

A horizontal banner with a green-to-blue gradient background. The text "FUND FINANCE FRIDAY" is centered in a white, sans-serif font. The banner is framed by a white grid pattern that curves inward from the sides.

FUND FINANCE FRIDAY

Keeping the Momentum Going

January 10, 2020 | Issue No. 59

Table of Contents:

- **Momentum Continues into 2020**
- **Subscription Finance Loan Agreement Series, Part 16: Covenants**
- **Private Market Outlook 2020 — Raise Your Expectations**
- **First Republic Bank Article on LPAs and Investor Views**
- **Player Profile — Kevin Lynch**
- **Cadwalader Advises LSTA on Exposure Draft of Its New Form of Credit Agreement for an Investment Grade Term Loan**
- **Recommended Reading**
- **Fund Finance Calendar**

Momentum Continues into 2020

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By Michael Mascia
Partner | Fund Finance

I hope everyone got some well-deserved downtime over the holidays and enjoyed a fun New Year's.

We are closing in on having our final 2019 numbers and completing our data project and look forward to making that information available to our clients in the coming weeks. But directionally, 2019 was very positive, with growth rates again well into double digits. In fact, the volume of closings in December was so robust that it felt like maybe our entire active portfolio may well have come off the board. So this week, we took an extensive look at our active deal sheet and pipeline metrics. Despite the busy December closing schedule, we are projecting continuing momentum through the first quarter. We enter 2020 with 51 active deals in the U.S., far in excess of what carried over last year. In December, we opened 24 new matters in the U.S., while for the year we had a monthly average of 19. We accrued nearly double the amount of time on prospective matters in December compared to the yearly average. And our LPA review count for December was consistent with prior months, despite the limited number of full business days. So we are not forecasting a drop-off to start the year.

Fiona Cheng joined the Cadwalader Fund Finance team as an associate in our New York office this week. Fiona obtained her bachelor's degree at the University of Melbourne and her law degree from the University of Sydney. Previously, she supported the fund finance desk of a major investment bank in New York. Welcome, Fiona!

Award nominations for the Julian Black Contribution to the Industry Award, the Dee Dee Sklar Women in Fund Finance Award, and the Next Gen Member of the Year Award are now due next Friday, January 17. Award nomination forms are available on the FFA's website. David Wasserman of Morgan Stanley is again volunteering to lead the selection committee.

And in some super exciting personal news, Wes Misson got engaged to Allison Johnson while on vacation in Park City, Utah over the break! Having been Wes' work wife for the past decade, I can vouch that Wes will make a great husband. Congratulations, Wes and Allison!!!





Subscription Finance Loan Agreement Series, Part 16: Covenants

January 10, 2020 | Issue No. 59

In our last article, we looked at the first part of a typical clause in an LMA-based subscription/capital call finance facility and particularly at information covenants. In this article, we take a look at the other areas typically covered by the covenants and undertakings in these facilities and, as always, with a focus on those which are more specific to the subscription/capital call finance world.

As with the information covenants covered last time around, a number of the general covenants that are common in other industries are also common to subscription/capital call finance, so any facility document based on an LMA precedent will look reasonably familiar in many respects to those who have also had experience with leverage, real estate or other loan finance products. However, there are also a number of covenants that are much more specific to the fund finance world, along, as always, with some issues that are specific to subscription/capital call finance even in the context of more widely used covenants. This article focusses on these in a little more detail below.

So, dealing first with some of the covenants that are common to many types of facilities in many industries, a very important covenant (and common across all types of facility documents), is the “negative pledge” (or, for those whose first language remains “normal” English, the covenant that restricts or prohibits the obligors from granting security over their assets). Where fund finance differs from other facilities is in the carve-outs allowed or considered to this covenant. Carve-outs may include assets which are not specifically covered by the (limited) security that will be given for the subscription/capital call facility, as well as carve-outs for specific parties to the facility – for example, a manager whose assets may include items entirely unrelated to the fund in question. Also (and again, very common across all types of Facilities), a covenant limiting financial indebtedness, where carve-outs may include, for example, hedging liabilities, indebtedness incurred in the normal course of making investments will or should always include any indebtedness of the fund to its investors where the investors subscribe to the fund by way of loan.

Then we come to a series of covenants that are both particular to subscription/capital call facilities but also (given the significance of the partnership documents) absolutely vital – namely, covenants dealing with the fund’s constitutional documents and the investor commitments. The primary areas of focus here for lenders is to ensure that any changes to the fund’s constitutional documents are severely proscribed (as we have discussed in previous articles in this series, these documents are the cornerstone of any credit and documentary decisions for lenders, so amendments other than those that are very much “administrative” are generally not desirable). Lenders will also want to ensure that, if there are amendments, the lenders are made aware of them immediately and that the fund does not take any action to jeopardise the continuing viability of the fund (for example, by terminating the general partner or manager). In terms of investors, the lenders’ focus will be on ensuring that the fund and its general partner and/or manager do not do anything to reduce or bring into question the level of any investor commitments. As part of this, there will be covenants requiring the fund and other obligors to ensure that those commitments are always paid into the account or accounts over

which the lenders have security, that commitments are not reduced or waived in any way and also that commitments are not redirected into other vehicles outside the lenders' security net (for example, to parallel funds or alternative investment vehicles).

Also in this category, it is worth mentioning a covenant that is sometimes, but not always, included or sought but is useful to consider (and, again, is very specific to fund finance). This is one designed in effect to "oil the wheels" of the structure by requiring the fund to ensure that a proportion (usually a fairly small proportion) of investor commitments are called and paid at intervals over the life of the subscription finance/capital call facility.

Finally, other covenants will cover (assuming that the fund does not come under the definition of "plan assets" and therefore subject to ERISA considerations, which is a whole subject in itself) requirements to ensure that the fund does not constitute "plan assets" and covenants dealing with compliance with sanctions and anti-money laundering measures. Apart from the "ERISA"-related covenants, these are not unique to subscription/capital call facilities, but it is worth pointing out that compliance with some of these covenants (particularly sanctions) can be problematic for funds given the variety and geographical reach of their investments.

As always with this series, this is intended to give a flavour of the types of issues and considerations which come up in particular parts of a facility in the context of a subscription/capital call facility. The above is by no means a complete list of the covenants which are or should be included in such facilities, but it is hoped that this helps to highlight some of the more common ones and the issues that arise. It is important when considering the covenant package overall to understand the fund's overall structure and (as always) to have carried out full due diligence on the fund's and related parties' constitutional and other documents so that any covenants can be properly tailored to the fund in question.

Private Market Outlook 2020 — Raise Your Expectations

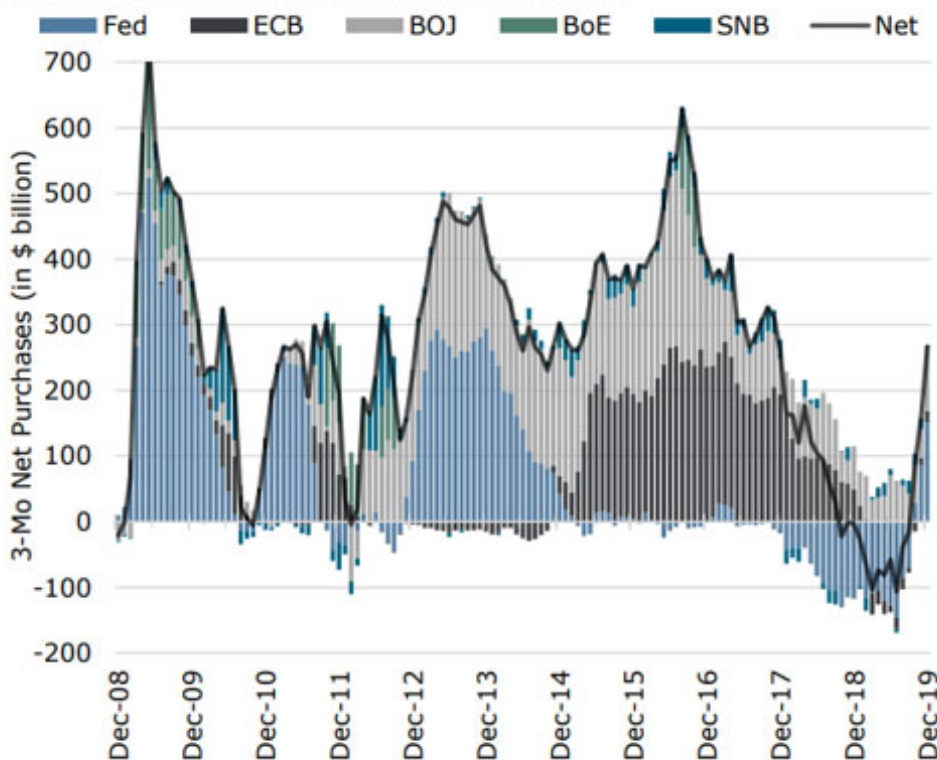
January 10, 2020 | Issue No. 59



By Chris van Heerden
Finance Practice Group Director

The first days of January feel familiar in some ways – we’re off into a new year with what once again looks like a “growing but slowing” economy and markets that are yield-starved across the board. This mix has clearly been beneficial to private market fundraising in recent years as investors have been willing to forgo liquidity to access private market returns. Unlike this time last year, however, central banks are back in play. Globally, central banks have pivoted to balance sheet expansion, and their re-engagement appears to be muting volatility and spurring a risk-on tone across markets – quite constructive for private market fundraising, in our view.

Global Central Bank Net Asset Purchases



Source: Wells Fargo Securities, Bloomberg L.P.

Also in the "plus" column, seminal shifts in the investment landscape carry into the new year. While neither of these trends are breaking news, they continue to have a large-scale impact on capital flows: (1) Investors are increasingly opting for passive investment vehicles when investing in public markets, and (2) when paying for active management, investors increasingly prefer to do that in the private market.

As these trends in capital flows continue to play out, private markets are moving farther into the mainstream. The SEC’s recent moves toward widening the accredited investor definition may perhaps be read as an acknowledgment that private market investment opportunities have

reached a scale where it no longer makes sense to exclude individual investors to the same extent as in the past.

Where does this leave us? Linear extrapolation, or forecasting with a ruler, would suggest that fundraising will extend the gradual slowing we've seen in the past two years, with 2020 fundraising coming in modestly below 2019. That's certainly possible and may even be the base case, but it may be too early to count out a re-acceleration in fundraising with some surprise to the upside.

First Republic Bank Article on LPAs and Investor Views

January 10, 2020 | Issue No. 59

Jeff Maier of First Republic Bank published an article this week on LinkedIn titled: "The LPA and Investor Appetite for Subscription Credit Facilities." The [article](#) discusses the evolution of the LPA and offering Investors optionality around levered sleeves.

Player Profile — Kevin Lynch

January 10, 2020 | Issue No. 59

Player Profile



This week we connect with Kevin Lynch, a partner in the Arthur Cox Finance Group in Dublin. Kevin has extensive experience in banking and finance transactions, with an emphasis on domestic and cross-border finance transactions and financial services. Kevin acts for a wide range of financial institutions, funds (both Irish and non-Irish domiciled), corporates and corporate service providers (including AIFMs and Depositaries), advising on funds lending transactions including subscription call facilities and real estate funds financing. Kevin's practice also includes asset/property finance, acquisition finance, derivative products and structured finance.

***Fund Finance Friday:* Kevin, tell us a bit about how you ended up involved in fund finance.**

KL: I qualified as a lawyer in 2000. As the market here is obviously smaller than the U.S., like many Irish lawyers I worked across a broad range of finance transactions, including acquisition finance, real estate finance, structured finance, derivatives and fund finance. From quite an early stage in my career, I was involved in deals involving either Irish funds, SPVs or assets of non-Irish funds custodied or sub-custodied in Ireland. Our firm has a strong investment funds practice, so my first deals were acting borrower side, but this evolved over time and right now the split between lender- and borrower-side instructions is about 60/40. Having the insights gained from acting for both borrowers and lenders has proved really useful over the years in structuring and advising on deals.

***FFF:* You cover a range of instruments and markets. From your vantage, where do you see the most exciting growth and innovation in financial markets?**

KL: From an Irish perspective, we have seen exponential growth in the funds market. As of September 2019, there were 7,500 Irish domiciled funds with net assets of €2.71 trillion. In 2005, there were 3,700 Irish domiciled funds with net assets of €584 million. As an outwardly focused economy and a key strategic location for the world's investment funds industry, Ireland and our firm are in the privileged position to be at the forefront of innovation in the funds products and structures which we can offer and advise on. Some specific examples of innovation include the development of the ICAV (Irish Collective Asset Management Vehicle) structure, the incorporation of tax-efficient SPVs into structures, and the development of

structures for the contribution of capital by investors not just through the subscription for shares but also, for example, by the subscription for notes both listed and unlisted.

FFF: Taking a longer-term perspective, how has working as an Irish fund finance counsel changed over the past ten years?

KL: For me, there have been two principal changes. Firstly, in line with the growth of the funds industry in Ireland, we have seen a significant increase in deal volume. We are kept more than busy! The second change is that structures have become more and more complex, so it is not uncommon on a deal that I would work closely with not just my funds colleagues but also my tax and capital markets colleagues. We have worked hard to establish a multi-disciplinary offering, and we are very fortunate to have leading experts in these fields in our funds finance team not just in Dublin but also through our representative offices in New York (led by Phil Cody) and London (led by David Molloy). This is invaluable in helping to foster and strengthen our team's relationships with clients and to keep on top of market developments.

FFF: What are the factors that lead funds to the decision to domicile entities in Ireland?

KL: Some of the key factors are: the range of fund structures which are available in Ireland to meet client needs; our tax regime; post-Brexit the fact that we will be the only English-speaking member state in the EU; the fact that we apply common law and from a lender perspective are creditor friendly (but without being one sided!); the overall ease to market and access to the broader EU market; and the presence of a sophisticated pool of service providers and advisors, including – I would like to think – ourselves.

FFF: Are there emerging issues under Irish law that might prove relevant to the fund finance market?

KL: No issues in particular, but there are some exciting changes to Irish Law in the pipeline to reform both our regulated and unregulated limited partnership structures, in the short-to-medium term.

FFF: What are the must-read resources for a young banker or attorney getting underway in the sector?

KL: Without a doubt, the *Global Legal Insights – Fund Finance Book* (Pink Book) ... and I say that not just because of Mike Mascia's involvement as Contributing Editor or the fact that I write the Irish chapter!

FFF: What do you enjoy most about your job?

KL: I love the variety of my job. On any given day, I could be working on deals with clients in the U.S., UK, Japan and other far-flung destinations as well as those based in Ireland. I am also very much a people person and enjoy meeting and talking to people. While a bit cheesy, I also take great satisfaction from a job well done.

FFF: Any bold fund finance predictions for 2020?

KL: I am not sure this is a bold prediction, but while values are a little “frothy” and you do hear some doom and gloom, I do not foresee a crash or a significant slowdown in the market in 2020. When the cycle does eventually come to an end, my restructuring experience post-Lehman will come in handy.

Cadwalader Advises LSTA on Exposure Draft of Its New Form of Credit Agreement for an Investment Grade Term Loan

January 10, 2020 | Issue No. 59

Cadwalader is advising the Loan Syndications and Trading Association (“LSTA”) as external counsel in connection with drafting its new Form of Credit Agreement – Investment Grade Term Loan (“IG Term Loan”). The IG Term Loan is a standalone term loan form designed for investment grade borrowers. It was modeled on the LSTA’s Investment Grade Revolving Credit Agreement form and will be the LSTA’s second complete credit agreement. The IG Term Loan also serves as the base for the [Compounded SOFR in Arrears Concept Credit Agreement](#), which is being developed in connection with LIBOR transition planning. The Cadwalader team is led by Finance partner Jeffrey Nagle, supported by Finance associate Evan Carter.

Recommended Reading

January 10, 2020 | Issue No. 59

"The benefits of family exercise: how staying healthy together helps to strengthen family bonds": Fund Finance lawyer Danielle Roman and her family were featured in an article in the *South China Morning Post* for their Spartan racing and family fitness. [[South China Morning Post](#)]

"Will a New Decade Bring Private Equity 4.0?": First Republic Bank's Scott Aleali published an article on LinkedIn providing forecasts for private equity in 2020 and beyond. [[LinkedIn](#)]

Part autobiography, part business lesson, part defense of capitalism and fully all-American, Ken Langone's book, *I Love Capitalism!*, despite the iffy title, is a fun and entertaining tale of Ken's early business dealings, the founding of The Home Depot, and his extensive board and philanthropic work. Definitely worth the read. [[Amazon](#)]

Fund Finance Calendar

January 10, 2020 | Issue No. 59

Fund Finance Calendar

Upcoming Events in Fund Finance

January 22-23, 2020 PEI CFOs & COOs Forum, New York

February 12, 2020 Women in Fund Finance Networking
Boat Trip, Miami

February 12-14, 2020 10th Annual Global Fund Finance
Symposium, Miami

March 16-18, 2020 PartnerConnect East 2020, Boston

July 8, 2020 6th Annual European Fund Finance
Symposium, London

If you have an event that you would like listed on the Fund Finance Friday calendar, please email us at fund-finance-friday@cwt.com.