

**CADWALADER**

# Common Events of Default in Subscription Credit Facilities: How Parties End Up Here, and Recommendations for Avoiding Preventable EODs

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Private equity sponsors and their funds benefit from the flexibility of revolving credit facilities and the ability to borrow significant amounts of capital on short notice. But that fast access to liquidity can quickly be paused if an Event of Default (“EOD”) has occurred under the credit facility. This article provides a brief overview of why EODs matter, offers some examples of common EODs in subscription credit facilities and considers ways to help avoid them.

## Why EODs Matter

EODs matter first and foremost because a lender needs to ensure the borrower’s ability to repay outstanding amounts under the credit facility and the lender’s interest in the collateral for repayment are not in danger throughout the life of the facility. If a borrower fails to pay outstanding amounts when due under the facility, has a substantial monetary judgment rendered against it, files for bankruptcy or reorganization or has another cataclysmic event, these serious issues could threaten a lender’s ability to recoup principal, interest and other amounts owing under the facility. EODs, particularly recurring instances of the same EOD or a series of EODs over time by a borrower, have the potential to strain the business relationship and trust between fund sponsors and lenders. Lenders generally consider EODs “uncurable” by the borrower, while a potential default – an event that, if not corrected, could lead to an EOD – can be cured by the borrower. That means EODs must be waived by lenders if they decide not to declare all amounts owing under a facility due and payable as a result of the EOD or exercise other remedies available to them at that time.

The occurrence of an EOD under a credit facility may indicate a potentially significant issue and freezes a fund’s ability to borrow so that an admin agent and lenders in a facility may assess the situation and consider the best path forward. This will often entail having legal counsel draft and negotiate a waiver letter detailing (1) the EOD that occurred, (2) the request by the borrower for the lenders to waive the EOD, (3) the lenders granting this request and (4) any remedial steps or waiver fees the borrower agrees to pay to allow it to resume borrowing in the normal course.

Waiver letters cost the borrower both time in having to focus on the EOD issue at hand and money due to legal costs. The borrower may also potentially face default interest rates being implemented by an admin agent as compensation for a lender’s increased risks and time spent remediating the situation. More importantly, EODs could cause a borrower to miss out on time-sensitive business opportunities while the borrower lacks its normal quick access to significant capital.

## **Common EODs in Subscription Credit Facilities**

Truly problematic defaults are extremely rare in fund finance (we're only aware of two in the history of the industry, each due to fraud). The types of EODs we see in practice are typically "foot fault" defaults that occur because a borrower took action for which it was unaware it would trigger an EOD under the credit facility. Subscription credit facility-related EODs may occur due to a lack of necessary preapproval or notice by the borrower to the admin agent of some event detailed in a credit facility, or the failure to provide the related investor or fund documents in a timely manner. This could happen when a borrower has separate operations and finance teams, or similarly when two separate law firms work on behalf of a borrower as fund counsel and finance counsel (or even two distinct practice groups within the same law firm) that are not in contact with one another about the requirements in the credit agreement. For example, a borrower might request its fund counsel to take normally innocuous steps like amending the borrower's partnership agreement without realizing that notifying the admin agent under a credit facility and allowing the admin agent's finance counsel to review the draft amendment was a prerequisite for any such amendment.

The borrower could add new investors under its partnership agreement without timely notifying the admin agent and providing executed copies of subscription agreements, side letters, commitment increases for existing investors or related investor documents. Similarly, a borrower might facilitate the transfer of an investor's limited partnership interest in the borrower to a transferee without properly notifying the admin agent or providing executed copies after the transfer has been executed. Or a borrower might allow investors to elect into other investors' applicable side letter provisions via the "most favored nations" election process without the admin agent's awareness or providing executed copies – all potentially jeopardizing a lender's awareness of any risks with the investor pool, in addition to not having the necessary investor information for calling capital from investors to repay a facility, thus leading to an EOD.

Other common subscription credit facility EODs include the following: a borrower (1) misreporting the borrowing base or pool of investors and their commitment amounts in a periodic compliance certificate, (2) directing its investors to fund capital contributions to a bank account that has not been pledged as collateral for the credit facility, (3) calling capital from investors without notifying the admin agent by the required time, or (4) reaffirming representations and warranties and covenants from the credit agreement while an EOD, potential default or cash control event has already occurred and is continuing. Any of these events has the potential to disrupt an otherwise-functioning credit facility.

### **Ways to Help Prevent Avoidable EODs**

A borrower maintaining active lines of communication between its fund and operations teams, as well as with external parties like its fund counsel, finance counsel and the admin agent, is one of the best ways to prevent avoidable EODs from occurring. Previewing for the admin agent and its counsel any planned amendments to the limited partnership agreement, investor transfers, new investor closes, the most favored nations election process, upcoming capital calls and related events will help all necessary parties stay on the same page in satisfying any preconditions before undergoing these types of transactions.

Credit agreements often can be lengthy and seemingly overwhelming legal documents unless someone has spent significant time learning the ins and outs of how they operate and the

ongoing requirements of a borrower. A borrower should pay particular attention to the representations and warranties and covenants to ascertain its ongoing obligations over the life of the facility, since breaches of those provisions are generally what lead to EODs. The borrower could request its counsel or the admin agent's counsel to prepare a brief "cheat sheet" for a new credit facility that summarizes some of the key notice and delivery obligations of a borrower in its credit agreement. While this will add to total legal costs when finalizing the legal documents for a facility, if it helps prevent even one EOD, this proactive approach can reduce overall fees and end up being a worthwhile upfront cost – not to mention the saved time and energy for parties and counsel in avoiding EODs that might have otherwise occurred. The borrower should also revisit the representations and warranties and covenants from time to time to refresh its perspective on its continued compliance with the credit agreement.

## **Final Thoughts**

EODs will temporarily freeze a borrower's ability to use the credit facility to facilitate acquisitions, investments or other expenditures and can cause concern for lenders. A borrower could unintentionally trigger an EOD in a subscription credit facility in a variety of ways. That being said, the vast majority of subscription credit facility EODs can be, and often are, quickly addressed by the parties and their counsel. One of the best ways to avoid EODs is the borrower maintaining open and regular communication with its internal finance and operations teams, external counsel, and the admin agent under a facility to help maintain the mutually beneficial and positive business relationship among the parties. Requesting the borrower's or admin agent's counsel to prepare a brief outline of some of the regular and ongoing notice or delivery requirements at the initial close of the credit facility can also help a borrower prevent common EODs from occurring during the life of the credit facility.

# 13th Annual Global Fund Finance Symposium - Keynote Speakers

February 9, 2024



The Fund Finance Association's annual symposiums bring together investors, fund managers, bankers and lawyers for education and networking within the fund finance market. The 13th Annual Global Fund Finance Symposium is just a few weeks away and will take place February 26-29, 2024 in Miami Beach.

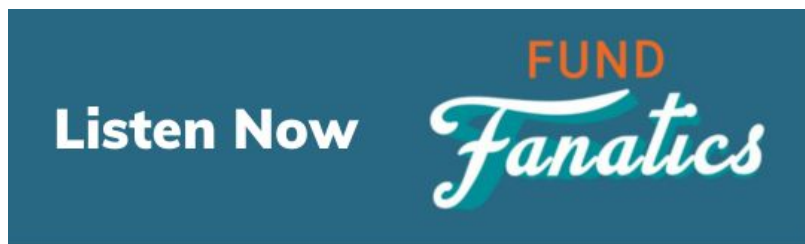
They are kicking off this year with an excellent lineup, including Miami's very own, **Mayor Suarez**; co-founder and CEO of Beyond Net Zero, **Lance Uggla**; political scientist, founder and president of Eurasia Group, **Ian Bremmer**; and Chief Financial Officer of Blackstone, **Michael Chae**.

Other prominent panelists include **Kenneth Miranda**, Cornell University's Chief Investment Officer; **Monica Kelsey**, Chief Financial Officer of Antares Capital; **Ilya Feige**, Global Head of Artificial Intelligence and Machine Learning for Cerberus Technology Solutions; **Sophia Velastegui**, Chief Product Officer of Aptiv; and **Ryan Patel**, TV news contributor, Board Director, and Senior Fellow at the Drucker School of Management.

Visit the FFA website [here](#) for a detailed agenda and speaker profiles.

## Fund Fanatics Features Calvin Marks

February 9, 2024



Join Scott Aleali, Head of Private Equity Finance at Citizens Bank, and Jeff Maier, Senior Managing Director - Private Equity Finance at Citizens Bank, with special guest [Calvin Marks](#), Director on the Secondaries Investment Team at Felicitas Global Partners, for the latest episode of Fund Fanatics!

Fund Fanatics' latest blend of music and the market features secondaries with Calvin Marks. There is no one-size-fits-all for a Private Equity secondary transaction. They discuss the various liquidity tools and trends, expected discounts to fair market value, and one view of using a NAV credit facility to send an early distribution to Limited Partners.

Listen to the episode [here](#).

# Fund Finance Series Webinar: 2024 Market Perspectives

February 9, 2024



**Fund Finance Series Webinar hosted by Michael Mbayi:  
2024 Market Perspectives**

Thursday, February 15th 2024 - 9:00 AM EST

Register [now](#) for the next session of the Fund Finance Series Webinar hosted by the Head of Banking & Finance at Praxio Law & Tax, Michael Mbayi: “2024 Market Perspectives.” The webinar will take place on Thursday, February 15th 2024 at 9 AM EST.

Michael will be joined by a panel of leaders in the industry, including Cadwalader's own Michael Hubbard, to do a recap of the activity of last year in America, EMEA and in the APAC region, to discuss the current global market trends and to give an outlook for 2024.

Do not miss the opportunity to get insights from industry leaders:

- Michael Mbayi, Head of Banking & Finance, Praxio Law & Tax
- Aleksandra Cison, Director, HSBC Innovation
- Michael Hubbard, Head of GP Solutions Europe, Cadwalader
- Sarah Lobbardi, Founder, Avardi Partners
- Don Metheven, Counsel, Freshfields
- Corinne Musa, Partner, Akin Gump

Register now [here](#).

# Women in Fund Finance Challenge: International Women's Day 2024

February 9, 2024



In celebration of International Women's Day, join Women in Fund Finance to raise money for Heifer International's Women Entrepreneurs 2 project, in Mexico, which will assist 1,000 families in the Yucatán Peninsula to close the living income gap by developing and/or strengthening women-led cage-free egg businesses that link to the market and strengthen the communities' social capital. Click [here](#) to learn more information.

Have your organization form a team or join one of the existing teams! The instructions are listed below and are super simple. Once you have registered and have joined a team, beginning on March 1st and extending through the entire month of March, you can record miles through walking/running as well as a wide list of exercise from yoga, cycling, skiing, playing soccer, swimming, HIIT classes, etc...You just have to move and the Racey app will assign you a certain number of minutes based on the intensity of the activity! Everything is done via your team's race page or by using the Racery iOS App or Android App.

Our goal is to truly "race around the world" during the month of March to collectively log 24,901 miles / 40,075km total - the circumference of the globe, and to reach a fundraising goal of US\$30,000 in support of this wonderful project. This is open to our constituents, allies, family and friends! We #inspireinclusion and look forward to seeing your miles logged beginning on March 1st!

To participate:

Step 1: Register with your name and email at the link here >> [WFF Virtual Race](#)

Step 2: When registering you will pay the \$11 registration fee, and we are asking for a minimum donation amount of US\$25 per person for Heifer International.

Organizations can form teams for their employees to join, or to compete as an individual, join the WFF/F mixer team! There is no age limit so friends, family colleagues are all welcome to participate.

Step 3: Share via Facebook, Twitter, LinkedIn, Email or Text for support from your friends and family!



Step 4: Throughout the month, take photos and video and share with us at [info@womeninfundfinance.com](mailto:info@womeninfundfinance.com). Photos/videos/chats can also be shared through the Racery platform!

Step 5: Record your activity. We will not require proof but feel free to share a photo of your Strava, Garmin or other activity record on Racery.

You'll earn a position in an individual leaderboard, and you'll also be part of a team competing together on miles and money raised. On top of the individual and team competitions, everyone's miles will push our collective avatar on a route around the world!

You'll get a digital bib and finish award, and Racery will keep track of fun stats like your total mileage, exercises/week, and streaks!

Even if you choose not to participate in the race around the world, we encourage you and your company to [make a donation](#) to this incredible organization!

#InspireInclusion

# Fund Finance Tidbits – On the Move

February 9, 2024

## CADWALADER FUND FINANCE 'ON THE MOVE'

The following individual(s) are on the move in the fund finance industry.



**Katie Saxon**  
Fund Finance Association

Congratulations to **Katie Saxon** who was recently appointed as the Fund Finance Association's new Chief Operating Officer and Chief Human Resources Officer. Katie joins the FFA with over 12 years of professional experience, primarily focused in Human Resources.



**Michelle Bolingbroke**  
Fund Finance Association

Congratulations to **Michelle Bolingbroke** who is taking on a new role as Chief Marketing Officer at the Fund Finance Association. She is primarily focused on driving the FFA global brand visibility and recognition.

# Fund Finance Hiring

February 9, 2024

Fund Finance Hiring

Here is who's hiring in Fund Finance:

RBC in London is hiring an Associate, CB Fund Finance. The role will be responsible for assisting the MD, Directors, VPs to undertake analysis, structuring, negotiation, closing and monitoring of fund finance loans. Candidates can learn more and apply [here](#).