabis industry, and Greenlane intends to be active. Finally, intellectual property has taken on an increasing importance to Greenlane and the industry as a whole. As Greenlane rolls out new, differentiated products and brands, we need a strong IP portfolio to protect our business. The rest of my time is spent dealing with all the issues you'd expect for a company of our size, including securities and corporate governance, commercial contracts, employment, litigation, insurance and data privacy.

I note that Greenlane went public in 2019. What issues did you face during the IPO given where the law currently stands? Did you "pave the way" for other cannabis businesses going forward, or were you able to "piggy-back" on any precedent?

The stock exchange and our underwriters had to be comfortable that Greenlane complies with applicable laws. We were fortunate that all the parties involved truly saw the opportunity in the space and wanted to learn about the legal landscape for ancillary businesses in light of cannabis itself still being a controlled substance. We were fortunate to have great advisors that helped educate everyone involved.

I wouldn't use words like "pave the way," which I reserve for the activists and other leaders who have fought to end the war on drugs. But Greenlane's listing on Nasdaq was certainly a step forward for the cannabis industry's ability to access the capital markets. I've heard from a number of lawyers who have looked at our IPO as a precedent for ones that followed.

What are the main issues you face when dealing with other stakeholders in the cannabis space, and how do you combat them? For example, is credit card processing a challenge and *is crypto-currency relevant to your business?*

A lot of vendors try to charge what we refer to as a “cannabis tax” for all sorts of services from merchant processing to insurance. These fees are sometimes a result of additional perceived risk by the vendor or additional costs for their compliance procedures, but other times they’re simply opportunistic. When we come across these issues, there’s always an educational component in showing that Greenlane is a consumer packaged goods company in the cannabis space, rather than a cannabis company. We’ve been largely successful in avoiding the “cannabis tax” because of our scale and our approach to compliance.

Another concern is that service providers like merchant processors or banks may abruptly decide they want no connection to the cannabis industry, no matter who the client is. The only way to address that risk is through preparation. Businesses in the cannabis industry should always have backup plans.

I feel strongly that crypto-currency is the wrong solution for the cannabis industry. To continue gaining political support and legitimacy, the industry needs to be transparent. Crypto-currency is antithetical to that objective. I certainly understand its appeal, especially to people with experience in the legacy market (*i.e.*, prior to state legalization), but it’s the wrong solution now.

How are other businesses in the cannabis industry, practically speaking, navigating the legislative gap between federal and state treatment?

It depends on the type of business. For a business that cultivates, processes, or sells cannabis, there’s no getting around federal law. “Plant-touching” businesses must be vigilant about compliance with state laws and federal enforcement priorities. For ancillary businesses, it’s a much more complicated issue and really depends on the nature of each business. Each business must look at what it can do to ensure it’s not participating in or enabling a violation of federal enforcement priorities, which range from preventing gun violence to ensuring minors don’t access cannabis. For example, in Greenlane’s case, we have controls to ensure we only sell empty vaporizer hardware to businesses that are licensed in good standing with their state regulators. Financial institutions probably have the biggest challenge as they try to meet their BSA obligations with only vague guidance on how to satisfy their regulators.

I understand that legislative reform in this industry, at least federally, is slow-going. What developments do you see on the horizon? In your opinion, does the new administration represent an opportunity to advance policy in this area?

I wouldn’t necessarily characterize it as slow-going, given the massive progress at the state level. Just this year, legalization ballot initiatives were successful in five states, including adult-use legalization in New Jersey and Arizona.

But you’re of course correct that reform has been slower at the federal level. The incoming administration has a mixed record on cannabis. While I expect them to continue the government’s hands-off approach to state legal cannabis and make progress on criminal justice policies, I’m not confident that cannabis will be a top priority either. The bigger thing to watch is control of the Senate. Legalization and banking reform both have support in the House. But, so far, Republican leadership has not shown an inclination to let those proposals see a vote in the Senate. If the Democrats gain control of the Senate, we might very well see progress. Even if they don’t, banking reform remains achievable, given the growing bi-partisan consensus that banking the cannabis issue is a matter of public safety.

Are you seeing an increased appetite of investment funds in this space, and if so, how are they participating?

Yes. We’re seeing increased investor appetite in both the public and private markets. In recent quarters, U.S. multi-state operators (*i.e.*, “plant-touching” businesses) have been growing rapidly as they begin to achieve scale. This, combined with continued legal reforms, has really increased investor appetite. Many funds are lending to cannabis businesses, as more traditional forms of credit remain unavailable to most companies in the industry. Other funds are taking equity stakes in both private and public cannabis companies. Just last week a very substantial deal was announced by which a SPAC acquired multiple California-based cannabis brands in one string of transactions, with Jay-Z announced as the Chief Visionary Officer of the newly combined company.