CADWALADER

FUND FINANCE FRIDAY

Batter Up

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You're Out!

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The Loan Syndications and Trading Association (LSTA) set forth the following model provision (the so-called "yank-a-bank" provision and usually captioned "Replacement Lenders" in loan agreements) in the wake of the 2008 financial crisis:

> Replacement of Lenders. If any Lender requests compensation under Section [*Increased Costs*], or if the Borrower is required to pay any Indemnified Taxes or additional amounts to any Lender or any Governmental Authority for the account of any Lender pursuant to Section [*Taxes*] and, in each case, such Lender has declined or is unable to designate a different lending office in accordance with Section 3(a), or if any Lender is a Defaulting Lender or a Non-Consenting Lender, then the Borrower may, at its sole expense and effort, upon notice to such Lender and the Administrative Agent, require such Lender to assign and delegate, without recourse (in accordance with and subject to the restrictions contained in, and consents required by, Section [*Successors and Assigns*]), all of its interests, rights (other than its existing rights to payments pursuant to Section [*Increased Cost*] or Section [*Taxes*]) and obligations under this Agreement and the related Loan Documents to an Eligible Assignee that shall assume such obligations (which assignee may be another Lender, if a Lender accepts such assignment); provided that (i) the Borrower shall have paid to the Administrative Agent the assignment fee (if any) specified in Section [*Successors and Assigns*]; (ii) such Lender shall have received payment of an amount equal to the outstanding principal of its Loans and participations in L/C Disbursements, accrued interest thereon, accrued fees and all other amounts payable to it hereunder and under the other Loan Documents (including any amounts under Section [*Breakfunding*]) from the assignee (to the extent of such outstanding principal and accrued interest and fees) or the Borrower (in the case of all other amounts); (iii) in the case of any such assignment resulting from a claim for compensation under Section [*Increased Costs*] or payments required to be made pursuant to Section [*Taxes*], such assignment will result in a reduction in such compensation or payments thereafter; (iv) such assignment does not conflict with applicable law; and (v) in the case of any assignment resulting from a Lender becoming a Non-Consenting Lender, the applicable assignee shall have consented to the applicable amendment, waiver or consent. A Lender shall not be required to make any such assignment or delegation if, prior thereto, as a result of a waiver by such Lender or otherwise, the circumstances entitling the Borrower to require such assignment and delegation cease to apply.

The yank-a-bank provision, among other things, generally allows a borrower to replace a lender that has declined to consent to a proposed amendment, waiver or other modification to the credit terms. This can be a powerful tool for a borrower in those cases where all but a small number of lenders are amenable to a modification that is viewed as being beneficial (or acceptable) to both the borrower and the lenders. If the yank-a-bank provision allows non-consenting lenders to be “yanked,” an amendment that needs unanimous approval cannot be held up by a small group of lenders trying to extract a higher amendment fee or some other concession in exchange for consent.

If a borrower exercises its right to replace a lender with a more compliant institution, the borrower is generally responsible for finding a replacement lender and for paying any transfer fees or other expenses relating to the substitution. The new lender takes an assignment (and not merely a participation) of loans and commitments from the lender being replaced, and the replaced lender is entitled to the full amount of its principal, interest and any related breakfunding costs and fees as of the date of assignment. It is also noteworthy that the replacement lender must also qualify as an eligible assignee under the loan agreement’s assignment provisions because the transfer of the non-consenting lender’s interest in the loan to the replacement lender is effected by an assignment.

In the COVID-19 environment, requests for amendments, waivers and modifications are rampant. This inevitably leads to questions from a lender: What if I cannot get credit approval for the requested amendment, waiver or modification? Will this ruin my rapport with the borrower or, better yet, cause the borrower to look for another credit provider at the expense of my role as a lender?

The answer to these ominous questions often starts with whether a yank-a-bank provision exists in the loan agreement and under what circumstances a borrower can utilize it. In some cases, the aggregate percentage of the lenders that may be so replaced is limited (5% is the often-used limit), and typically replacement is allowed only for issues where a lender refuses to agree to an amendment, waiver or other modification that requires the unanimous consent of lenders and “required lenders” (typically more than 50% of lenders by commitment) have, in fact, consented.

A borrower’s use of the yank-a-bank provision to remove a lender will inevitably change the relationship between lender and borrower. Accordingly, the yank-a-bank provision is seldom deployed in practice in subscription facilities. (This is likely impacted by the fact that so many subscription facilities are bilateral in nature.) Nonetheless, the threat of the provision’s use remains in a borrower’s toolbox as a sledgehammer, but, if used, its effect can likely never be taken back to restore the relationship with the lender on the receiving end of this tool’s strike.

‘Fund Finance Friday: Industry Conversations’ – License and (Cayman) Registration, Please (32 minutes)

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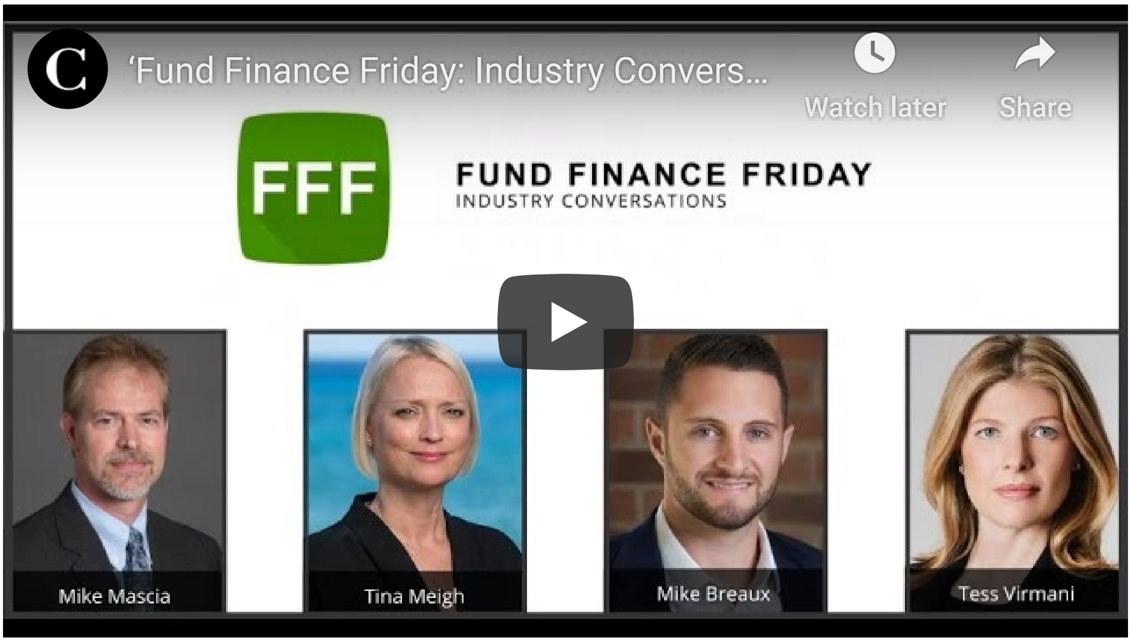
Industry Conversations

In today’s video version of *Fund Finance Friday: Industry Conversations*, Mike Mascia of Cadwalader hosts Mike Breaux, Director at Stifel Bank, who gives an update on the bank’s fund finance practice and his market observations; Tess Virmani, Associate General Counsel at the LSTA, who discusses the LIBOR transition and incorporating ESG standards in loan transactions; and Tina Meigh of the Maples Group, who offers a practical viewpoint from the trenches on obtaining Cayman registrations to comply with the Private Funds Law.

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



Private Equity Wire: Investindustrial Announces First European ESG-Linked Subscription Credit Facility

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Private Equity Wire recently published an article highlighting Investindustrial's recent EUR 600 million facility as one of the first European subscription credit facilities linked to Environmental, Social, and Governance (ESG) initiatives. Consistent with Investindustrial's ongoing commitment to sustainability, the facility is structured to allow for a reduction in interest payments if environmental, gender, governance and other ESG parameters are satisfied. As Investindustrial aims for its portfolio to be carbon positive by the end of 2020 and to source all electricity consumption from renewable energy by 2027, any interest cost savings from the facility will be reserved to develop these carbon reduction projects. To read the full article, click **here**.

PEI: ‘For NAV Finance to Be a Winner, Don’t Underestimate the Obstacles’

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Private Equity International published an article last week on the recent popularity of NAV facilities as a tool to access liquidity. The article discusses how NAV facilities have emerged in “record numbers” as an answer to the liquidity crisis stemming from the COVID-19 pandemic. But the article goes on to warn that the practical challenges accompanying these facilities cannot be overlooked. From tax implications and approval requirements to a lack of underwriting approvals amongst lenders, the practical difficulties of NAV facilities demand careful structuring and a strong understanding of the intended use of the particular facility. To read the full article, visit the PEI site **here**.

17Capital Partner Thomas Doyle on Why Portfolio Financing is Needed to Get Through the Next Two Years

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This week, *Private Equity News* published an article by 17Capital partner Thomas Doyle highlighting portfolio financing as a quick source of liquidity in the midst of the COVID-19 pandemic, with 17Capital completing nearly one billion dollars' worth of financings in recent months. Because of a challenging macroeconomic backdrop and the possibility that this uncertainty could continue for the long run, companies are requiring liquidity while facing significant financial planning challenges. As a tool for private equity fund managers to ensure that companies have adequate resources to endure the next two years or beyond, Doyle emphasizes the value of flexible preferred equity instruments and NAV facilities. By securing financing against the cash flows of the underlying portfolio companies, these financings promote an alignment of interests between parties and allow private equity investors to access financing tailored to their needs. To read the full article, click **here**.

Fund Finance Association Opens Registration for Virtual FFA University

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FFA University, the intensive, full-day training session designed for both bankers and lawyers transacting under U.S. law in the arena of Fund Finance, will be held *virtually* this year on Tuesday, September 22. Participants will have the opportunity to attend lectures taught by many of the industry's leading senior practitioners, covering everything from fund formation to deal structures to transaction documentation. For all interested in attending, registration is now open on the Fund Finance Association's **website**.

Fund Finance Hiring

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Fund Finance Hiring

Brickfield Recruitment, an executive search firm focused exclusively on the fund finance sector, is currently seeking candidates for a VP position on the credit desk of a global bank. The position will be based in New York. Qualified candidates should have at least 5 years of fund finance experience. If interested, please contact Rory Smith at **rory@brickfieldrecruitment.com**.