CADWALADER

FUND FINANCE FRIDAY

Room for Optimism

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Then and Now

By Wesley Misson
Partner | Fund Finance

With all the headlines about Delta controlling the news cycle and recent announcements of more quasi-shutdowns, delayed office returns and mask mandates, it seems as if the start to August feels eerily familiar to last year's summer concerns. But dig a little deeper and you will see that this is not a case of deja vu − there is a ton of room for optimism in our market generally and, when compared to YTD numbers last year, the contrast is striking.

So let's take a look at what's behind our optimism and what's driving this growth and momentum as we get set to say goodbye to summer and head into what appears to be an extremely robust remainder of the year ahead, regardless of what continues to happen in the macro.

- Could a 2021 private equity trifecta be in the making? The global private equity market set a pace to reach or exceed $1 trillion full-year totals in fundraising, deal value and in exit values, assuming of course that the first half momentum continues. In fact, fundraising totaled $631 billion in the first half, pointing to a 2021 total that may end up closer to $1.3 trillion, based on Preqin data. At mid-year, dry powder totaled a record $3.3 trillion.
- Scale continues to be a theme. Nine funds with commitments north of $5 billion accounted for more than half of the capital raised in buyout funds in the first half. These mega-funds handily exceeded fundraising targets. It's not a capital-raising theme only. Average buy-out deal size moved sharply higher to $1.1 billion in the first half, more than double prior-year average, based on Dealogic data.
- The larger fund sizes are naturally creating higher demand for large facilities. We have already seen a healthy dose of billion-dollar-plus subscription lines close this year, and we expect that trend to accelerate and the need for large syndicated deals to possibly reach an all-time high.
- SPACs continue to grease the skids for portfolio company exits. Despite the slump in SPAC IPO activity since April, Bain & Co. reports that more than 400 SPACs controlled $133 billion at mid-year, with ultimate spending power available for mergers well above the pre-funded capital.
- A favorable exit environment and distributions being returned to investors at record pace free up investor capital to support fundraising. Preqin's mid-year Investor Outlook reported that 90% of LPs plan to make equal or greater commitments to private equity over the next 12 months. Adding fuel to the already hot fundraising fire presents further opportunity to lend as the new vintages come online (many larger in commitment size than their predecessors as noted above).

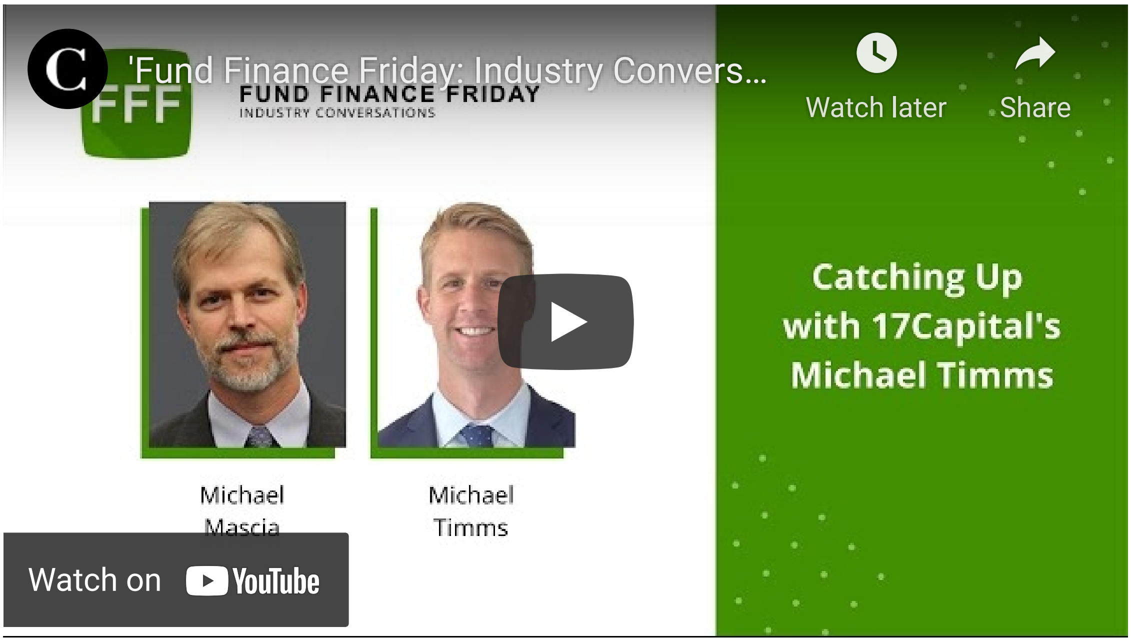
- Bespoke structures are once again very much in vogue. While practically non-existent in the summer of 2020, we are currently seeing a larger-than-usual demand for non-traditional facilities – SMAs, umbrellas, NAV/hybrids, equity commitment facilities, etc. While still making up a significant minority of our market in the U.S., we anticipate this share to grow.
- LIBOR successor is king. Well, in terms of lawyer hours that is certainly becoming the case. We expect hundreds of amendments to be completed before end of year as banks transition out of LIBOR.
- ESG is all the rage. This time last year, we were discussing our very first ESG subscription line in the U.S. Fast forward and we have now closed three more in July, bringing us into the double digits for facilities with an ESG component. It is great to see such momentum and buy-in to use our market to help propel change for the greater good. At Cadwalader, we are proud to be a part of leading the ESG facility market and now have a deep bench of lawyers that have worked on multiple such facilities.

We should all feel fortunate to be part of an incredibly resilient and active market. Look at where we have been, and now where we are heading. So much opportunity for our industry, and lots of job creation. Enjoy the remainder of the summer, and good luck as we head into the busy home stretch. I look forward to gathering with many of you in Miami next year (hopefully sooner) and toasting to our incredible accomplishments and all you do for our industry.

'Fund Finance Friday: Industry Conversations' — Catching Up with 17Capital's Michael Timms

In this week's *FFF: Industry Conversations*, Mike Mascia sits down with 17Capital Investment Director Michael Timms. They discuss 17Capital's fund finance capabilities and Michael's role at 17Capital's West Coast outpost.

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



The Cayman Private Funds Act 1st Anniversary – No Gifts Required!

By Derek Stenson
Partner | Conyers

By Michael O'Connor
Partner | Conyers

It may be that you woke up last Saturday morning, spotted the date 7 August on your phone, and then had that feeling that you'd forgotten something of significance on this date – a birthday perhaps, or maybe worse, a wedding anniversary?! Thankfully, there was no need to bolt out the front door and do some indiscriminate present-buying on this occasion, as all that you missed (we hope!) was the one-year anniversary of the effective date of the Cayman Islands Private Funds Act (or the PF Law as it was then known).

The 1st anniversary of PF Act "Game Day" is an opportune time, however, to take stock and see what, if anything, has changed as the PF Act settled in as part of fund finance transactions over the past year and what issues have been at the fore as sponsors and lenders have navigated their way through this new law.

Remind me – why did Cayman introduce the PF Act?

Contrary to popular belief, the PF Act was not introduced in order to give Cayman fund finance attorneys a more prominent position in transactions! In short, the PF Act was introduced so that the Cayman Islands would meet the standards of international bodies (such as the EU and OECD) and, in particular, in order to avoid being part of the EU's list of non-cooperative jurisdictions for tax matters (more often referred to as the "EU tax blacklist").

Following the registration of over 12,000 private funds ahead of the 7 August 2020 deadline, the EU Council deemed that Cayman's efforts had been sufficient in this regard and Cayman was removed from the EU tax blacklist – which remains the current position.

It's all coming back to me now – so what happened after 7 August?

Loan document negotiations pre-7 August 2020 had been very much focused on registration of funds by or before a set number of days ahead of the 7 August deadline.

From this point forward, the market shifted almost instantly to a position of requiring Cayman private funds that fell within the scope of the PF Act to be *registered* with CIMA prior to closing or being allowed to join a facility. This remains the market position from our perspective, and we have only seen it departed from in a few very situation-specific circumstances (*e.g.*, where the Cayman fund is one of a considerable number of parties across multiple jurisdictions granting security and is immaterial to the overall security – in such scenarios we have seen a postclosing deliverable to demonstrate that the registration has been finalized within a set deadline).

The other aspect of PF Act compliance that remains a feature of transactions is the requirement to maintain registration (which is uncontroversial in our view) and what, if any, the cure period should be if a Cayman private fund is in default of this provision by virtue of being involuntarily de-registered by CIMA for non-compliance with the PF Act. On this point, lenders have taken a number of approaches varying from no-cure period (*e.g.*, immediate default on it becoming apparent that a private fund has been de-registered by CIMA) to allowing for a number of days for private fund to cure the default (*i.e.*, re-register with CIMA).

Anything new for lenders to be aware of?

The main issue that has arisen continues to be one of timing – primarily, will a Cayman fund be registered with CIMA by the time the sponsor wishes it to join a facility. This has led in some instances to closings being moved to facilitate the CIMA registration occurring or, more frequently, the exclusion of the Cayman private fund from the initial closing to be subsequently joined to the facility at such time as the sponsor can demonstrate CIMA registration has occurred.

What next? Are any changes expected to the Private Funds Act?

We don't currently expect any material changes to the PF Act, but as the law remains a relatively new concept, ambiguity does still arise on the interpretation of whether certain bespoke vehicles are within scope of the PF Act or fall within "non-fund arrangements" (which are not required to register with CIMA) and, over time, it can be expected that further guidance would be issued by CIMA in this area.

Conclusion

It's perhaps surprising that the PF Act continues to be a feature of transactions one year out from its effective date, and it isn't yet showing any sign of fading into insignificance. As precedent is built on new deals and vintages of funds, however, it should result in less negotiation of these terms. Our expectation is that timing (and deal management around such timing) will end up being the main impact of the PF Act and, as CIMA continues to build efficiency in the registration process for such funds, it is hoped that this too will fade as an issue over time.

WFF Event at National Arts Club

The FFA's Women in Fund Finance group this week announced an event in partnership with Morgan Stanley Private Wealth Management at the National Arts Club in New York on Thursday, September 23. The event will feature a collection of prints from Andy Warhol. For more information, click **here**.

NAV Finance Article

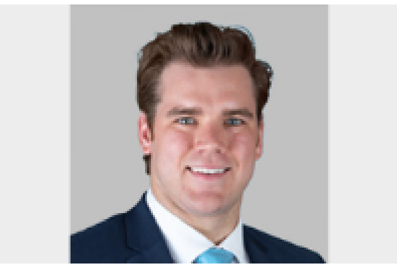
NAV financings are on the rise, according to an article from White & Case, available **here**.

Fund Finance Hiring

Fund Finance Hiring

Wells Fargo is hiring for an Associate role in its Subscription Finance group in its Los Angeles, New York or Charlotte office. For more information, click **here**.

Michael Johnson Joins Cadwalader's Fund Finance Practice in Charlotte



Michael Johnson has joined Cadwalader's Fund Finance practice as an associate in our Charlotte office. Michael joins us from K&L Gates, where he represented many companies and fund sponsors in M&A transactions and various corporate matters.

Michael is a 2019 graduate of Wake Forest Law.