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2ND ANNUAL SYMPOSIUM

Subscription Credit Facilities

January 19, 2012

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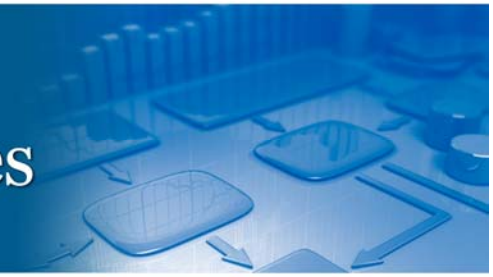
Subscription Credit Facilities



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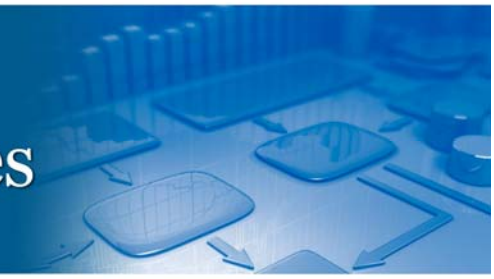
Subscription Credit Facilities



Program Agenda

January 19, 2012

1:30 p.m. **Registration – Preliminary Session**

2:00 p.m. **Preliminary Session: The Basics of Subscription Credit Facilities**
Zachary Barnett, Mike Mascia, Stephen Prostor

3:00 p.m. **Main Session: Welcome and Introduction**
Mike Mascia, Julian Black

3:30 p.m. **Break-Out Panels**

Panel A: Fund Structuring and Regulatory Updates
Kristin Rylko (Moderator), Phil Capling, Wendy Dodson Gallegos, Carol Hitselberger, Lennine Occhino

Panel B: The Cayman Islands Perspective
Robert Wieser (Moderator), Julian Black, Simon Raftopoulos

Panel C: Current Issues in the Subscription Facility Market
Mark Dempsey, Mike Mascia, Wesley Misson

4:30 p.m. **Industry Panel**
Mike Mascia (Moderator), Zachary Barnett, Jeff Johnston, Dee Dee Sklar, David Wasserman, K. Jay Weaver

5:30 p.m. **Cocktail Reception sponsored by Wells Fargo Securities**

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2nd Annual Subscription Credit Facility Symposium

January 19, 2012

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The Basics of Subscription Credit Facilities

Presented by

Zachary Barnett
Mayer Brown, LLP
Partner, Chicago

Mike Mascia
Mayer Brown LLP
Partner, New York

Stephen Prostor
Citi Private Bank
Director

Agenda

- Basic Overview of a Subscription Credit Facility
- Key Facility Features
- Fund Documentation
- The Credit Facility and its Documentation
- Security Structures/Documentation

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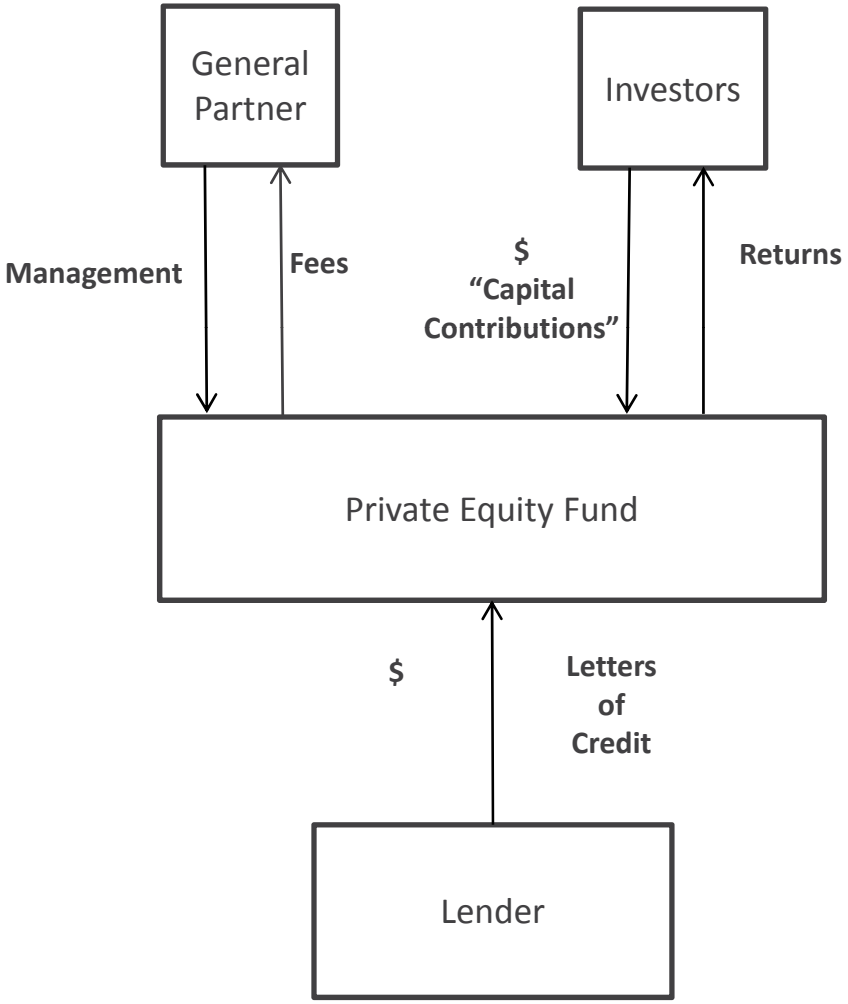
Subscription Credit Facility Overview

Subscription Credit Facility Overview



- A typically revolving credit facility to a closed end private equity or real estate fund.
- The defining characteristic is the Collateral Package: The Facility is secured not by the Assets of the Fund, but by the Capital Commitments of the Investors.

Subscription Credit Facility Overview

- Collateral
  - The Investors' Capital Commitments, Capital Contributions and the General Partner's right to make Capital Calls on the Investors and enforce payment thereof
- Related Credit Arrangements
  - Unsecured Facilities
  - Secured Guaranties
  - Hybrid Facilities

Subscription Credit Facility Overview

- Key Propositions
  - The Investors are aware of the Facility, the pledge of their Capital Commitments and that the Lender can make Capital Calls directly
  - The Partnership Agreement of the Fund must permit the Facility and not have provisions that unduly restrict or otherwise interfere with the Lender's rights to repayment
  - Fundamental Premise: The Investors must fund their Capital Contributions without set-off, counterclaim or defense
    - The Lender is underwriting the credit wherewithal of the Investors
    - A dispute between the Investor and the General Partner is a risk that should not be allocated to the Lender

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Key Facility Features

Available to Various Fund Types

- Subscription facilities have been established for private equity funds of all types
  - Buyout
  - Power
  - Energy
  - Infrastructure
  - Real Estate
  - Mezzanine
  - Funds of Funds – Primary and Secondary
  - Venture

Purpose of Borrowings

- Subscription facilities can be used for short term bridging of capital calls or longer term bridging purposes
  - Generally to bridge the time between the Fund making an investment (using proceeds under the facility towards the purchase) and the calling of capital at a later date to repay the borrowing

Purpose of Borrowings

- Bridge to Capital Calls
  - To avoid the need to call capital well in advance of closing an investment
  - To backstop late capital call proceeds from the fund's limited partners
  - To batch capital calls for very active funds rather than calling capital for each investment (especially useful for funds of funds, who receive periodic capital calls from some 20-30 underlying funds)
  - 30-120 day repayment and/or cleanup requirement is sometimes required
  - Longer term repayment (up to three years) where the facility provides or backstops construction debt during the development phase of a project before capital is typically called

Purpose of Borrowings

- Bridge to Other Sources of Deal Financing
  - To bridge other sources of capital that might not be available or ready at the time of a given investment
  - In lieu of calling capital to provide that other financing
  - Aligns the capital called with the long term capital needed, enhancing the IRR/MOI
  - Allows the purchase of an asset outright with facility proceeds. Permanent debt to follow upon repositioning of acquired asset (common in real estate funds)

Typical Financing Structure

- Subscription facilities are generally structured as senior, secured revolving credit facilities
  - Committed vs. Uncommitted
    - Both types are available in the market
  - Facility size
    - $10 million to $1 billion
  - Tenor
    - 1-3 year revolving facilities (typically extended as needed)
  - Availability
    - Loans and/or letters of credit, FX, interest rate or commodity hedging

Typical Financing Structure

- Security
  - Pledge of uncalled capital commitments / capital call bank account
  - Power of attorney to exercise managers rights to call capital, etc.
  - Investor letters may be required if commitments are > 364 days
- Advances
  - 50-100% of unfunded capital commitments (depending on financial strength of Investors)

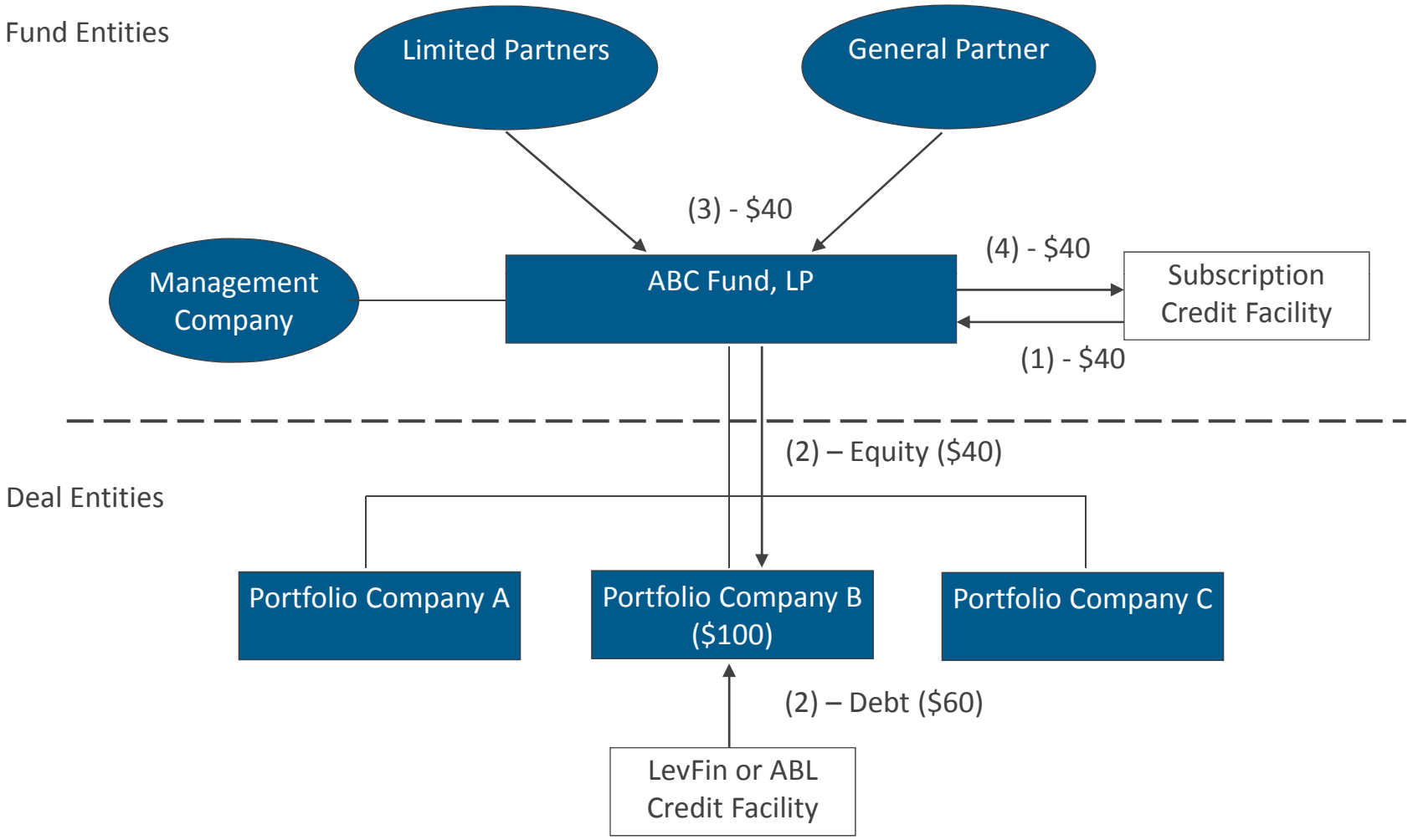
Typical Fund Investors

- Institutional investor commitments are what subscription lenders typically lend against
  - State Pension Funds
  - University Endowments
  - Foundations
  - Insurance Companies
  - Corporations
  - Financial Institutions
  - Foreign Pension Funds
  - Sovereign Wealth Funds
  - Funds of Funds and Secondary Funds
  - High Net Worth Individuals and Related Entities

Short Term Bridge Example

- The following example shows a short term bridge of the equity in a buyout / acquisition
  - $100 million Buyout / Acquisition
  - Sources
    - $40 million Subscription Debt
    - $60 million LevFin/ABL Debt
    - $100 million Total
- Uses
  - $100 million Purchase Price
  - $100 million Total

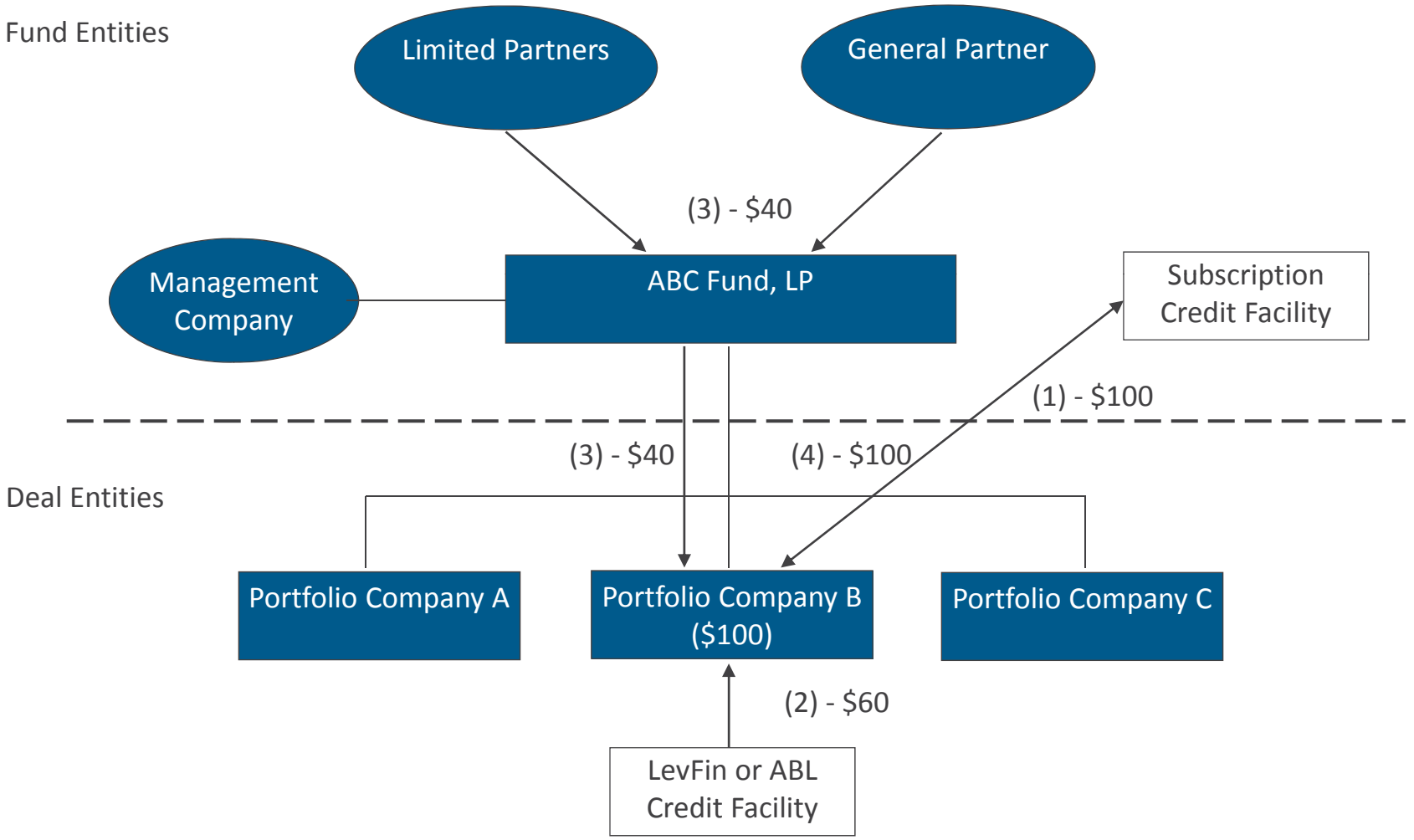
Short Term Bridge Flowchart



Long Term Bridge Example

- The following example shows a long term bridge of the entire purchase price in a buyout / acquisition
  - $100 million Buyout / Acquisition
  - Sources
    - $100 million Subscription Debt
    - $100 million Total
- Uses
  - $100 million Purchase Price
  - $100 million Total

Long Term Bridging Flowchart



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Fund Documentation

Fund Documentation

- Primary Documents
  - Limited Partnership Agreement
  - Subscription Agreements
  - Investor Letters
  - Investor Opinions/Authority Certificates
  - Side Letters
  - Credit Link Documents

Fund Documentation – Limited Partnership Agreements

- Five Areas of Focus
  - Subscription Facility Provisions
  - Commitment Period
  - Debt Limitations
  - Transfers of Interest
  - General LPA Don't's

Fund Documentation – Limited Partnership Agreements

- Subscription Facility Provisions
  - Language should try to mirror Investor Letter as much as possible (ERISA Investors cannot have separate agreements with bank)
    - Permit indebtedness in connection with Facility as either borrower or guarantor –ideally language should be as broad as possible; authorizing cross collateralization, joint and several borrowings with other funds, etc.
    - Acknowledgments of pledge and Agent's right to call capital
    - Agreement to fund without setoff, counterclaim or defense
    - Limitations on how long loans can be outstanding
    - GP and Investors agree capital calls to be funded only to subscription/collateral account
    - Delivery of financials from Investors

Fund Documentation – Limited Partnership Agreements

- Commitment Period
  - Ability to call capital to repay borrowings during and after (often permitted in definition of Fund Expenses or Follow-on Contributions)
  - Termination and/or Suspension – problematic if you can't call capital after the end of the Commitment Period or during a suspension thereof. Commitment Period can often be terminated by the Investors or acts outside of GPs control such as Key-Person Events or GP fault/no-fault removal provisions
  - Capital Call Mechanics (timing for and permitted uses)

Fund Documentation – Limited Partnership Agreements

- Debt Limitations
  - Credit agreement limitations often mirror the LPA limitations. Check to see when limitations kick-in and whether they can be adjusted by Advisory Committee approval
- Transfers of Interest
  - General Partner removal (fault and no-fault)
  - Limited Partner – ideally includes sub line lender consent and at a minimum GP consent
    - Partial transfers
    - Transferee not appearing on OFAC

Fund Documentation – Limited Partnership Agreements

- LPA Don't's
  - Restrictions on amount or percentage of capital that can be called as a result of a default of another Investor
  - No Third Party Beneficiary clauses
  - Withdrawal/Excuse Provisions: Ideally, any withdrawal under the LPA indicates that a payment to repay subscription facility is a pre-condition
  - Investors not responsible for amounts owed under subscription facility that are incurred after expiration of Commitment Period
  - Note needed link between provisions in the LPA and negative covenants in the Credit Agreement

Fund Documentation

- Subscription Agreements
  - Between each Investor and the Fund
  - Along with the LPA, governs Investor's agreement to fund its commitment
  - Must be delivered by each Investor
  - Reviewed for acceptability
    - Commitment amounts match borrowing base
    - Properly executed and accepted by GP countersignature
    - Information complete and no changes to the form that are materially adverse to the Lender

Fund Documentation

- Investor Letters
  - Agreement/Acknowledgment between Investor and Agent
    - Key agreements/acknowledgments
      - The Fund's pledge to the Agent of Investor's commitment, contributions and right to call capital
      - Make contributions when called without setoff, counterclaim or defense (including fraud, mistake, Section 365 of the Bankruptcy Code)
      - Make all contributions into a deposit account controlled by Agent
      - Subordination of claims
      - Limitation on transfers and collateral assignment
      - Will provide financial statements/certify commitment amount
      - Special provisions for ERISA, governmental and foreign investors

Fund Documentation

- Investor Letters
  - Who must deliver?
    - Included/Eligible Investors only v. all Investors
    - Obligation to obtain: Commercially reasonable efforts/good faith efforts
  - No Investor Letter Deals
    - Clear market practice in Europe
    - Major sponsors are obtaining in the United States
    - Does not change the Lenders' legal position materially if the LPA incorporates the same concepts. Certainly is some practical benefit in obtaining them.

Fund Documentation

- Investor Opinions/Authority Certificates
  - From Included Investors only
  - Opinion covers
    - Valid existence/corporate power and authority
    - Due Authorization/execution and enforceability
    - No violation of law or conflict with organizational docs
    - Sovereign immunity (governmental investors)
    - Choice of law/submission to jurisdiction (foreign investors)
  - Authority Certificate in lieu of opinion
  - Opinions/Certificates provide comfort but not necessary for enforceability

Fund Documentation

- Side Letters
  - What are they?
    - An Investor's separate agreement with the Fund that alters the terms of its subscription agreement
  - Key things to watch out for
    - Express retention of sovereign immunity
    - Rights to transfer/assign interests
    - Obligation to deliver Investor Letters/Opinions
    - Investor excuse rights/exclusions for violating investment policy
    - MFN clauses and elections

Fund Documentation

- Credit Link Documents
  - Many Investors must be linked to a parent, sponsor or related entity or government that has a credit rating
  - Relevant documents include
    - Financials and organizational documents
    - Guarantees
    - Comfort Letters/Keepwell Agreements
    - Statement of Facts
  - These documents will be a condition to such Investor's inclusion in the borrowing base

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The Credit Facility: Documentation

The Credit Facility

- Documentation
  - Credit Agreement
  - Security Agreement
  - Pledge of Collateral Account
  - Account Control Agreement
  - Filings, Opinions, Certificates, etc.

The Credit Facility: Key Negative Covenants

- Linked to the Limited Partnership Agreement—must restrict what the Fund can do to impair the Collateral
- Standard Negative Covenants Provisions
  - Negative Pledge
  - Limitations on use of proceeds
  - Existence/Fundamental Changes
  - Limitation on distributions to Investors during an Event of Default
  - Restrictions on withdrawals from the Collateral Account
  - Restrictions on Amendments to the Limited Partnership Agreement
  - Formation of AIV's
  - Deemed Contributions

The Credit Facility: Key Negative Covenants

- Contested Negative Covenant Issues
  - Limitation on Transfers/Admission of Investors
  - Financial Covenants are rare – some leverage limitations are entering deals if the LPA restrictions are loose
  - Partnership Agreement Defaults (GP/Investors)
  - Restrictions on GP exercising rights or remedies

The Credit Facility: Events of Default

- Standard Events of Default ("EODs")
  - Breach of Representations, Warranties and Covenants
  - Bankruptcy
  - Judgment
  - Cross-default
  - GP defaults and change of control issues
  - Commitment period terminations
  - ERISA events

The Credit Facility: Events of Default

- Contested EODs
  - Material Adverse Effect
  - Change in Investment Advisor
  - Key-Person Event
  - Investor payment defaults – aggregate defaults
    - Commitment Modifications Challenges
  - Battleground: GP/Sponsor bankruptcy

The Credit Facility: Remedies

- Administrative Agent can issue capital calls investors (cooperative GP would likely make initial call after Event of Default)
  - Certificates of LPs confirming unfunded capital commitment
  - Capital Calls must be in compliance with LPA
    - Typically requires all Investors/pro rata
      - This is the reason why it is imperative that all parallel funds pledge right to call
    - Use of proceeds
  - Other LPA rights and remedies pertaining to capital calls such as investor dilution, adjustment in percentage interest, etc.
- Sale of Collateral pursuant to UCC
- Application of cash in Collateral Account
- Claims against fund and Investors for breach

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The Security Structure

The Security Structure

- The Security Agreement
- Collateral Description
  - All of the Borrower's and General Partner's rights, titles, interests and privileges in and to (i) the Capital Commitments and Capital Contributions; (ii) the Borrower's and General Partner's rights to make Capital Calls; (iii) all of the Borrower's and General Partner's rights, titles, interests, remedies, and privileges under the Partnership Documents (a) to issue and enforce Capital Calls, (b) to receive and enforce Capital Contributions, (c) relating to Capital Calls, Capital Commitments and/or Capital Contributions; and (iv) all proceeds of any and all of the foregoing
- **Note:** Choice of law of the grant
  - If the Fund is not a Delaware entity, local counsel should confirm they are comfortable with the security grant being under New York law
  - Caymans, Canada are OK with US law grant, Luxembourg advises a parallel grant under Lux law

The Security Structure

- The Collateral Account
  - The Fund covenants that all Capital Contributions will be funded into the Collateral Account
  - Often held by the Agent; if not always subject to a Control Agreement
  - When can the Agent take control of the Account?
    - Event of Default
    - Default
    - Borrowing Base Deficiency

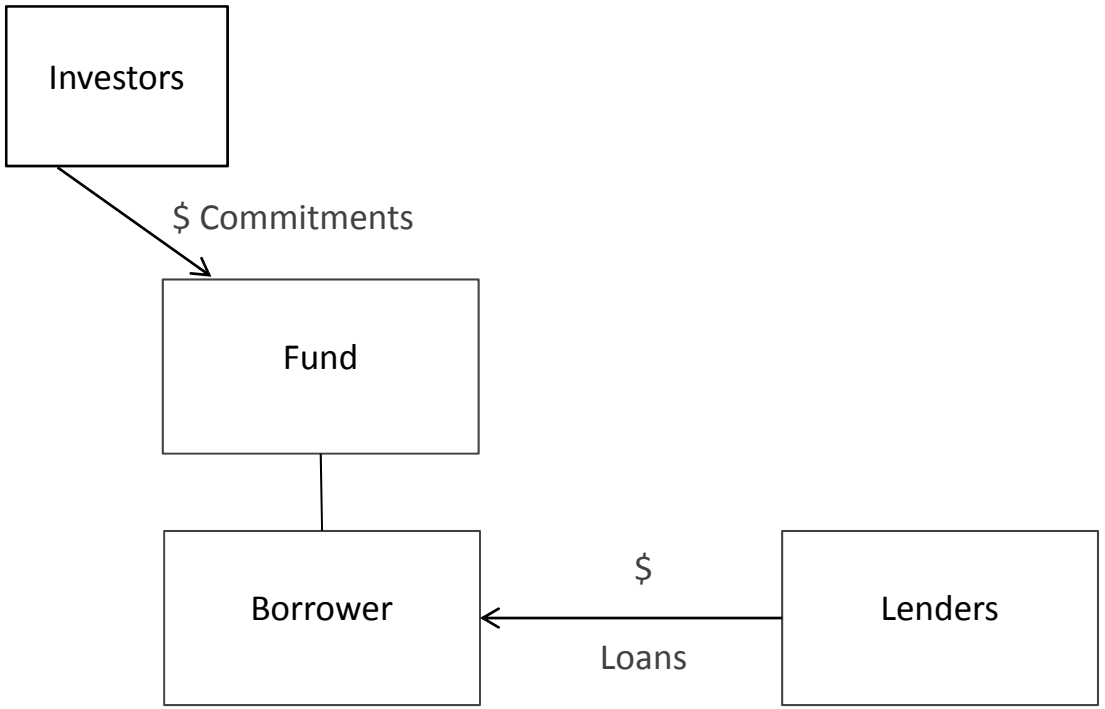
The Security Structure

- Perfection
  - General Intangibles under the UCC-Perfect by Filing
  - Location of debtor: We typically file in both D.C. and [New York] for non-Delaware entities

The Security Structure

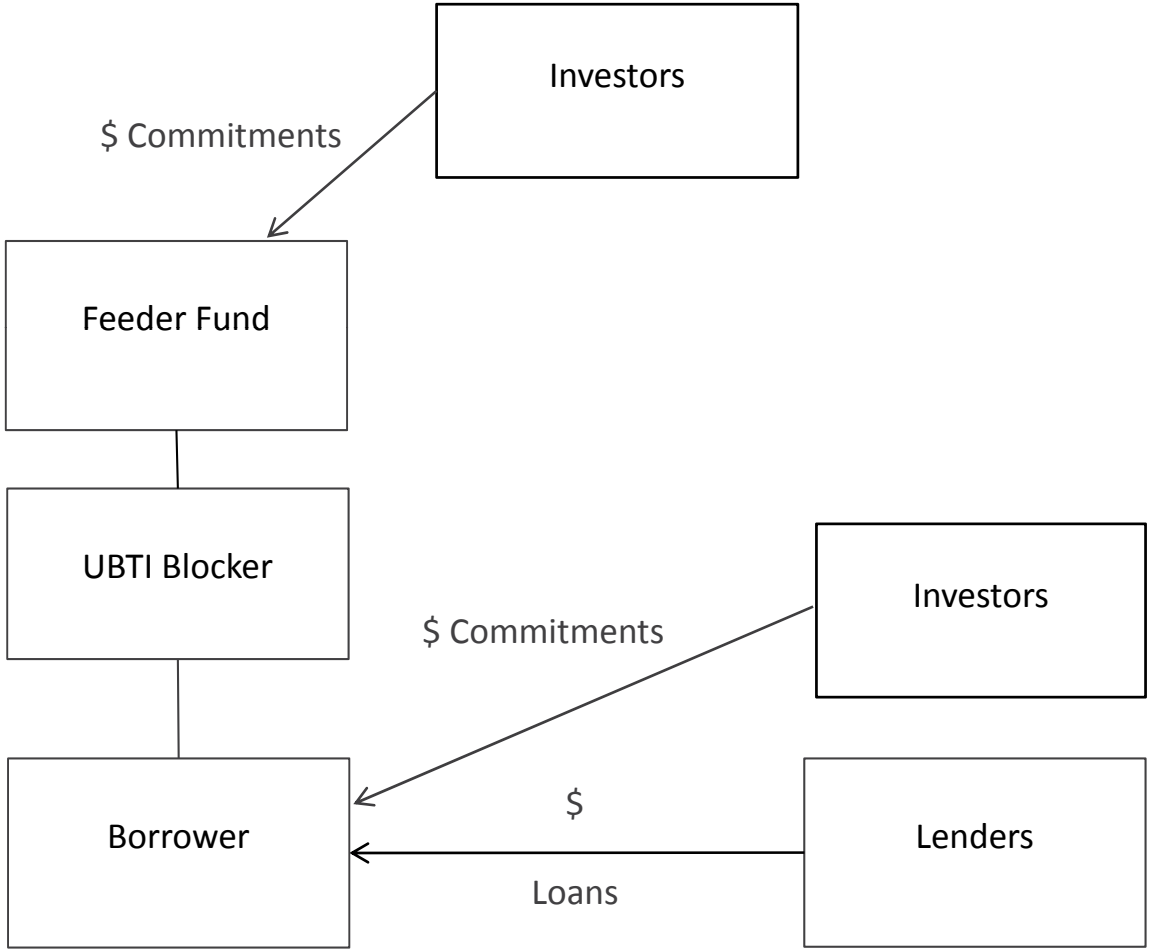
- Cayman Issues
  - Consult local counsel
  - Notice to Investors

The Security Structure: Impact of a Guarantor Structure



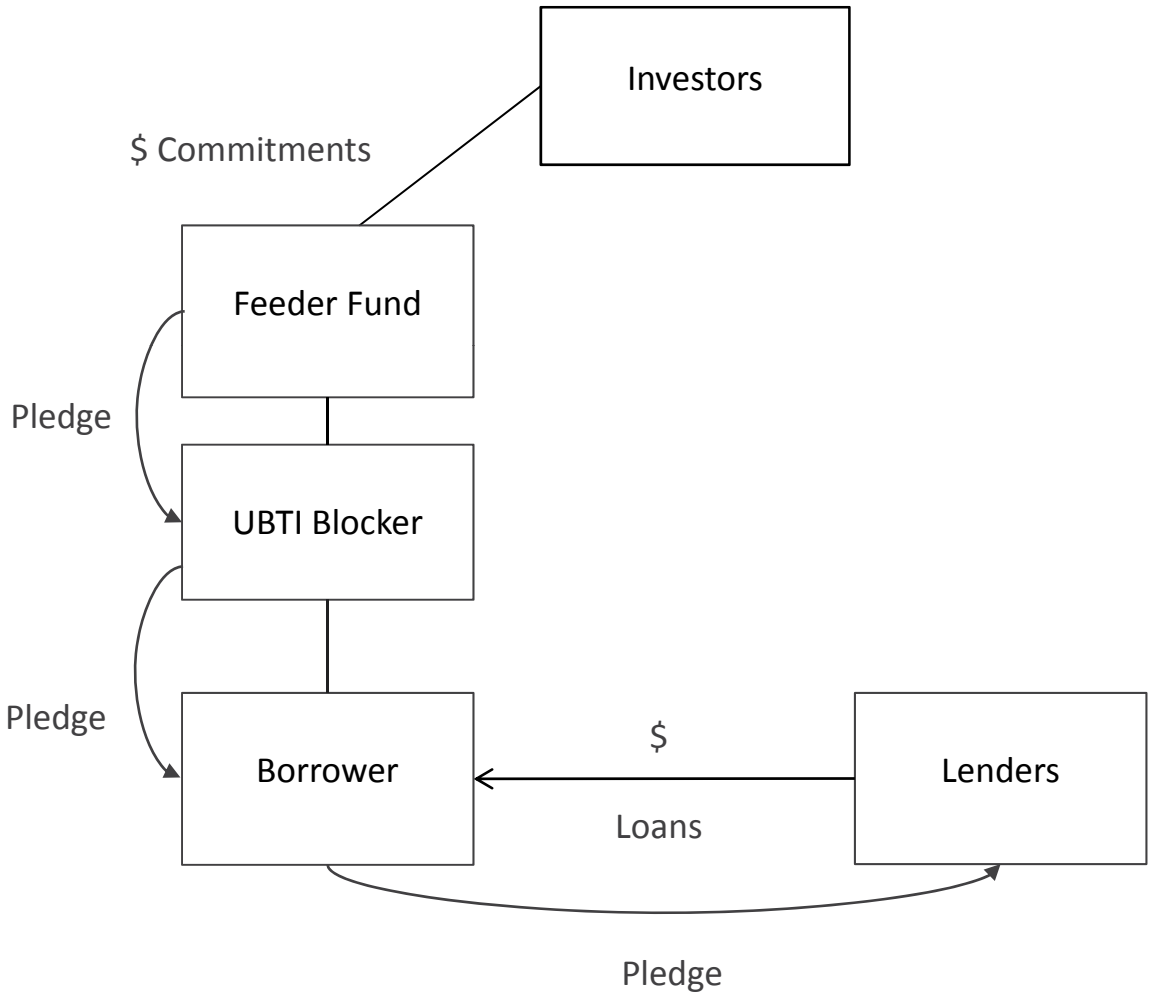
- Accommodate structure, so long as it's credit neutral to the Lenders
- The Fund guarantees Loans to Borrower, secures the guaranty with a pledge of its Capital Commitments

The Security Structure: Impact of a Guarantor Structure



- Understand the Fund Structure
- Both the Feeder Fund (the Guarantor) and the Borrower and their respective General Partners must pledge.

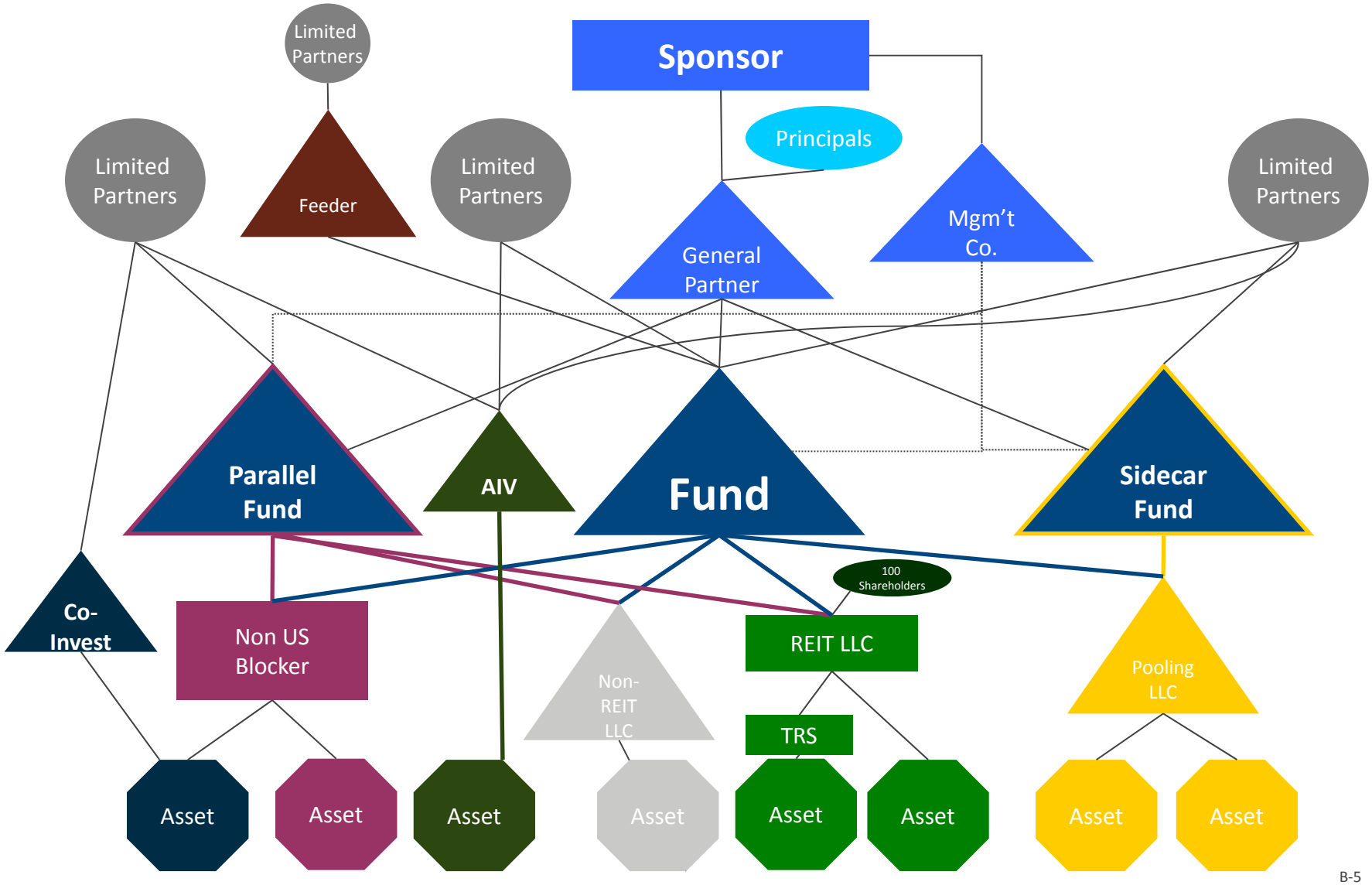
The Security Structure: Cascading Pledges



- The Fund's tax counsel objects to the Feeder Fund being a Guarantor, but the Lenders must be able to make Capital Calls.
- The Feeder Fund grants a security interest in its Capital Commitments to the UBTI Blocker.
- The UBTI Blocker grants a Security Interest to the Borrower in all its rights under the Security Agreement from the Feeder Fund.
- The Borrower grants a security interest to the Agent including all its rights under the Security Agreement from the UBTI Blocker.

Common Vehicles

Main Fund, Parallel Fund, Feeder Fund, AIV, Co-Invest Fund, Sidecar Fund, Subsidiary REIT



The Security Structure: Cascading Pledges

- Considerations
  - Complicated structures create maximum optionality for Investors
  - But they create a lot of complication
    - Each entity often has its own Collateral Account
    - Each entity is often formed under different jurisdictions
    - If an AIV is formed for a Feeder Fund, the entire security structure can need to be re-done
    - $

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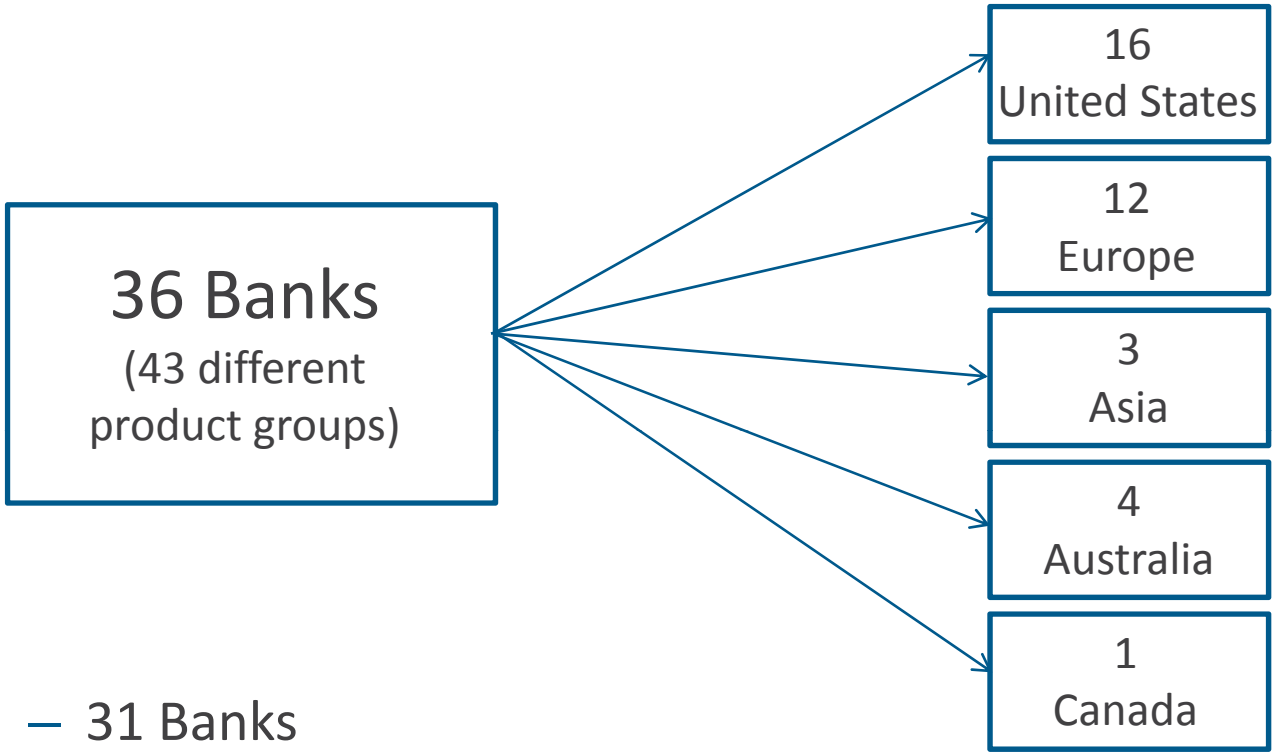
2nd Annual Subscription Credit Facility Symposium

January 19, 2012

2011

- Positive to very positive year for the asset class
- Limited Partner Capital Commitments were up about 22% from 2010
- Some extremely large facilities were consummated and successfully syndicated
- Mayer Brown formed approximately 40 funds, closed 61 subscription credit facilities with lender commitments of approximately $19 billion and represented Investors in approximately 60 consummated investments, all up materially from 2010

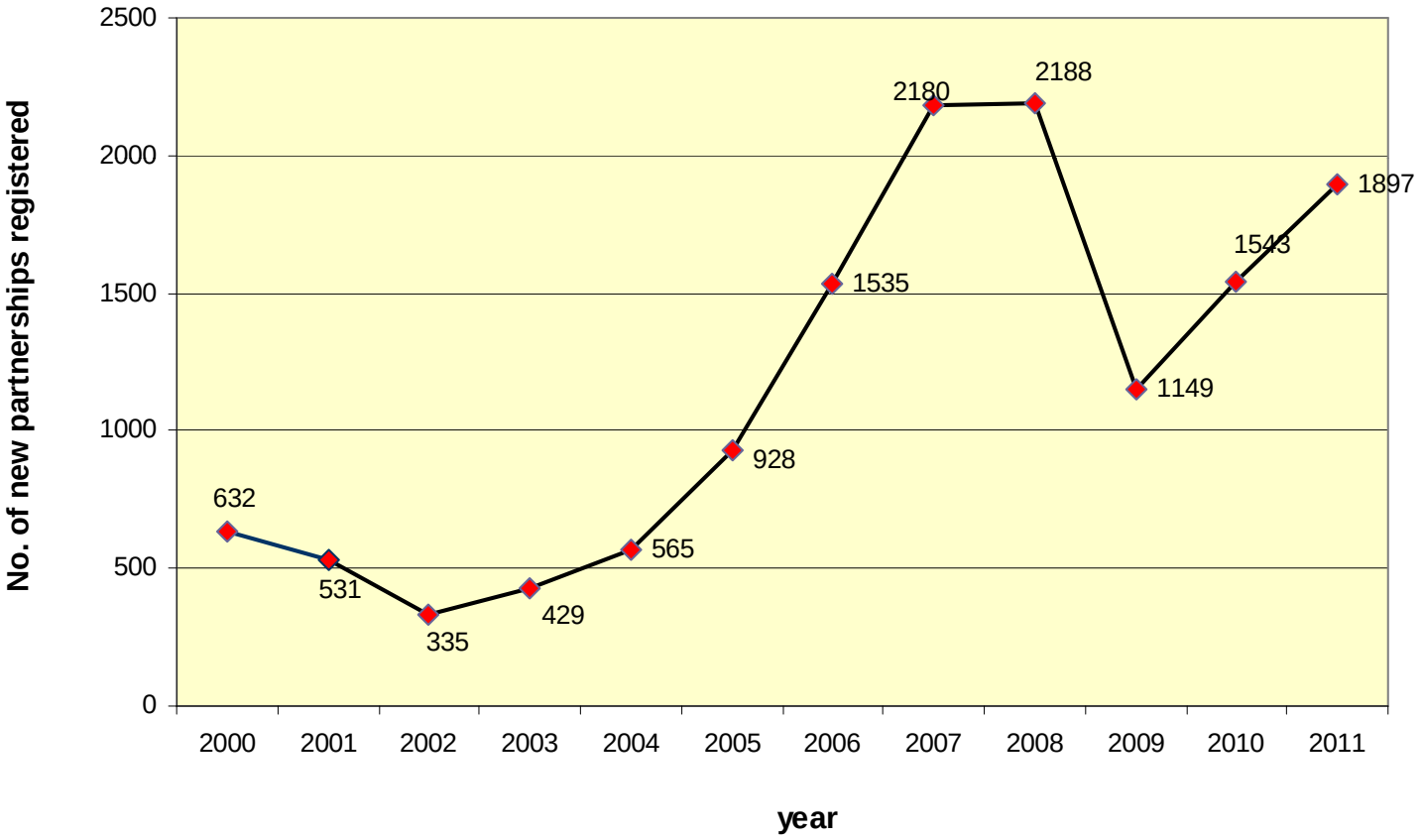
Lender Composition



- 31 Banks
- 7 Commercial Paper Conduits
- 5 Life Insurance Companies

CAYMAN ISLANDS

New Partnerships Registered 2001 - 2011



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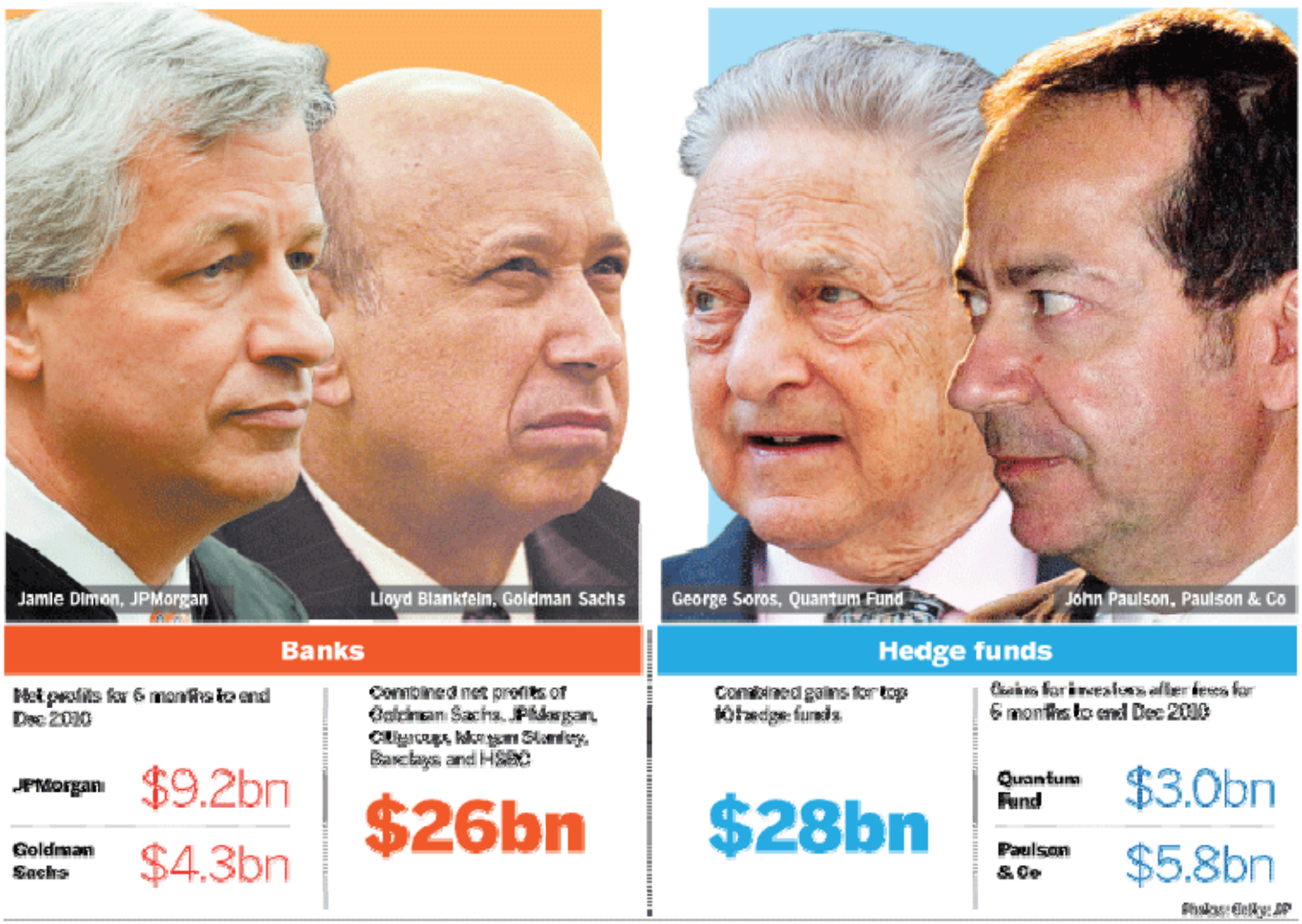
The Money Makers



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Agenda

3:00 – 3:25	Welcome and Introduction (Wharton Ballroom)
3:30 – 4:20	Break-Out Panels
• Panel A	Fund Structuring and Regulatory Updates (Wharton Ballroom)
• Panel B	The Cayman Islands Perspective (Soho Room)
• Panel C	Current Issues in the Subscription Facility Market (Nolita Room)
4:30 – 5:30	Industry Panel (Wharton Ballroom)
5:30 – 6:45	Cocktail Reception Sponsored by Wells Fargo Securities (Atrium)

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Panel A: Fund Structuring and Regulatory Updates

Presented by

Phil Capling
Wells Fargo Securities
Senior Vice President

Carol Hitselberger
Mayer Brown LLP
Partner, Charlotte

Wendy Dodson Gallegos
Mayer Brown LLP
Partner, Chicago

Lennine Occhino
Mayer Brown LLP
Partner, Chicago

Kristin Rylko
Mayer Brown LLP
Associate, Chicago

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Regulatory Capital Overview

Bank Capital Basics

- Reasons for international capital standards
  - Protect bank's depositors
  - Protect other banks (and their depositors)
  - Provide "level playing field"
- Tier I capital
  - Is a bank's core capital
  - Consists of equity capital and disclosed reserves
  - Basel Accord requires at least 50% of a bank's capital to be Tier I
- Tier II capital
  - Is a bank's supplementary capital
  - Consists of revaluation reserves, general provisions/general loan loss reserves, hybrid debt capital instruments and some subordinated term debt instruments
  - Tier II capital is limited to 100% of the Tier I capital held

International Context and Background

- Basel Committee on Bank Supervision
  - Established by the central-bank Governors of the Group of Ten countries at the end of 1974
  - Current membership: central banks and bank regulators from Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, United Kingdom and United States
  - Influence goes beyond members: 1988 Accord has been adopted by virtually all countries with internationally active banks
  - No formal supranational supervisory authority: Accord has no legal force until implemented by participating nations

International Context and Background

- Risk-Based Capital Accords
  - Initial Accord adopted by Committee in 1988 and rolled out by members over a period of several years
  - Work on Basel II, the new Accord, announced in June 1999
  - US banking agencies modified Basel I to add ratings-based approach for asset-backed exposures effective January 1, 2002
  - After many rounds of consultation, Committee approved Basel II in 2004
  - 2004 was like 1988; now we are in the multi-year roll-out period
  - Dodd-Frank requires significant revisions, including Collins Amendment
  - BIS III also will change landscape

Executive Summary

Basel I

- In effect since 1988; very simple in application
- Easy to achieve significant capital reduction with little or no risk transfer

Basel II introduced to:

- Combat regulatory arbitrage
- Exploit and improve bank risk management systems

Basel II

- Much more complex and risk sensitive
  - First Pillar – Minimum capital
  - Second Pillar – Supervisory review
  - Third Pillar – Market discipline
- Treats exposures very unequally depending on exposure characteristics
- Treats banks very unequally depending on sophistication of risk management systems

Modified Basel I – Capital Charges

- Asset risk weights
  - OECD sovereigns: 0%
  - OECD banks: 20%
  - Residential mortgages: 50%
  - Senior Asset-Backed Securities: Ratings Dependent
  - Everything else: 100%
- Sample capital calculation
  - $100 million corporate exposure
  - 100% risk weight = $100 million risk weighted assets (RWA)
  - Capital charge = $\frac{\text{Capital}}{\text{RWA}}$ = 8% minimum
  - Capital charge: $8 million

What may be ratings dependent for Modified Basel I?

- Recourse Obligations
- Direct Credit Substitutes
- Senior Asset (and Mortgage)-Backed Securities
- Residual Interests (other than credit-enhancing I/O strips)

Impact for Senior Asset (and Mortgage)-Backed Securities

- May use ratings-based approach if rated
- If unrated, ratings-based approach not available

Modified Basel I – Capital Charges

- Off balance sheet exposures
  - **Credit Conversion Factors**
    - Unfunded commitments under one year: 0% [now 10% for US banks]
    - Unfunded commitments over one year: 50%
    - Assets sold with recourse: gross up
  - **Sample capital calculation**
    - $1 billion long term corporate loan commitment
    - 50% Credit Conversion Factor (CCF) x 100% (risk weight)
      $1 billion x 50% x 100% = $500 million
    - Capital charge = $\frac{\text{Capital}}{\text{RWA}}$ = 8% minimum
    - Capital charge = $40 million

Basel II – Three Pillars

First Pillar

Minimum Capital Charges: Minimum capital requirements based on market, credit and operational risk to (a) reduce risk of failure by cushioning against losses, and (b) provide continuing access to financial markets to meet liquidity needs, and (c) provide incentives for prudent risk management

Second Pillar

Supervisory Review: Qualitative supervision by regulators of internal bank risk control and capital assessment process, including supervisory power to require banks to hold more capital than required under the First Pillar

Third Pillar

Market Discipline: New public disclosure requirements to compel improved bank risk management

Basel II - Types of Banks

Standardized

- Measure credit risk pursuant to fixed risk weights based on external ratings
- Least sophisticated capital calculations; generally highest capital burdens
- Implementation Guidance still pending for US Banks

Foundation IRB

- Measure credit risk using sophisticated formulas using internally determined inputs of probability of default (PD) and inputs fixed by regulators of loss given default (LGD), exposure at default (EAD) and maturity (M).
- More risk sensitive capital requirements
- Many European banks qualify for Foundation IRB status
- Foundation IRB is not available for US Banks

Advanced IRB

- Measure credit risk using sophisticated formulas and internally determined inputs of PD, LGD, EAD and M
- Most risk-sensitive (although not always lowest) capital requirements
- Transition to Advanced IRB status only with robust internal risk management systems and data
- ***US: "core banks" required to use this and other banks may opt in, with supervisory approval***
  - ***Core banks = consolidated total assets of $250 billion or more and/or consolidated total on-balance sheet foreign exposure of $10 billion or more***
  - ***"Banks" include bank holding companies (always), and all banks that are subsidiaries of a "core BHC" will be core banks***

Basel II - Timeline

	Basel II Time Frames		US Time Frame
	Foundation IRB	Advanced Approaches*	Advanced IRB
2006	Parallel calculation	Parallel calculation or impact studies	New framework does not apply
2007	Transition – 95% floor	Parallel calculation	New framework does not apply
2008	Transition – 90% floor	Transition – 90% floor	Parallel calculation – still delayed – once commenced, 3 transition years of 95% floor, 90% floor and 85% floor
2009	Transition – 80% floor	Transition – 80% floor	
2010	No more transition	No more transition	
2011	No more transition	No more transition	

* These are the advanced IRB credit risks and the advanced measurement approach for operational risk.
* Note, however, potential impact of Collins Amendment and Dodd-Frank 939A.

Basel II – Application of US Final Rules

- Categories of Exposure
  - Wholesale
  - Retail
  - Securitization
  - Equity

Basel II – Application of US Final Rules

Risk Weighting of Unsecuritized Exposures

	Wholesale	*Retail*
IRB	Risk adjusted amounts determined by bank inputs (PD, LGD, EAD and M) for individual exposures	Risk adjusted amounts determined by bank inputs (PD, LGD, EAD) for retail segments (e.g., residential mortgage loans, qualifying revolvers, other)
Modified Basel I	100% for everything except governments, banks and international organizations	50% for residential mortgage loans; 100% for everything else
Standardized	RBA for most wholesale exposures	LTV scale for residential mortgages; 75% for "regulatory" retail and 100% for other retail

Basel II – Securitization Capital Charges

- IRB hierarchy
  - Ratings Based Approach – mandatory if external rating, else inferred rating (if available)
    - "Inferred rating" refers to external rating of another securitization exposure to subordinated obligation of same issuer with same underlying assets, having no credit enhancement that is unavailable to unrated exposure and having a remaining maturity equal to or longer than the unrated exposure. This rating (if available) must be imputed to the unrated exposure.
  - Supervisory Formula (if all data available)
  - Otherwise deduction from capital (exception for certain conduit exposures)

Ratings Based Approach

Long Term Ratings*	Current Risk Weights	Risk Weights Under US Final Rules		
		Granular Pool		*Non-Granular Pool*
		Senior Exposure	*Non-Senior Exposure*	
AAA	20%	7%	12%	20%
AA		8%	15%	25%
A+	50%	10%	18%	35%
A		12%	20%	
A-		20%	35%	
BBB+	100%	35%	50%	
BBB		60%	75%	
BBB-		100%		
BB+	200%	250%		
BB		425%		
BB-		650%		
B, below or unrated	RBA Not Available	Deduct from tier 1 and tier 2 capital		
Short Term Ratings				
A-1	20%	7%	12%	20%
A-2	50%	12%	20%	35%
A-3	100%	60%	75%	75%

*** For investing banks, one rating is sufficient. If there are multiple ratings on a particular position, the lowest solicited rating governs.**

Basel II – Securitization Capital Charges

- To qualify as a traditional securitization, a transaction must meet all four of the criteria listed below:
  1. All or a portion of the credit risk of one or more underlying exposures is transferred to one or more third parties
  2. The credit risk associated with the underlying exposures has been separated into at least two tranches reflecting different levels of seniority
  3. Performance of the securitization exposures depends on the performance of the underlying exposures
  4. All or substantially all of the underlying exposures are financial exposures

Basel II – Securitization Capital Charges

- Securitization Exposure "outs" when underlying exposures are owned by:
  - Operating company
    - Companies that produce goods or provide services beyond the business of investing, reinvesting, holding, or trading in financial assets. Examples of operating companies are depository institutions, bank holding companies, securities brokers and dealers, insurance companies, and nonbank mortgage lenders. Accordingly, an equity investment in an operating company, such as a bank, generally would be an equity exposure under the final rule; a debt investment in an operating company, such as a bank, generally would be a wholesale exposure under the final rule
  - Small business investment companies (SBICs)
  - Community development investment vehicles
  - Other Regulatory Agencies "outs" as deemed appropriate

Basel II – Securitization Capital Charges

- The SFA capital requirement for a securitization exposure is UE (underlying exposure) multiplied by TP multiplied by the greater of (i) 0.0056 * T; or (ii) S[L+T] – S[L], where:

(i) $$S[Y] = \begin{cases} Y & when\ Y \le K_{IRB} \\ K_{IRB} + K[Y] - K[K_{IRB}] + \dfrac{d \cdot K_{IRB}}{20}\left(1 - e^{\frac{20 \cdot (K_{IRB} - Y)}{K_{IRB}}}\right) & when\ Y > K_{IRB} \end{cases}$$

(ii) $$K[Y] = (1-h) \cdot \left[(1 - \beta[Y; a, b]) \cdot Y + \beta[Y; a+1, b] \cdot c\right]$$

(iii) $$h = \left(1 - \frac{K_{IRB}}{EWALGD}\right)^{N}$$

(iv) $$a = g \cdot c$$

(v) $$b = g \cdot (1-c)$$

(vi) $$c = \frac{K_{IRB}}{1-h}$$

(vii) $$g = \frac{(1-c) \cdot c}{f} - 1$$

(viii) $$f = \frac{v + K_{IRB}^{\ 2}}{1-h} - c^2 + \frac{(1-K_{IRB}) \cdot K_{IRB} - v}{(1-h) \cdot 1000}$$

(ix) $$v = K_{IRB} \cdot \frac{(EWALGD - K_{IRB}) + .25 \cdot (1 - EWALGD)}{N}$$

(x) $$d = 1 - (1-h) \cdot (1 - \beta[K_{IRB}; a, b])$$

SSFA Formula

$$K_{SSFA} = \frac{e^{a \cdot u} - e^{a \cdot l}}{a(u - l)}$$

where

$$a = -\frac{1}{p \cdot K_G},$$

$$u = D - K_G$$

$$l = A - K_G$$

$e = 2.71828$ (the base of the natural logarithms)

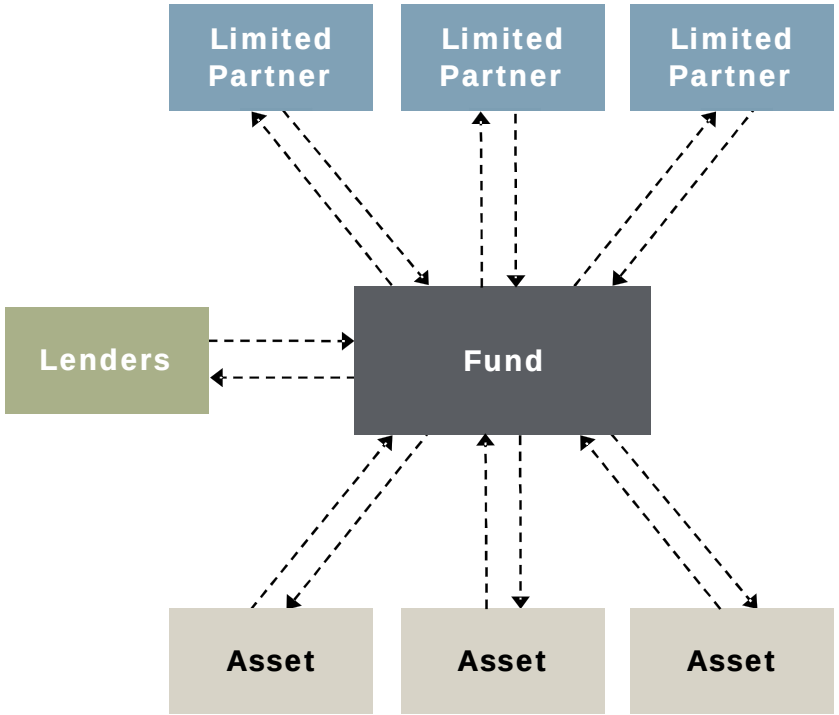
is equal to the greater of:

(i) K_{SSFA} multiplied by 100 and expressed as a percent; or

(ii) The supervisory minimum specific risk-weighting factor assigned to the tranche based on cumulative losses (see Table 15)

Basel II – Securitization Capital Charges

- Regulatory questions are:
  - Do the commitments from LPs for future capital contributions (subscription loan collateral) constitute 'financial assets'?
  - If the collateral is a financial asset, is fund an operating company?



Regulatory Capital

- 2012 will be a key year for US and global implementation of enhanced capital and liquidity requirements
- Resolution of Dodd-Frank Section 939A ratings ban issues
  - Gating issue/obstacle to US implementation of Basel 2.5/Basel III
- Finalization of US Basel 2.5 implementing proposal (January 2011)
  - Address market risk/trading book aspects of Basel 2.5
  - Incorporates 2005 BCBS changes to market risk rule never acted on in US (amend scope of positions subject to market risk rule, revise modeling requirements, and implement Pillar 2 and 3 aspects)
  - Includes market risk components of July 2009 Basel 2.5 (as amended June 2010)
    - Changes to VaR calculation, including tighter internal model requirements, stressed VaR, and incremental risk charge
    - Pillar 2 (supervisory standards) and Pillar 3 (disclosure requirements) components
  - Did not include Basel 2.5 trading book changes for securitizations and other exposures because of Dodd-Frank 939A ratings ban

Regulatory Capital

- Implementation of Basel III capital and liquidity requirements
  - Significant increases to quantity and quality of capital
  - US incorporation of Basel 2.5 banking book changes, including significantly increased capital requirements for resecuritizations, short-term ABCP liquidity facilities, and additional Pillar 2 and Pillar 3 requirements
  - Global leverage ratio; implications for US
  - New formulaic liquidity requirements
    - Liquidity Funding Ratio
    - Net Stable Funding Ratio
  - Proposal by end of Q1 2012?

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Fund Structure

Basic Structure Considerations

- Funds are typically formed as an entity that can be classified as a partnership for US federal income tax purposes (e.g., a Delaware limited partnership or a Cayman Islands exempted limited partnership)
- A fund that is classified as a partnership is not subject to US federal income tax on its income.
  - Instead, the taxable income and deductions generated by the fund "passes through" to the Investors in the fund
- The pass-though nature of most funds creates potential tax issues for many types of Investors:
  - Tax-Exempt Investors – want to minimize or eliminate the amount of income that is "unrelated business taxable income" ("UBTI")
  - Non-US Investors – want to minimize or eliminate the amount of income that is effectively connected with a US trade or business ("effectively connected income" or "ECI"), and income that is treated as ECI under the Foreign Investment in Real Property Tax Act ("FIRPTA")
  - Governmental Investors (e.g., sovereign wealth funds) have additional considerations
  - Fund Sponsor – generally wants to retain pass-through of character of capital gains in respect of its carried interest, while avoiding "phantom income"
- Funds can be structured to address these various tax issues, but there is generally a trade-off between simplicity and tax-efficiency

Unrelated Business Taxable Income ("UBTI")

- Most types of tax-exempt entities (private pension plans, educational endowments and foundations), despite their general exemption from income taxes, are subject to income tax on their UBTI.
- UBTI Defined
  - Gross income from a trade or business regularly carried on by a tax-exempt entity and that is not substantially related to the tax-exempt entity's exempt purpose.
- Flow Through of UBTI
  - Items of unrelated business income or deduction recognized by a fund taxed as a partnership for US federal income tax purposes are allocated to the tax-exempt investors and retain their character as UBTI in the hands of the tax-exempt investor.
- Consequences of UBTI
  - The receipt of UBTI generally does not affect the tax-exempt status of most tax-exempt entities.
    - The receipt of more than $1,000 of UBTI (on a gross basis) from <u>any</u> source will require a tax-exempt investor to file a US federal income tax return

Sources of UBTI

- Potential Sources of UBTI in a Fund
  - Fee Income
    - Fee income earned by a fund and allocated to a tax-exempt investor is UBTI
      - This is true even if the fee is earned in an activity that is incidental to the production of investment income.
  - Investments in Other Pass-Through Entities
    - Income from an investment in a partnership that is engaged in a trade or business (an operating company) will give rise to UBTI to a tax-exempt investor
      - The share of the business income that is passed through to the tax-exempt investors retains its character as UBTI
  - Leveraged Investments
    - If a fund directly or indirectly through a lower tier partnership holds leveraged assets, a portion of the income produced by those assets will generally be UBTI.
      - There is an exception for certain types of tax-exempt investors with respect to investments in leveraged real estate. The real property debt exception is not available for all investors (e.g., private foundations or IRAs) and requires compliance with structural requirements and the "fractions rule".

Investment in a Real Estate Investment Trust ("REIT")

- Tax-Exempt Investors
  - The use of a subsidiary REIT generally "blocks" UBTI from passing through to tax-exempt investors
    - If the REIT is a "pension-held REIT" at any time during a taxable year (i.e., at least one qualified pension plan owns more than 25% of the value of the REIT, or a group of qualified pension plans individually holding more than 10% of the value of the REIT collectively own more than 50% of the value of the REIT), it no longer acts as a UBTI blocker for those pension plans that indirectly own more than 10% of the REIT
  - Distributions by the REIT to tax-exempt investors should not constitute UBTI, provided that the UBTI Investor does not finance the acquisition of its interest in the Fund with "acquisition indebtedness" (i.e., use debt to acquire its interest in the Fund) and the Fund does not finance the acquisition of its shares of the REIT with "acquisition indebtedness"
  - Gain on indirect sale of REIT shares (i.e., sale of interests in the Fund) should not constitute UBTI, provided that the UBTI Investor does not finance the acquisition of its interest in the Fund with "acquisition indebtedness" and the Fund does not finance the acquisition of its shares of the REIT with "acquisition indebtedness"

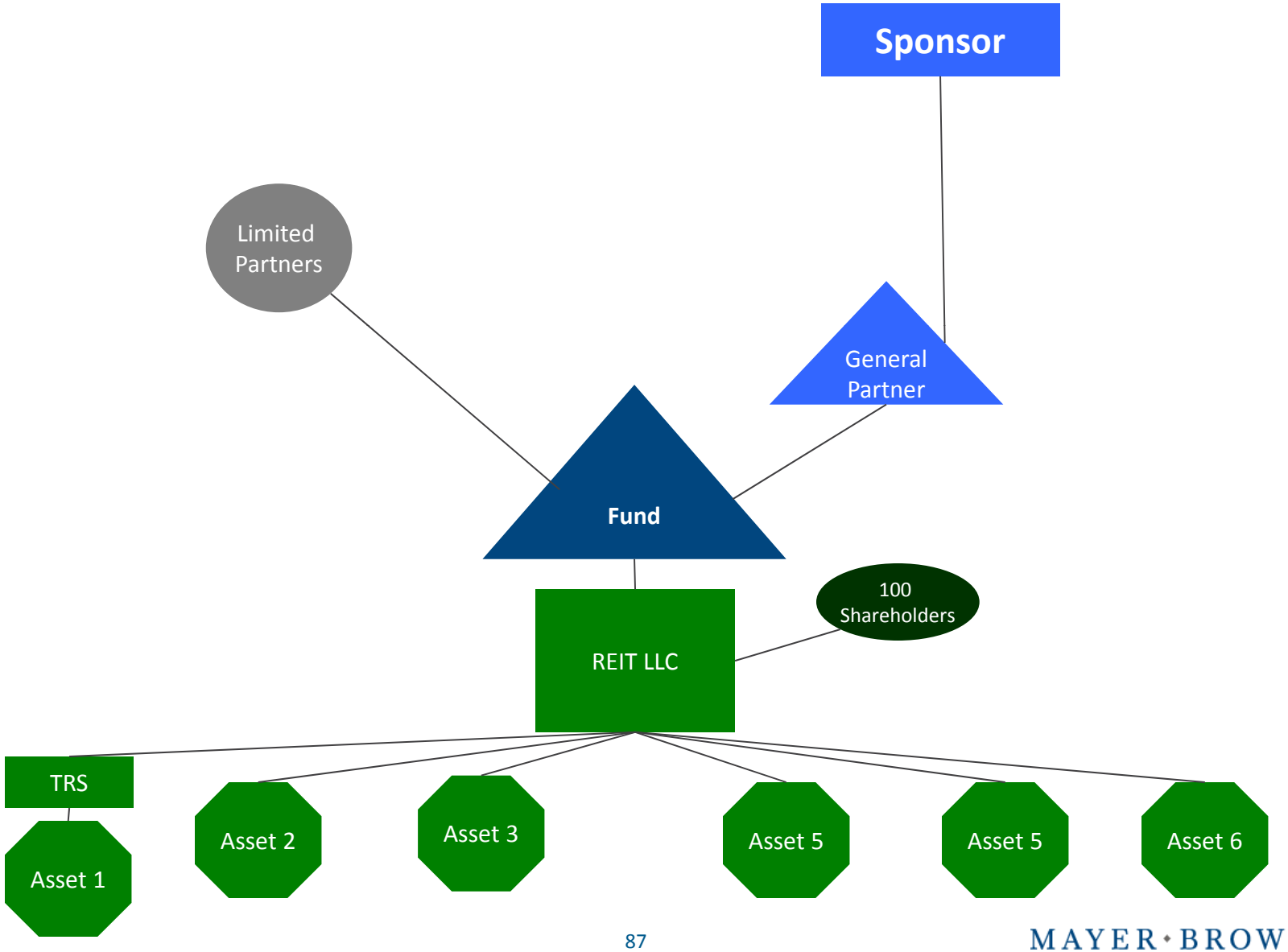
Effectively Connected Income ("ECI")

- Non-US investors are subject to US tax at the regular graduated rates (current maximum federal rate of 35% for individuals and corporations) on ECI
- ECI Defined
  - ECI is not well defined but generally it is similar in concept to UBTI
    - Unlike UBTI, leverage does not give rise to ECI
- Flow Through of ECI
  - Items of ECI recognized by a fund taxed as a partnership for US federal income tax purposes are allocated to the non-US investors and retain their character as ECI in the hands of the non-US investor
- Capital Gains on Sale of US Assets
  - Capital gain on sale of US assets generally is not taxable to a non-US investor unless it constitutes ECI
    - Gain from the sale of an interest in US real property generally is treated as ECI under the Foreign Investment in Real Property Act ("FIRPTA")

Investment in a Real Estate Investment Trust ("REIT")

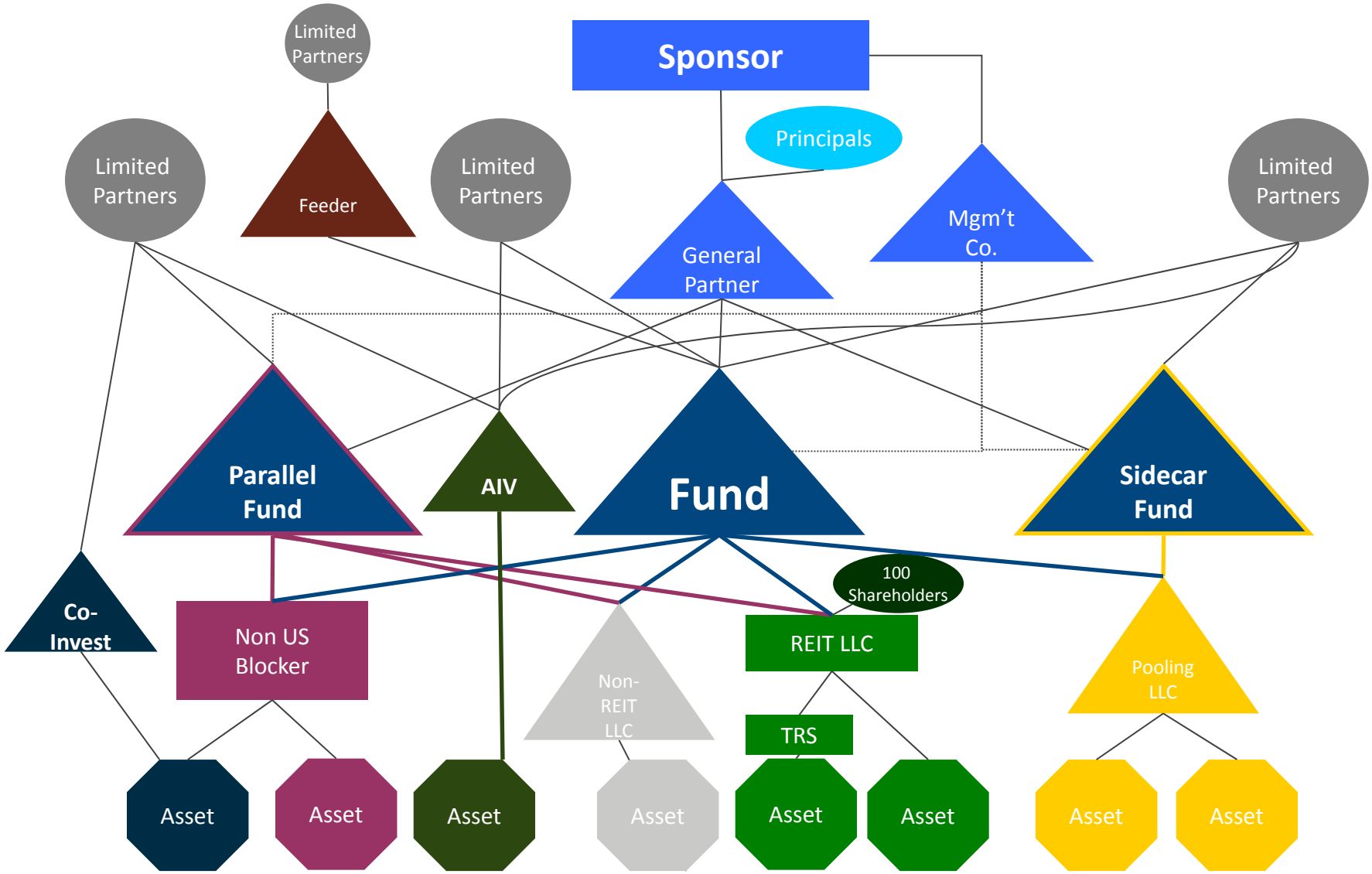
- Non-US Investors
  - The use of a subsidiary REIT converts operating income that would otherwise be ECI into dividends income
    - Withholding taxes on dividends income may be reduced or eliminated by treaty (e.g., under US/Netherlands tax treaty, withholding rate is reduced to 0% for Dutch pension plans)
  - Gain on indirect sale of REIT shares (i.e., sale of interests in the Fund) is not subject to tax if the REIT is "domestically controlled" (at least 50% owned by US persons)
  - Special rules apply in the case of sales of interests in publicly traded REITs and distributions received from them

Simple Fund Structure



Common Vehicles

Main Fund, Parallel Fund, Feeder Fund, AIV, Co-Invest Fund, Sidecar Fund, Subsidiary REIT



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Fund Structure – Other Considerations

- Why do funds typically want subsidiaries to be the borrowers under the subscription facilities?
- Why do funds hold investments through special purpose vehicles?

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ERISA Issues and Concerns

What Is a "Prohibited Transaction"?

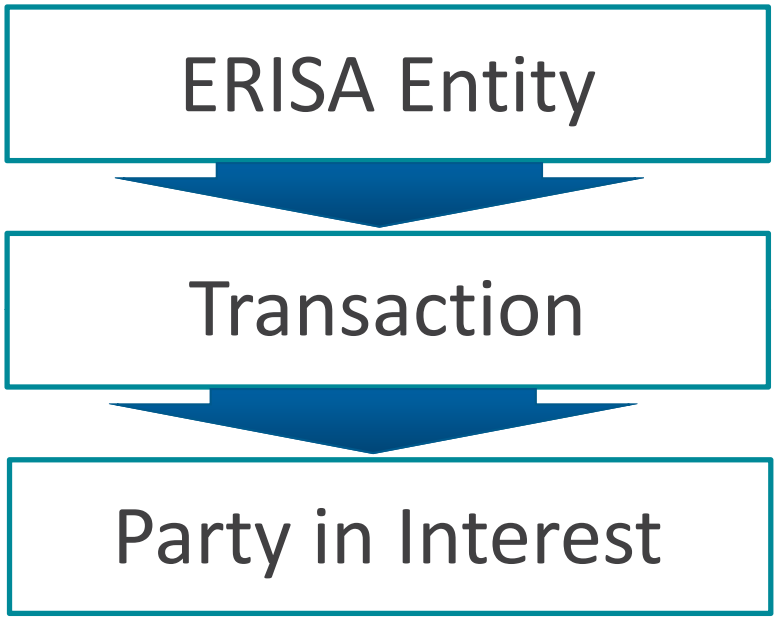
ERISA Entity

- ERISA plan
- ERISA commingled fund

What Is a "Prohibited Transaction"?

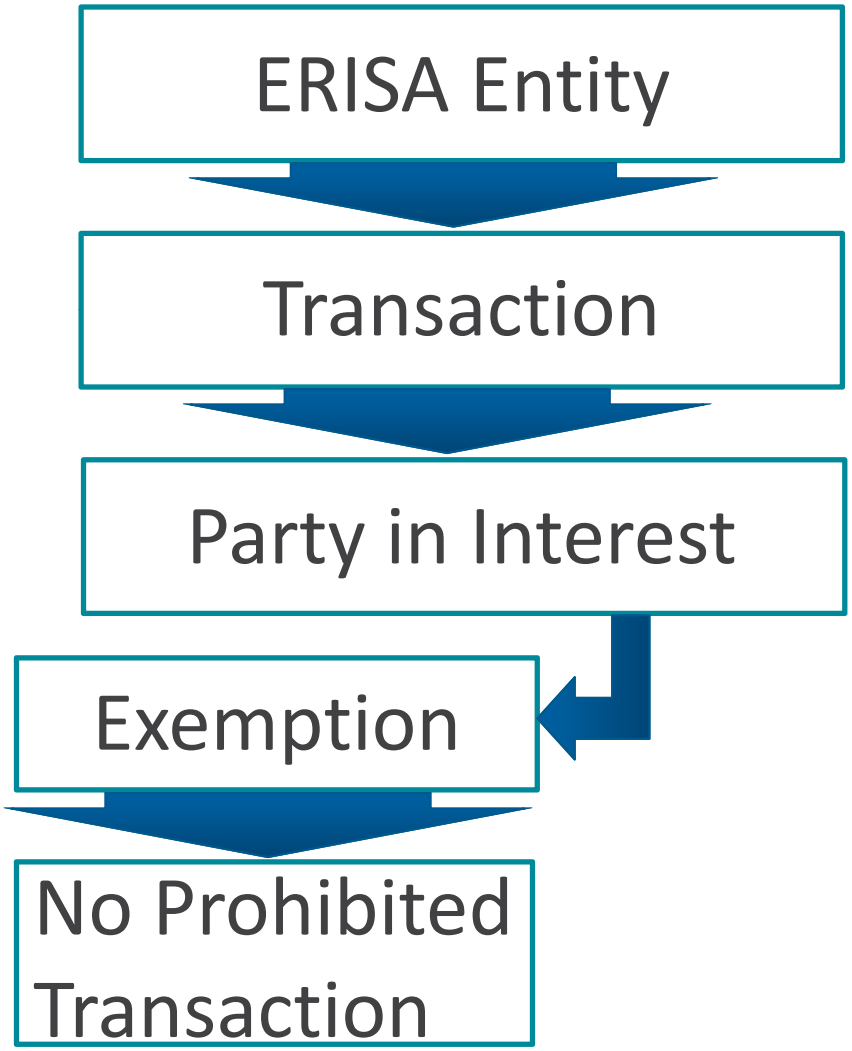
- Purchase or sale
- Extension of credit
- Lease
- Use of assets

What Is a "Prohibited Transaction"?



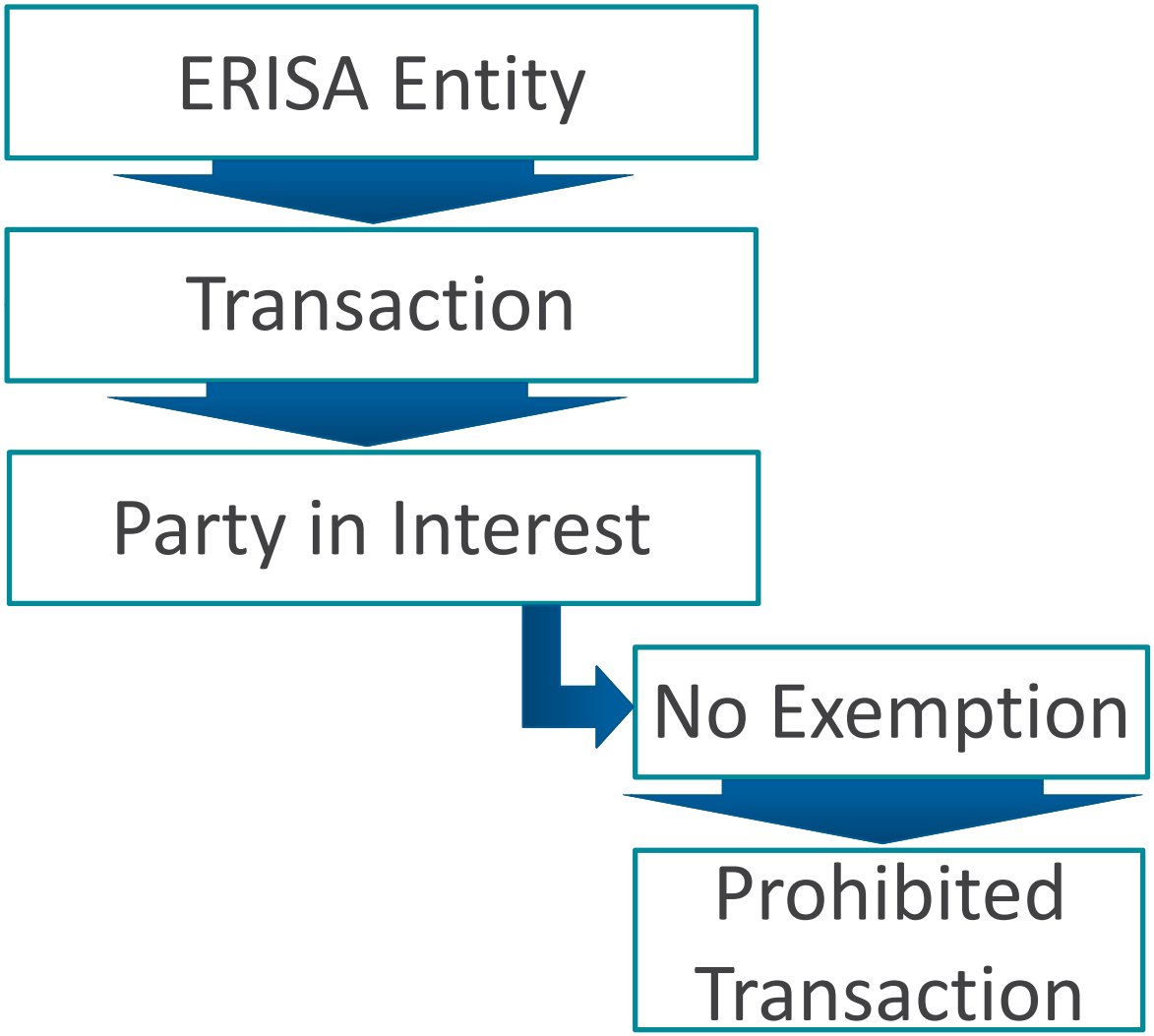
- Plan sponsor
- Union
- Fiduciary
- Service Provider
- Affiliates of foregoing

What Is a "Prohibited Transaction"?



- Individual lender prohibited transaction exemption (PTE)
- ERISA Section 408(b)(17) exempts certain transactions with service providers
- PTE 84-14: Available for accounts managed by a qualified professional asset manager, or "QPAM"
- PTE 90-1: Available for commingled insurance company separate accounts
- PTE 91-38: Available for bank collective funds

What Is a "Prohibited Transaction"?



What Are the Consequences of a Prohibited Transaction?

- Fiduciary breach of ERISA
- Prohibited transaction excise taxes imposed on party in interest
  - 15% per year of "amount involved" in transaction
  - 100% of amount involved if transaction not corrected
  - Non-deductible
- Enforceability issues
  - Must unwind loan, make plan whole and may not be able to foreclose or exercise other remedies that may involve a new prohibited transaction

ERISA Plan Asset Exceptions

- Less than 25% Benefit Plan Investors
  - Applies separately to each entity within fund structure and to each class of securities issued by the entity
  - Must be satisfied immediately after each transfer of an interest in the fund
  - "Benefit Plan Investors" include:
    - Private pension plans
    - Taft Hartley (union – sponsored) plans
    - Individual retirement accounts (IRAs)
    - Certain fund of funds, collective investment funds, insurance company separate accounts and other commingled investment vehicles

ERISA Plan Asset Exceptions

- Real Estate Operating Company (REOC)
  - 50% of assets in “managed or developed” real estate
  - REOC has the right to participate in property management or development activities
  - Must satisfy 50% asset tests on date of first investment and on each annual testing date for life of the REOC

ERISA Plan Asset Exceptions

- Venture Capital Operating Company (VCOC)
  - 50% of assets in "operating companies" (including REOCs)
  - VCOC has the right to participate substantially in management decisions of operating companies
  - Must satisfy 50% asset tests on date of first investment and on each annual testing date until VCOC enters distribution period
  - Real estate funds are often structured so that Fund qualifies as a VCOC with subsidiaries that qualify as REOCs

ERISA Investor Excuses and Withdrawals

- ERISA investors insist on protections from risk that Fund could lose its plan asset exception, including:
  - Initial and annual GP certifications or ERISA opinions
  - Notice of plan asset problem
  - Excuse right
  - General Partner obligation to cure
  - Withdrawal right
- Practical ERISA experience of Mayer Brown
  - No Investor we know of has withdrawn because of ERISA issue

ERISA Investor Letters

- Plan asset exception only protects the Lender from ERISA prohibited transaction risk for direct transactions with the Fund entities
- Separate “agreement” between Lender and ERISA investor could raise ERISA prohibited transaction risk
- ERISA Investor Letters typically tweaked so that Investors merely acknowledge their commitments under Fund agreements

ERISA Implications of Underfunded Pension Liabilities

- Under a defined benefit pension plan
  - Employees are promised a defined retirement benefit
  - Employers are obligated to fund plan over time to satisfy promised retirement benefits
- Funding status of plan based on difference between
  - Projected earnings on net plan assets
  - Projected pension liabilities
- Termination of underfunded plan only permitted if
  - Employer fully funds the plan
  - PBGC permits or requires termination and assumes control

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Placement Agent Regulations

Placement Agent Regulations

- Side Letter Provision
  - Investor has the unilateral right to cease making capital contributions or withdraw from the Fund if the Fund/GP breaches Placement Agent disclosure representations and warranties
  - Certain governmental Investors only (New York, Pennsylvania, Ohio, California and Connecticut, for example)
- Common Placement Agent Policy Disclosure Provisions
  - Fund/GP did not use a Placement Agent to obtain investment from Investor
  - Disclosure as to the names, services performed by, and compensation of, any Placement Agent

Placement Agent Regulations

- Ways to Address Placement Agent Disclosure Requirements
  - Concentration Limit
  - "Savings" language
    - Termination of Investor's obligation to fund further capital contributions does not apply to indebtedness or liabilities under Subscription Facility incurred prior to the date of termination or withdrawal[1]
  - Exclusion from Borrowing Base

[1] Note: all relevant regulations and other materials must be reviewed to confirm "savings" language is enforceable against the specific Investor and does not conflict with applicable law.

Placement

- Other Considerations
  - Equitable arguments weigh in favor of requiring Investor to honor capital call(s) to repay Fund's liabilities under Subscription Facility incurred prior to exercise of termination or withdrawal right —no "test case"
  - Legal opinion from Investor's counsel or Officer's Certificate as to "savings" clause
  - Most Favored Nations clauses likely inapplicable
  - No clear market trend has emerged

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The Volcker Rule

Background

- Section 619 of Dodd-Frank creates new Section 13 of the Bank Holding Company Act ("BHCA") which prohibits:
  - "Proprietary trading" in securities, derivatives and other instruments
  - Sponsoring or investing in private equity and hedge funds ("covered funds")
  - Banking entities that serve as investment adviser/manager/sponsor to a covered fund from entering into certain transactions with that fund

Background

- Purpose of Volcker Rule is to prohibit banks and their affiliates from engaging in proprietary activities deemed to be risky and speculative
- Institutions with access to government assistance should stick to lending and other customer-service activities
- The “new” Glass-Steagall
- Added to Dodd-Frank in the Senate
- Volcker Rule has limited relevance to causes of the financial crisis
- Full of unintended consequences

Current Status of Regulations

- FSOC study in January 2011
- FRB, OCC, FDIC, and SEC proposed regulations week of October 10
  - CFTC this month
- Almost 300 pages long with almost 400 specific questions
- Comments were due January 13, 2012, but recently extended to February 13, 2012

Effective Date

- Statutory effective date July 21, 2012
- Two year conformance period until July 2014
- Further extensions possible
  - Up to three one year extensions with FRB approval
  - "Illiquid" funds may be eligible for additional 5 year extension
- Federal Reserve Board issued a final rule February 14, 2011 implementing these schedules (76 FR 8265)
- New proposal suggests compliance structure should be in place by July 21, 2012 and activities should be conformed "as soon as practicable" after the effective date

Covered Banking Entities

- Any FDIC-insured depository institution
- Any company that controls such an institution
- Any foreign bank (and any parent FBO) with a US branch or agency or a US insured depository institution subsidiary
- Any affiliate or subsidiary of the above
- Applies to all of these entities on a global basis (subject to exemptions for non-US banks outside the United States)
- Affiliate is defined according to the BHCA definition

Prohibitions on Covered Funds

- A banking entity may not, as principal, directly or indirectly, have an equity, partnership or other ownership interest in, or sponsor, a covered fund unless exempt
- A banking entity that serves as investment adviser/manager/sponsor to a covered fund may not enter into a covered transaction, as defined in section 23A of the Federal Reserve Act, with that fund, and other transactions must be on market terms
- If ownership/sponsorship of the covered fund is permitted, does it become an "affiliate" subject to the prop trading ban discussed above?

Definition of Covered Fund

- "Covered Fund" is (i) any issuer that would be an investment company as defined in the Investment Company Act of 1940 (the "Act"), but for section 3(c)(1) or 3(c)(7) of the Act, or (ii) any "similar funds" determined by the agencies
- Under the proposal, funds exempt under other sections of the Act (such as section 3(c)(5) and SEC Rule 3a-7) are not covered funds
- The Agencies propose to designate as "similar funds" a "commodity pool" and any foreign entity that is the foreign equivalent of a covered fund, even if it is not subject to the Act

Definition of Ownership Interests

- "Ownership Interests" include equity, partnership and similar interests (including warrants and options), whether voting or nonvoting, and derivatives thereon. The definition focuses on whether the interest exposes the banking entity to profits or losses of the fund
- Debt securities with similar characteristics are covered as "other similar interests"
- Carried interest is not included in the definition of "ownership interest" provided that it is received as compensation for services rendered to the fund and certain other conditions are met

Definition of Sponsor

- Serving as a general partner, managing member, trustee or CPO of a fund, or
- Selecting in any manner or controlling the directors, trustees, or management, or
- Sharing the same or similar name for various purposes
- A “trustee” is excluded from the definition if the trustee does not exercise investment discretion, or is not a directed trustee, with respect to a covered fund

Certain Permitted Covered Fund Activities

- Asset Management De Minimus Investments Exception
- Risk-Mitigating Hedging Purposes
- Activities Conducted Solely Offshore
- Loan Backed Covered Fund that issues ABS
- Limited ABS Issuer Exemption

Organizing and Offering of Covered Funds in Connection with Bona Fide Fiduciary and Advisory Services to Customers

- A banking entity is permitted to organize and offer a covered fund if eight criteria are satisfied
- The banking entity must adopt a credible plan outlining how the banking entity intends to provide advisory or similar services to its customers through organizing and offering the fund
- Co-investment on de minimis basis is permitted
- Exemption not likely to be of help to ABS vehicles

Conditions on De Minimis Co-Investment in Customer Funds

- The banking entity's investment may not exceed 3 percent of the total ownership interests within one year of establishment unless extended by FRB
- No more than 3 percent of the losses of the covered fund may be attributed to the banking entity
- A banking entity may not invest more than 3 percent of its Tier 1 capital in covered funds on an aggregate basis

Exemption for Activities Conducted Solely Offshore

- Available to non-US banking entities not controlled by a US banking entity
- Banking entity engaged in covered fund activity is not organized under US law
- No subsidiary, affiliate or employee of banking entity involved in the offer or sale of an "ownership interest" in the covered fund is incorporated or physically located in the US
- No "ownership interest" in the covered fund is offered for sale or sold to a resident of the US

Loan Backed Securitization Vehicle Exemption

- Covered banking entity may hold ownership interest in or sponsor a covered fund that issues ABS if its assets are solely loans and related rights

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2nd Annual Subscription Credit Facility Symposium

January 19, 2012

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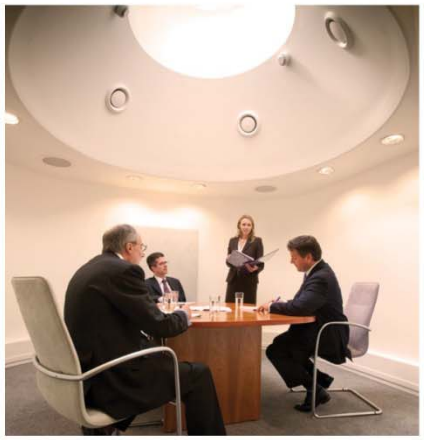




Second Annual Subscription Credit Facility Symposium

January 2012

APPLEBY

Subscription Finance:
The Cayman Islands Perspective

Moderator:

Robert Wieser, Executive Director, WestLB

Panelists:

Julian Black, Partner, Appleby

Simon Raftopoulos, Partner, Appleby

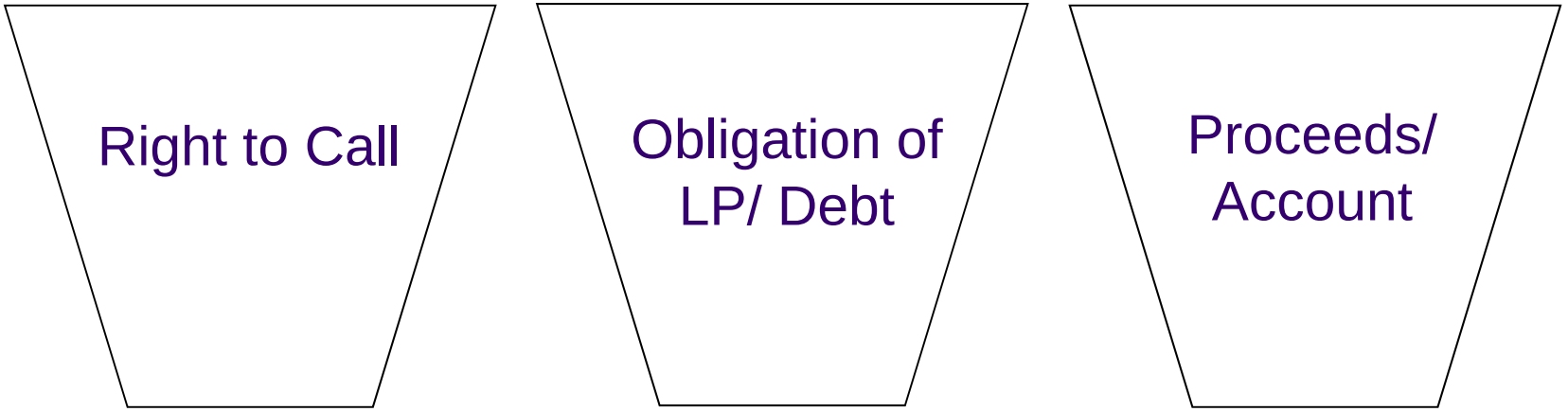
Nature of the Cayman ELP

- Popularity
- Delaware LPs & Cayman LPs
  - Legal existence
  - Side letters
  - Indemnification/ Third party rights
  - LPs withdrawal
  - Punitive provisions

Security

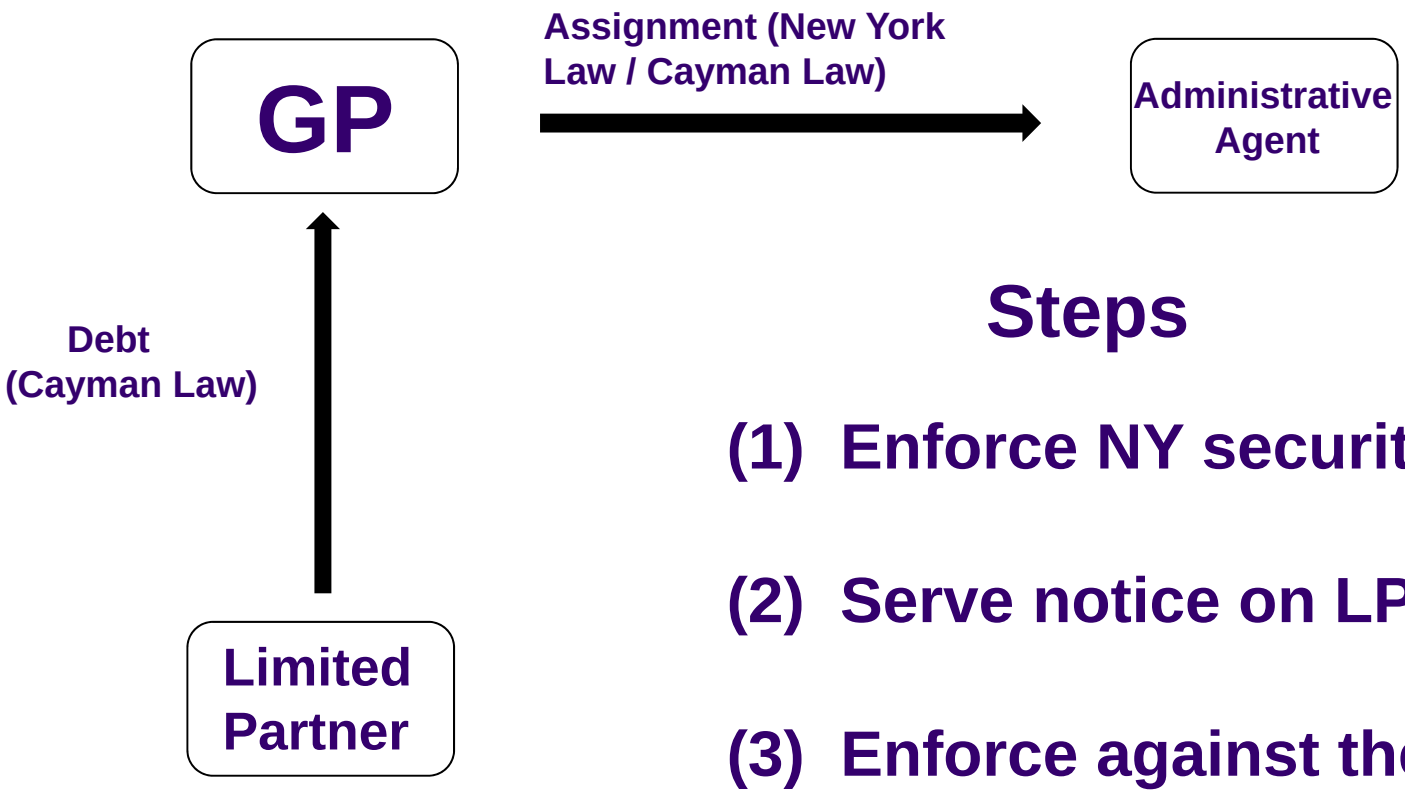
- What is Security: Recap
- Conflicts of Law
- Validity of Security Contract
- Perfection/Priority of Security
  - Dearle v. Hall
- Enforcement
- Quasi-Security

The Assets



Cayman **Cayman** **New York**

Enforcement



Steps

(1) Enforce NY security

(2) Serve notice on LPs

(3) Enforce against the LPs

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Legal Bear Traps Under Cayman Law

Documentation Review

- LPA, Subscription Agreement & Side Letters
  - Parties
  - Obligations
  - Right to Call
  - Assignability

Opinion Review

- Assignability
- Priority & Perfection
- Obligations
- Due Execution & Enforceability
- Formation & Good Standing

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THE RIGHT PEOPLE. THE RIGHT PLACES.

Bermuda
British Virgin Islands
Cayman Islands
Guernsey
Hong Kong
Isle of Man
Jersey
London
Mauritius
Seychelles
Zurich

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2nd Annual Subscription Credit Facility Symposium

January 19, 2012

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Panel C: Current Issues in the Subscription Facility Market

Presented by

Mike Mascia
Mayer Brown LLP
Partner, New York

Mark Dempsey
Mayer Brown LLP
Associate, Chicago

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Agenda

- Implications of Overcall Limitations in a Partnership Agreement
- Enforceability of Capital Commitments
- Emerging Side Letter Issues
- Sovereign Immunity
- Aftercare Credit Facilities
- Credit Facilities for Open-End Funds

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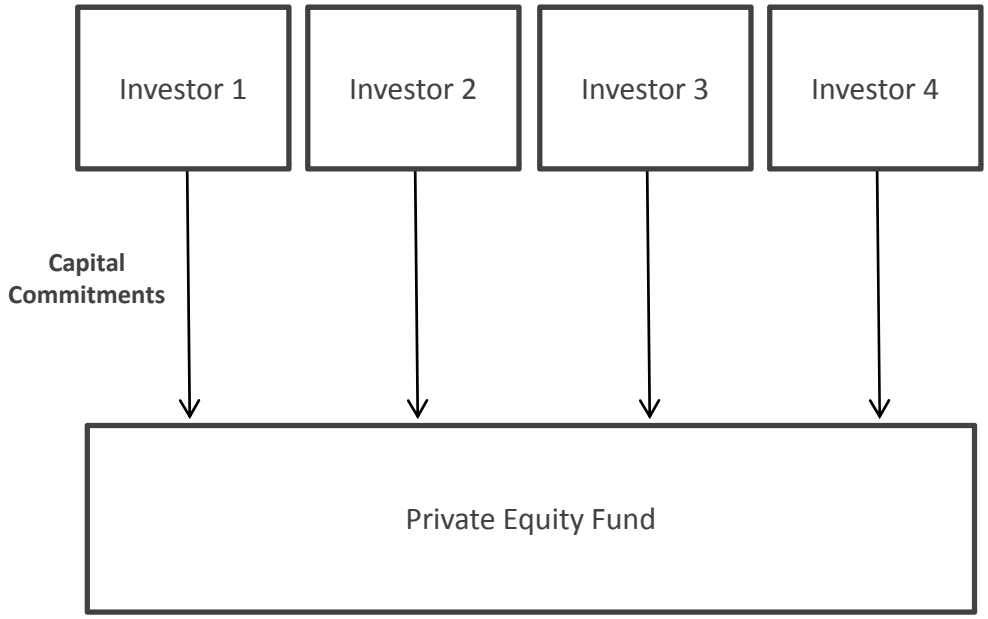
Implications of Overcall Limitations in a Partnership Agreement

Overview of Overcall Limitations



- A Lender's general expectation, as in any ABL loan or securitization, is that 100% of each Investor's uncalled capital commitment is available to support repayment and over collateralize any defaults by another Investor
- That's the entire point of a Borrowing Base
- Overcall limitations cut against that expectation

Overview of Overcall Limitations

- Subscription Facilities are different from RMBS or an Auto Loan Securitization
  - Each Obligor in an RMBS transaction has a separate and distinct mortgage contract the payment obligation of which has nothing to do with the performance of other obligors of other mortgages in the pool
  - All Investors in a Subscription Facility have a Capital Commitment obligation largely governed by a single contract – the Partnership Agreement
  - Investors in a Fund may have a valid interest in ensuring that their Capital Contributions are invested by the Fund in a diversified pool of Investments
  - Investors may not want, as a result of the default of other Investors, their entire Capital Commitment ending up in a single investment

Overview of Overcall Limitations

- Primary Forms:
  - Maximum Cap for Follow-Up Calls
  - Hard Concentration Limits
  - Note: Different Partnership Agreements Structure Differently

Overview of Overcall Limitations

- Maximum Cap for Follow-Up Calls
  - Example: If any Limited Partner defaults on its obligations to fund any Capital Call hereunder, the General Partner shall be authorized to make a subsequent Capital Call on the non-defaulting Limited Partners for the resulting deficit, *provided that no such non-defaulting Limited Partner shall be obligated to fund such a subsequent Capital Call in an amount in excess of [50]% of the amount it initially funded pursuant to the original Capital Call*
  - So, if an Investor originally funded $10, the most it would be contractually obligated to fund on a follow-up call would be $5, even if that is less than its remaining Uncalled Capital

Overview of Overcall Limitations

- Numerical Example

Hypothetical

At Maturity of the Facility:

- $200 million Uncalled Capital
- $100 million Facility
- $20 million Loans Outstanding
- $20 million Capital Call to repay Loans

25% Investors Default

$20 million	Capital Call
- $15 million	Funded (25% of Investors Default)
$5 million	Due and Owing
$7.5 million	Available for Follow-Up Call (50% of $15 million)
$5 million	Collected – Banks Repaid

Overview of Overcall Limitations

- Numerical Example

50% Investors Default

	$20 million	Capital Call
-	$10 million	Funded (50% of Investors Default)
	$10 million	Due and Owing

$5 million	Available for Follow-Up Call (50% of $10 million)
$5 million	Collected – Banks $5 million Under

33% Investors Default is the Inflection Point

Overview of Overcall Limitations

- Hard Concentration Limit
  - Example: If any Limited Partner defaults on its obligations to fund any Capital Call hereunder, the General Partner shall be authorized to make a subsequent Capital Call on the non-defaulting Limited Partners for the resulting deficit, *provided that no such non-defaulting Limited Partner shall be obligated to fund an amount in excess of [15]% of its Capital Commitment with respect to any single Investment*
  - So, if an Investor has a Capital Commitment of $100, and the initial Capital Call required it to fund $10, the most it would be contractually obligated to fund on a follow-up call would be $5, even if that is less than its remaining Uncalled Capital
  - Is a Capital Call to repay a Loan "with respect to any single Investment?"

Overview of Overcall Limitations

- Numerical Example

Hypothetical

$100 million Aggregate Capital Commitments
15% Hard Concentration Limit

10% Investment

$10 million	Investment funded by Loans
$10 million	Capital Call
- $8 million	Funded (20% Investors Default)
$2 million	Due and Owing
$4 million	Available for Follow-Up Call (Non-defaulters funded $8 million, 15% of their aggregate Capital Commitment of $80 million is $12 million leaving $4 million)
$2 million	Collected – Banks Repaid

Overview of Overcall Limitations

- Numerical Example

15% Investment

$15 million	Investment funded by Loans
$15 million	Capital Call
- $14 million	Funded (About 6.5% of Investors Default)
$1 million	Due and Owing
$0 million	Available for Follow-Up Call (Each Investor has already funded its maximum 15%)

Note:

- The Borrowing Base does not protect the Lenders
- The credit risk of all Investors, not just Included Investors, is relevant here

Overview of Overcall Limitations

- Solutions and Risk Mitigants
  - Amend Partnership Agreement
  - Use of Proceeds Restriction: Loans may only be used in connection with Investments the acquisition cost of which is less than or equal to [10]% of the aggregate Capital Commitments
    - Gives the Lender a buffer between the [10]% and the [15]%
    - This provides overcollateralization back at the 50% Maximum Cap for Follow-up Calls risk threshold
    - Note that if acquisition cost is funded in part with leverage, the real test under the Partnership Agreement is equity contributed/to be contributed, not acquisition cost
  - Historic Default Rates
    - Many Sponsors have historical default rates less than 1%
    - But a non-granular Investor pool (i.e., one big Investor), can impact the risk analysis

Overview of Overcall Limitations

- Notes
  - Overcall Limitations seem to be more prevalent in private equity than real estate funds
  - Ideally we add a clarifier to the Partnership Agreement that overcall limitations apply “other than with respect to Capital Calls to repay the Subscription Facility”
  - Should Facilities with overcall limitations price the same as those without when the risk exposure is different?
  - Segments of the market are accommodating overcall restrictions in varying degrees

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Enforceability of Capital Commitments

Enforceability of Capital Commitments

- Theories of Enforcement
  - Contractual
    - Under the Partnership Agreement, Subscription Agreement and Investor Letter, the Investor has contractually committed to fund
  - Statutory
    - Under [Delaware] partnership law, the Investor is obligated to fund

Enforceability of Capital Commitments

- 6 Del. C. §17-502 (2010)—Reliance by Lenders

(a) (1) Except as provided in the partnership agreement, a partner is obligated to the limited partnership to perform any promise to contribute cash or property or to perform services, even if that partner is unable to perform because of death, disability or any other reason. If a partner does not make the required contribution of property or services, he or she is obligated at the option of the limited partnership to contribute cash equal to that portion of the agreed value (as stated in the records of the limited partnership) of the contribution that has not been made.

(b) (1) Unless otherwise provided in the partnership agreement, the obligation of a partner to make a contribution or return money or other property paid or distributed in violation of this chapter may be compromised only by consent of all the partners. ***Notwithstanding the compromise, a creditor of a limited partnership who extends credit, after the entering into of a partnership agreement or an amendment thereto which, in either case, reflects the obligation, and before the amendment thereof to reflect the compromise, may enforce the original obligation to the extent that, in extending credit, the creditor reasonably relied on the obligation of a partner to make a contribution or return.***

Enforceability of Capital Commitments

- Cases
  - *In re* LJM2 Co-Investment, L.P., 866 A.2d 762(Del. Ch. 2004) – citing 6 Del. C. §17-502 (2010)
- Potential Defenses
  - Investor Specific Sovereign Immunity, ERISA, etc.
  - Executory Contracts
  - Financial Accommodations

Enforceability of Capital Commitments

- Executory Contracts
  - Chase Manhattan Bank v. Iridium Afr. Corp., 307 F. Supp. 2d 608 (D. Del. 2004)
    - A waiver of all defenses is absolute; the failure to issue additional interests in bankruptcy does not negate the obligation to make contributions and does not create an executory contract
- Financial Accommodations
  - Lowin v. Dayton Sec. Assoc. (In re The Sec. Group 1980) 124 B.R. 875 (Bankr. M.D. Fla. 1991), aff'd in part, vacated in part by In re Sec. Group 1980, 74 F.3d 1103 (11th Cir. 1996)

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Emerging Side Letter Issues

Emerging Side Letter Issues

- Side Letters
  - What are they?
    - An Investor's separate agreement with the Fund that alters the terms of its subscription agreement
  - Key things to watch out for
    - Express retention of sovereign immunity
    - Rights to transfer/assign interests
    - Obligation to deliver Investor Letters/Opinions
    - Investor excuse rights/exclusions for violating investment policy
    - MFN clauses and elections

Emerging Side Letter Issues

- Important: Lender's counsel must review all Side Letters
- MFN clauses:
  - May be included in Partnership Agreement
  - Allow each Investor that executes a side letter to elect any right or benefit afforded to another Investor in its side letter
  - Thus, all side letters are relevant for all Investors
  - MFN carve-outs
    - Investor specific items (regulatory or jurisdictional)
    - Subscription credit facility items

Emerging Side Letter Issues

- Lender Consent rights
  - All existing side letters should be delivered to and reviewed by the lenders at closing
  - New side letters and material amendments to existing side letters should receive prior approval of the lenders or the agent
    - This could be included within any covenant prohibiting amendments to constituent documents

Emerging Side Letter Issues

- New Emerging Issues
  - Placement Agent Regulations
  - Borrowing Opt-Out Elections
  - Israeli Regulatory Withdrawal Right

Placement Agent Regulations

- Side Letter Provision
  - Investor has the unilateral right to cease making capital contributions or withdraw from the Fund if the Fund/GP breaches Placement Agent disclosure representations and warranties
  - Certain governmental Investors only (New York, Pennsylvania, Ohio, California and Connecticut, for example)
- Common Placement Agent Policy Disclosure Provisions
  - Fund/GP did not use a Placement Agent to obtain investment from Investor
  - Disclosure as to the names, services performed by, and compensation of, any Placement Agent

Placement Agent Regulations

- Ways to Address Placement Agent Disclosure Requirements
  - Concentration Limit
  - "Savings" language
    - Termination of Investor's obligation to fund further capital contributions does not apply to indebtedness or liabilities under Subscription Facility incurred prior to the date of termination or withdrawal[1]
- Exclusion from Borrowing Base

[1] Note: all relevant regulations and other materials must be reviewed to confirm "savings" language is enforceable against the specific Investor and does not conflict with applicable law.

Placement Agent Regulations

- Other Considerations
  - Equitable arguments weigh in favor of requiring Investor to honor capital call(s) to repay Fund's liabilities under Subscription Facility incurred prior to exercise of termination or withdrawal right —no "test case"
  - Legal opinion from Investor's counsel or Officer's Certificate as to "savings" clause
  - Most Favored Nations clauses likely inapplicable
  - No clear market trend has emerged

Emerging Side Letter Issues

- Borrowing Opt-Out Elections
  - Some LPAs provide the right for Investors to elect to opt-out of certain borrowings by permitting the applicable Investor to fund a loan to the Fund in lieu of funding capital when called for repayment
  - Note: such loan does not reduce the Investor's unfunded commitment
  - Creates timing issues with borrowing notices and administrative burden with borrowing base
  - Solution: Lenders can either exclude these Investors or deal with the issue on a loan-by-loan basis

Emerging Side Letter Issues

- Israeli Regulatory Withdrawal Right
  - Israeli regulation prohibits Investors formed in Israeli from holding a direct interest in any vehicle whose jurisdiction of formation has a credit rating lower than A-/A3
  - The ratings event permits the Investor to cease making contributions and to transfer its interest
  - Unless side letter or LPA provides that Investor is liable for existing indebtedness, provides risk to lenders for including such Investor in the borrowing base

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Sovereign Immunity

Sovereign Immunity

- In General
  - Founded on the principle that "The King can do no wrong," and prohibits suit against a sovereign unless such suit is consented to by the applicable sovereign
  - Potentially applicable to federal, state, and local governmental Investors, as well as foreign sovereigns
  - Most states have a statutory or common law waiver of immunity for commercial transactions
  - Must be evaluated on a state-by-state and investor-by-investor basis – best to get an express waiver of immunity in the investor letter or LPA if possible
  - Practical implication – despite legal risk is it likely that Investor would not fund?

Sovereign Immunity

- By the Numbers:
  - Public Pensions
    - The largest 100 public defined benefit retirement systems in the US have $2.534 trillion in assets[1]
  - Sovereign Wealth Funds
    - Collectively, have $4 trillion dollars in assets[2]

[1] US Census Bureau, Governments Division, *Finances of Selected State and Local Government Retirement Systems*, December 16, 2011, http://www.census.gov/govs/qpr/2011q3t1.html

[2] Financial Times, *Sovereign wealth fund assets rise to 4,000bn*, March 8, 2011, http://www.ft.com/intl/cms/s/0/a94d23b0-49be-11e0-acf0-00144feab49a.html

Sovereign Immunity

- Waivers/Commercial Obligation Waiver
- Texas, other State law limitations, California Counties
- Sovereign Wealth Funds

Sovereign Immunity

- Waiver language
  - Investor reps and covenants
    - It is not subject to or cannot claim sovereign immunity
    - To the extent it is entitled to sovereign immunity now or at any time in the future it irrevocably waives to the fullest extent permitted by law
- Commercial law rep
  - Investor reps
    - It is subject to commercial law
    - Its making and performance of the LPA, Subscription Agreement and Investor Letter constitute private commercial and not governmental acts

Sovereign Immunity

- Statutory waivers
  - Investor acknowledges and agrees that
    - Each of the LPA, the Subscription Agreement and the Investor Letter constitute a contract within the meaning of [Cal. Gov. Code Section 814][Section 12-201, State Gov. Article, Ann. Code of Maryland][ORS 30.320] [other state statute]
- Jurisdictional requirements
  - Many states will require that claims be brought before a specific board and be subject to certain procedural requirements in their jurisdiction

Sovereign Immunity

- Texas
  - General rule in Texas that a governmental entity cannot be sued for breach of contract despite a waiver (Texas Supreme Court Cases)
- State law damage limitations
  - Statutory limitations on the ability to recover contract damages (AR, CT, WV and others have potential limitations)
- California counties
  - County Employee's Retirement Law exempts county pensions from monetary judgments and damages

Sovereign Immunity

- Sovereign Wealth Funds
  - Sections 1605-1607 of the Foreign Sovereign Immunities Act generally deny immunity if such immunity has been waived and for commercial acts
  - US Supreme Court – "when a foreign government acts, not as a regulator of a market, but in the manner of a private player within that market, the foreign sovereign's actions are 'commercial'" (*Scalia – Republic of Argentina v. Weltover, 504 US 607 (1992)*)
  - Many sovereign nations and immune non-governmental entities (i.e. the United Nations) will agree to binding arbitration

Sovereign Immunity

- Side Letter Concerns
  - Express retention of Immunity:

"Investor hereby reserves all immunities, defenses, rights or actions arising out of its sovereign status or under the Eleventh Amendment to the United States Constitution, and no waiver of any such immunities, defenses, rights or actions shall be implied or otherwise deemed to exist by its entry into the Partnership Agreement, the Subscription Agreement or this letter agreement, by any express or implied provision thereof or by any actions or omissions to act on behalf of the Investor or any representative or agent of the Investor, whether taken pursuant to the Partnership Agreement or the Subscription Agreement or prior to the entry by the Investor into the Partnership Agreement or the Subscription Agreement."

Sovereign Immunity

- Side Letter Concerns
  - Rep in Favor of Lenders:

"Notwithstanding the foregoing sentence, the Investor hereby acknowledges that the foregoing sentence in no way compromises or otherwise limits the obligations of the Investor under the Partnership Agreement or the Subscription Agreement, including but not limited to (a) the Investor's obligations with respect to its Capital Commitments, (b) its obligations to return distributions in certain circumstances described in the Partnership Agreement, including without limitation, paragraph [__] thereof and (c) any obligation to reimburse or otherwise pay the Partnership or any other Partner for any loss, damage or liability arising from a breach of any representation, warranty or agreement of the Investor contained in the Partnership Agreement or the Subscription Agreement. ***A lender which provides financing to the Partnership or any Alterative Vehicle in accordance with paragraph [__] of the Partnership Agreement may rely on the provisions of this paragraph****."*

Sovereign Immunity

- Side Letter Concerns
  - All language should be reviewed against applicable law to confirm it's enforceable against the Investor
  - Common Pitfalls:
    - Investor provides a lender-friendly rep but state law does not definitively recognize it as a waiver
      - Texas
    - Investor validly waives immunity per state law but some regulation or local law prohibits or otherwise limits a lender's ability to collect
      - California county pensions

Sovereign Immunity

- Side Letter Concerns
  - *Note*: The law could change or be interpreted differently by a court considering the equities and reliance by a Lender, but the Lender should know the risk when accepting

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Aftercare Credit Facilities

Aftercare Credit Facilities

- Funds are increasingly looking for opportunities for flexibility after the expiration of Investment Period
- Aftercare Facilities generally
  - Credit facility for a Fund in the later stages of its life cycle following the expiration of the fund's Investment Period
  - Provide leverage to the Fund for permitted follow-on investments, to pay partnership expenses and/or to permit outstanding letters of credit
  - Typically smaller than a standard subscription facility, perhaps 10-20% of primary facility size
  - Important to review the Partnership Agreement to confirm if borrowings and repayment thereof are permitted

Aftercare Credit Facilities

- There are multiple structures used for aftercare credit facilities depending on need and permissibility under Partnership Agreement
- Primary Forms
  - Standard revolving line of credit
  - Single draw facility (with draw made prior to termination of Investment Period)
  - Letter of credit facility (either new or existing letters of credit)
  - Security / Borrowing Base
    - Secured by Unfunded Capital Commitments of Investor
    - Unsecured with borrowing base determined by Unfunded Capital Commitments of Investors
    - Borrowing Base determined by unencumbered assets of Fund

Aftercare Credit Facilities

- Limited Partnership Agreement
  - The Fund must have the ability to call capital to repay indebtedness after the expiration of the Investment Period
    - Express language is preferred
    - Unambiguous requirement that the fund's Investors are required to fund capital call obligations for purpose of repaying indebtedness following the expiration of the fund's Investment Period.
  - Confirm the Fund's ability to take on new indebtedness after the expiration of the Investment Period
  - Confirm that indebtedness can be secured by unfunded Capital Commitments of Investors after the expiration of the Investment Period

Aftercare Credit Facilities

- Sample language from a Partnership Agreement permitting borrowings and repayment after the expiration of the Investment Period:
  - Upon expiration or termination of the Commitment Period, no Investment may be made by the Partnership and no Partner shall be required to make Capital Contributions in respect of Investments; ***provided, however, that subsequent to the expiration or termination of the Commitment Period, any Available Commitments may be called by the General Partner in its discretion to the extent necessary to ... repay any principal, interest and other amounts, if any, owing or which may become due under any Credit Facility or in respect of any other permitted borrowings***…

Aftercare Credit Facilities

- Sample language from a Partnership Agreement permitting repayment of existing borrowings after the expiration of the Investment Period:
  - The General Partner may from time to time at any time prior to the end of the Commitment Period call for payment (a "Capital Call") of the Partners' Unfunded Commitments on a pro rata basis based on Commitments in order to have funds available for any of the purposes for which the Fund is authorized, including… repaying indebtedness and paying fees and expenses…; ***provided, that the General Partner may make a Capital Call of the Partners' Unfunded Commitments after the end of the Commitment Period to … recapitalize or repay loans on Fund Assets or assets of any Alternative Investment Vehicle or any amounts outstanding under any Facility obtained prior to the end of the Commitment Period***, …

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Credit Facilities for Open-End Funds

Credit Facilities for Open-End Funds

- Open-End Funds – potential for growth?
  - New Investors may enter the Fund throughout the life of the Fund
  - Investors may redeem their interest and withdraw from the Fund on a regular basis, typically quarterly or semi-annual basis
  - Partnership Agreement issues
    - Commitment period, rather than full funding upon closing into Fund
    - Redemption/notice periods
    - Funding mechanics among tranches of Investors
  - Subscription Facility could be adapted to work with an open-end Fund with unfunded capital commitments, relying on the same security and documentation

Credit Facilities for Open-End Funds

- Credit Facility Issues
  - Credit Facilities may require more active reporting relating to incoming and outgoing Investors
  - Close attention to Limited Partnership Agreement provisions regarding timing and notices of withdrawal or redemption by an Investor
  - Tenor of the Facility
    - Duration of redemption “lock-out” period
    - Could arguably run for life-span of Fund
    - 364-day with 1-year extensions

Credit Facilities for Open-End Funds

- Additional Lender protections
  - Occurrence of an Exclusion Event with respect to any Investor upon notice of withdrawal or redemption
  - Notice obligation with respect to receipt of redemption notices
  - Security Agreement to include future Investors
  - Mandatory Clean-Up Calls—Mandatory capital calls after delivery of redemption notices
  - Event of Default if threshold % of Investors request redemption
  - Quarterly borrowing base updates

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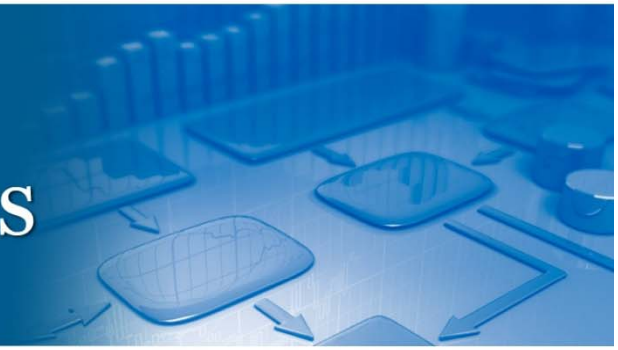
Subscription Credit Facilities



Industry Panel

Industry Panel

- Mike Mascia, Partner, Mayer Brown (Moderator)
- Zachary Barnett, Partner, Mayer Brown
- Jeff Johnston, Director, Wells Fargo Bank, N.A.
- Dee Dee Sklar, Managing Director, WestLB AG, New York Branch
- David Wasserman, Director, Sumitomo Mitsui Banking Corporation
- K. Jay Weaver, Co-Founder and Managing Principal, Walton Street Capital, L.L.C.

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2nd Annual Subscription Credit Facility Symposium

January 19, 2012

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Zachary Barnett – Mayer Brown, Chicago Partner

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Zac Barnett is a partner in Mayer Brown's Banking & Finance and Private Investment Fund practices. Zac primarily represents real estate, private equity, debt, energy and infrastructure funds. His deep understanding of these vehicles has led to the development of creative fund financing structures including fund of fund and fund of hedge fund facilities, open-end fund lending as well as several different variations of aftercare facilities. Zac has extensive experience representing both borrowers and lenders in connection with subscription facilities and is particularly adept at increasing borrowing base availability via limited partner negotiation. He was recognized in Chambers USA 2010 and Chambers USA 2011. Zac has a JD from Northwestern University School of Law.

Julian Black – Appleby Global Partner, Corporate & Commercial

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Julian Black is a partner at Appleby. Julian joined Appleby in 2010 as a Partner. Before that he was a Partner at Walkers, and prior to moving to the Cayman Islands in 2000, Julian was an Associate at Clifford Chance and Freshfields in London.

Julian's main practice is acting for Lenders in relation to Subscription Credit Facilities, and has acted on some 20 transactions in 2011, with a gross commitment in excess of US$9.5 Billion. He is proud to count amongst his clients WestLB, Wells Fargo, Deutsche Bank, SMBC, Natixis and Macquarie Bank.

Julian's other major focus is the New York CLO Market, in relation to which he acts for many of the Lead Arrangers. In 2011, Julian closed deals for each of Citibank, Bank of America, Credit Suisse and Natixis.

Julian has been consistently ranked as a leading lawyer in the Cayman Islands in all of the top global directories. Chambers Global praises Julian for his advice on Corporate and Finance law, emphasizing his excellent marketing capabilities. PLC *Which Lawyer*, he ranks as Highly Recommended and is described as "the go-to specialist for Securitisation".

Julian has recently been appointed to Global Head of Structured Finance at Appleby.

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Phil Capling – Wells Fargo Securities, Senior Vice President

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Phil Capling, CPA, is a Senior Vice President in the Asset Backed Finance and Securitization group of Wells Fargo Securities. Mr. Capling is part of the Bank Strategy team which provides capital markets solutions to financial services institutions. Mr. Capling is a Board Member of the American Securitization Forum (ASF) and Co-Chairperson of the ASF's Risk Based Capital Task Force. Prior to joining Wells Fargo Securities, Mr. Capling managed structured transactions for Wells Fargo's Treasury group. Prior to joining Wells Fargo, Mr. Capling was with Ernst & Young's assurance services group for 10 years. Mr. Capling is a CPA holder in North Carolina and received a BA from the University of North Carolina Charlotte in Accounting.

Mark Dempsey – Mayer Brown, Chicago Associate

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Mark is an associate in Mayer Brown LLP's Banking and Finance practice. He primarily represents private equity funds and REITS in subscription loan and other secured and unsecured real estate and energy financings. Mark provides representation and counsel to commercial lending institutions, insurance companies, funds and borrowers in negotiating and documenting syndicated and leveraged finance transactions (ranging from investment grade, leveraged and middle market deals to highly leveraged acquisition financings), bridge loans, bilateral loans and credit facilities, secured and unsecured lending agreements, debt restructurings and other financing transactions. He also advises commercial banking clients engaged in international financing transactions. Mark has a BS and JD from the University of Illinois.

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Subscription Credit Facilities

Wendy Dodson Gallegos – Mayer Brown, Chicago Partner

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Wendy Dodson Gallegos is a partner in the Chicago office of Mayer Brown's Corporate and Securities practice. A member of Mayer Brown's Private Investment Fund practice, Wendy represents fund sponsors in structuring, negotiating and forming real estate private equity funds with a wide range of investment strategies, including core, core-plus, value-added and opportunity. Wendy also represents private investment funds and institutional investors in the deployment of capital, including forming joint ventures and making other private equity investments.

Wendy joined the firm after serving as a law clerk to The Honorable Bobby R. Baldock of the United States Court of Appeals for the Tenth Circuit. Prior to her legal career, Wendy worked as a corporate lender and international product manager for Wachovia Bank and as a corporate cash management consultant for AmSouth Bank.

Carol Hitselberger – Mayer Brown, Charlotte Partner

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Carol Hitselberger serves on Mayer Brown's Partnership Board and focuses her practice on financing matters. Her experience encompasses securitization and other structured financial products, including structuring domestic and cross-border commercial paper-funded securitization vehicles and securitizing trade receivables, credit card receivables, aircraft, leases, franchise portfolios, government contracts, trademark licenses, and various other financial assets. She has experience with synthetic leases and synthetic securitizations. Her work also includes representation of program sponsors, underwriters, placement agents, advisors, liquidity providers, credit enhancers and issuers in private placements, public offerings, and Rule 144A/Regulation S executions. According to Chambers USA, Carol is "an absolutely brilliant lawyer" (2011) and is "at the cutting edge on securitization issues" (2010).

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Subscription Credit Facilities

Jeff Johnston – Wells Fargo Bank, N.A., Director

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Jeff Johnston, CFA, is a Director in the Asset Backed Finance and Securitization group in Wells Fargo Securities. Mr. Johnston manages the Subscription Finance team which provides lending facilities to private equity style funds and is responsible for the origination, structuring, execution and syndication of these facilities for the institutional clients of Wells Fargo as well as leading loan syndication efforts for Asset Backed Finance. Mr. Johnston is also responsible for the portfolio and workout of legacy structured products for the bank, including cash and synthetic ABS and CRE CDO's, total return swaps and RMBS positions. Mr. Johnston is an Officer and portfolio manager for Structured Asset Investors, LLC and Structured Credit Partners, LLC, a wholly owned registered investment advisor of Wells Fargo. Prior to joining Wells Fargo, Mr. Johnston worked at Bank of America for seven years largely in their Global Structured Products group working on securitizations and financings for a variety of different asset classes. Mr. Johnston is a CFA charterholder and received a BA from the University of South Florida in Physics.

Michael Mascia – Mayer Brown, New York Partner

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Mike Mascia is a partner in Mayer Brown's Banking and Finance practice group based in New York. He leads the firm's Capital Call Subscription Credit Facility team and has a globally recognized practice in the space. He has represented the Lead Arrangers and Lenders in several of the largest subscription credit facilities ever consummated, including facilities across from funds sponsored by many of the world's preeminent sponsors such as Blackstone, Goldman Sachs, Morgan Stanley, Fortress and First Reserve. In 2011, he represented lender groups in 29 distinct transactions with collective lender commitments in excess of $16 Billion. He is a frequent speaker and author on fund finance issues and is a member of Mayer Brown's global securitization practice group. Mike has an MBA from the Sloan School of Management at the Massachusetts Institute of Technology and a BA and JD from the University of North Carolina.

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Subscription Credit Facilities

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Wes is an associate in the Banking and Finance practice group. He concentrates his practice on securitization and other structured financial products with a special focus on lender representation in complex financings for private equity and real estate funds. Wes has represented major US and foreign banks and their related commercial paper conduits as lead lender, arranger, structuring agent, administrative agent, lender or issuer in the negotiation and documentation of more than 40 financings for strategic private equity funds and related entities where the loans are secured by the capital commitments of the funds' investors. Wes is well versed on syndicated and cross-border fund financings. He also has vast experience working with fund-related borrowers and negotiating third-party investor documentation with institutional, high net worth and sovereign wealth investors. His experience also includes advising financial institutions in asset transfers related to private equity funds, supply-chain finance programs and securitization transactions with asset classes including middle-market corporate loans, student loans, equipment leases and trade receivables. Wes joined Mayer Brown in 2007.

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Lennine Occhino is a partner in the ERISA practice. Since joining the firm in 1988, Lennine has concentrated exclusively in the pension investment area, advising on the structuring and offering of alternative investment vehicles of all types to ERISA and government plans and other institutional investors, including onshore and offshore hedge funds, private equity funds, real estate funds, infrastructure funds, group trusts, bank collective trusts, insurance company separate accounts, REMICs and REITs. Lennine also advises plan sponsors, trustees, investment managers, and other fiduciaries with respect to their fiduciary obligations and compliance procedures. She has extensive experience representing clients in connection with Department of Labor prohibited transaction exemption and advisory opinion requests, as well as audits and enforcement actions brought by the Department of Labor. In 2012, Lennine was recognized by peers for Employee Benefits Law in *Best Lawyers in America*. Lennine is the Global Coordinating Leader of Mayer Brown's Private Investment Fund Industry Group.

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2ND ANNUAL SYMPOSIUM

Subscription Credit Facilities

Simon Raftopoulos – Appleby Global Partner, Corporate & Commercial

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Simon Raftopoulos is a partner and a member of the Corporate Finance and Structured Finance teams. Simon joined Appleby in 2006 and was made partner in 2009. Prior to joining Appleby in 2006, Simon was an associate in the Banking and Financial Services Group of Matheson Ormsby Prentice Solicitors in Dublin.

Simon is a recognised Finance Law expert in the Cayman Islands who has been closing subscription financings since he was a junior associate.

Simon has structured, negotiated and assisted counsel in documenting a wide range of facilities including multiple fund structures, offshore funds and AIV and feeder funds. Simon has deep specific experience as Cayman counsel in structuring collateral packages for a number of financial institutions.

In 2010, Legal 500 described Simon as a 'rising young star' for private equity and structured finance, M&A and general banking.

PLC Which Lawyer? (2010 and 2011) and IFLR1000 (2010) recognized Simon as a leading lawyer in the field of Corporate/M&A and Corporate Finance.

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Kristin Rylko is an Associate in Mayer Brown LLP’s Banking and Finance practice and a member of its Private Investment Fund group. Kristin represents commercial lending institutions, insurance companies, funds, REITs and borrowers in negotiating and documenting syndicated and leveraged finance transactions (ranging from investment grade, leveraged and middle market deals to highly leveraged acquisition financings), fund financings, bridge loans, bilateral loans and credit facilities, secured and unsecured lending arrangements, debt restructurings and other domestic and cross-border financing transactions. Kristin received a bachelor’s degree in economics from the University of Illinois and a juris doctor from Chicago-Kent College of Law.

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Subscription Credit Facilities

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Stephen (Steve) Prostor is Director, Senior Credit Officer and Head CPB Loan Syndications at Citi Private Bank where his team originates, structures and distributes senior secured credit facilities for Financial Sponsor and Sports Finance clients to other financial institutions. Prior to his current position, Steve spent four years as a Director in Financial Sponsors at Citi Private Bank originating and structuring senior, secured debt financing (as both Agent and participant) to private equity funds, their management companies and their partners.

Prior to joining Citi Private Bank, Mr. Prostor spent two years as a Group Vice President and Senior Relationship Manager in the Commercial Business Group at Citibank originating and structuring middle market syndicated and leveraged transactions (as both Agent and participant). Prior to joining Citibank, Steve spent six years at HSBC in New York (in leveraged finance, syndicated finance and middle market) and ten years at PNC in Pittsburgh, Dallas and New York (in energy lending, corporate banking and asset-based lending, respectively). Mr. Prostor received a B.S. in Finance and Economics from Miami University in Oxford, Ohio in 1988 and attended Duquesne Law School in Pittsburgh.

Mr. Prostor is currently President and Chairman of the New York chapter of the Association for Corporate Growth (ACG New York). (www.acgnyc.org). ACG New York is the premier association in New York for middle market deal-making professionals in the corporate growth, M&A, leveraged buyout and acquisition finance industry; ACG New York has approximately 1,000 members. Mr. Prostor is also a Director and member of the Finance and Audit committees of the Association for Corporate Growth (www.acg.org). The Association for Corporate Growth (ACG) is the global community for middle market M&A dealmakers and business leaders focused on driving growth; ACG has more than 14,000 members throughout North America, Europe and Asia.

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Subscription Credit Facilities

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Dee Dee Sklar is a Managing Director, Financial Institutions-Americas Head, and Global Head of Fund-Level Finance. Since 2005, she has led the strategic planning and business management of origination, client, product, and strategic initiatives for the Global Funds business (Financial Sponsors, Investment Advisors and the funds they manage) and has managed the Bank's strategic counterparty relationships with FIs in the Americas. Prior to her current role, Ms. Sklar was part of Asset Securitization and Structured Finance.
During the past seven years the team has provided subscription / capital call financings to 180 Private Equity funds focused on varying strategies including buyout, corporate mezzanine, energy, infrastructure, real estate, secondaries and transportation. Coverage includes sponsors located in the US, Europe, Latin America and Asia.
Ms. Sklar's 30 years of business experience demonstrates strong business-building and client-development success. Before joining WestLB in 2000, Ms. Sklar was part of Rothschild Inc., NMR Rothschild Americas, as part of the firm's Asset Securitization effort in the US and Europe.

Ms. Sklar received a BS Degree in Economics from the University of Tennessee. She is a member of the, Financial Women's Association of New York 's Resource Committee. She holds the Series 7, 63, 24 and 79 and is licensed by the FSA. Ms Sklar speaks regularly at industry conferences and contributes to industry publications.

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Subscription Credit Facilities

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David Wasserman is Senior Vice President and Team Leader Executive, in Sumitomo Mitsui Banking Corporation's Institutional Real Estate Group - Americas Division. Mr. Wasserman is currently involved in originating, structuring, arranging and executing on a portfolio of real estate and subscription secured credit facilities in excess of US$4 Billion globally, primarily as Lead Arranger and Bookrunner. Subscription Clients include fund managers in North America, Europe and Asia across the Real Estate, Infrastructure, Energy, and traditional Private Equity industries. David Wasserman is a Vice President and Senior Client Executive at SMBC in its Real Estate Department. In his current role, Mr. Wasserman is responsible for the origination, structuring and portfolio management of real estate and subscription based loans to clients on a global basis. David, as part of the Real Estate Department, transacts a significant part of his business as a Lead Arranger on senior credit facilities to worldwide private equity firms in North America, Europe and Asia. Prior to his role in the Real Estate Department, Mr. Wasserman was responsible for the client management and marketing of SMBC's debt, banking, and capital market products to Large Corporate relationships headquartered in the Mid-West and Northeast United States.

Before joining SMBC in 2004, Mr. Wasserman worked at Bank Of America and Fleet Bank in a variety of portfolio management roles in Leveraged/Sponsor Finance, Middle Market, and Trade Finance Lending Departments. David began his career as a associate at PriceWaterhouseCoopers in the Pension Consulting Department (previously known as Kwasha Lipton) where he worked on the conversion and implementation of Defined Benefit and Health & Welfare Plans of private and public companies. Dave holds a BS in Applied Mathematical Economics from SUNY Oswego and a MBA in Finance from Rutgers University.

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Subscription Credit Facilities

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Mr. Weaver oversees the finance area of Walton Street Capital and is a member of the Investment and Management Committee. He has direct experience in finance, acquisitions, debt purchasing and restructuring. During his 20 years in the real estate industry, he has developed close relationships with many major financial institutions while structuring and sourcing a wide variety of capital markets transactions totaling in excess of $20 billion. Prior to joining Walton Street, Mr. Weaver was a Senior Vice President of JMB Realty Corporation. He has a B.B.A. from University of Alaska and an M.M. from J.L. Kellogg Graduate School of Management at Northwestern University. Mr. Weaver is a member of the ICSC and ULI.

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Robert Wieser is an Executive Director in the Funds Finance Team where he has originated and structured client and product initiatives since the Team's inception, in 2004. In addition to his origination and client relationship responsibilities for US, Latin American, and Asian managers, Mr. Wieser is involved in strategic planning, and product development. Prior to joining the Team, Mr. Wieser, was WestLB's Head of Credit for Financial Institutions and Asset Backed Securitization in the Americas.

With 23 years in banking, across fixed-income origination, credit, and equity research, Mr. Wieser's background encompasses most components of corporate capital structure. Before joining WestLB, in 1997, Mr. Wieser was in Credit (industrial, project finance, & Latin American) at The Industrial Bank of Japan and was an Equity Research Associate (Metals and Mining) at Lehman Brothers.

Mr. Wieser received a MBA in International Finance from New York University's Stern School of Business and BA Degrees in Finance and Quantitative Economics from the California Polytechnic State University at San Luis Obispo. He is also a Chartered Financial Analyst.

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Legal Update
July 7, 2011

Enforceability of Capital Commitments in a Subscription Credit Facility

Introduction

A subscription credit facility (a "Facility"), also frequently referred to as a capital call facility, is a loan made by a bank or other credit institution (the "Creditor") to a closed end real estate or private equity fund (the "Fund"). The defining characteristic of a Facility is the collateral package: the obligations are typically not secured by the underlying assets of the Fund, but instead are secured by the unfunded commitments (the "Capital Commitments") of the limited partners of the Fund (the "Investors") to fund capital contributions ("Capital Contributions") when called from time to time by the Fund or the Fund's general partner. The loan documents for the Facility contain provisions securing the rights of the Creditor, including a pledge of (i) the Capital Commitments of the Investors, (ii) the right of the Fund to make a call (each, a "Capital Call") upon the Capital Commitments of the Investors after an event of default and to enforce the payment thereof, and (iii) the account into which the Investors fund Capital Contributions in response to a Capital Call.

As we come out of the recent financial crisis, Investors appear willing to again make Capital Commitments to Funds, and the number of Funds in formation and seeking Capital Commitments appears to be up markedly from the recent past. Correspondingly, Fund inquiries for Facilities are also on the rise. As Creditors evaluate these lending opportunities, they naturally inquire into the enforceability of Investors' Capital Commitments in the event of a default under a Facility. This Legal Update seeks to address the current state of the law on point.

Enforceability of Capital Commitments

Although the subscription credit facility product has been around for many years, the volume of published case law precedent on point is limited. Creditors typically see this as a good thing: few Facilities have defaulted and thus there has been little need for litigation against Investors seeking to compel the funding of Capital Contributions. Anecdotal evidence during the financial crisis certainly supports this positive performance, as very few Investor defaults, let alone Facility defaults, have been reported by active Creditors in the market.

There is, however, published legal precedent supporting Creditors' enforcement rights, and it is generally accepted that a Creditor can enforce the Capital Contributions of the Investors under two separate theories of liability: state statutory law and general contract law. We examine each in turn below. Additionally, a Creditor's rights to the Capital Commitments of the Investors should not be materially impaired by a Fund's bankruptcy proceeding. While there is not definitive legal authority negating all possible defenses an Investor could raise, there is sufficient law on point to give Creditors' ample comfort that the collateral supporting a Facility is enforceable.

STATE STATUTORY RIGHT OF CREDITORS TO CAPITAL COMMITMENTS

Delaware Statutory Law. Most Funds are formed as either limited partnerships or limited liability companies, and the vast majority of stateside Funds are organized under Delaware law. Delaware statutory law contains specific provisions addressing the obligations of an Investor to a Fund: "Except as provided in the partnership agreement, *a partner is obligated to the limited partnership to perform any promise to contribute cash or property or to perform services*, even if that partner is unable to perform because of death, disability or any other reason."[1] In addition, an Investor's obligation to honor its promise to make Capital Contributions explicitly extends for the benefit of Creditors, and although an Investor's obligations to the Fund can be "compromised" by consent of the other Investors, this compromise will not excuse the liability or obligations of the Investor in question to Creditors of the Fund. Title 6, Section 17-502 (b)(1) of the Delaware Code provides:

> Unless otherwise provided in the partnership agreement, the obligation of a partner to make a contribution or return money or other property paid or distributed in violation of this chapter may be compromised only by consent of all the partners. Notwithstanding the compromise, a creditor of a limited partnership who extends credit, after the entering into of a partnership agreement or an amendment thereto which, in either case, reflects the obligation, and before the amendment thereof to reflect the compromise, may enforce the original obligation to the extent that, in extending credit, the creditor reasonably relied on the obligation of a partner to make a contribution or return.[2]

The Revised Uniform Partnership Law, adopted by most states, contains similar provisions allowing a Creditor to enforce its rights against an Investor, even if the Investor's obligations to the Fund have been compromised.[3] The Delaware LLC statutory framework provides similar protections for Creditors.[4]

A Delaware Superior Court has confirmed a Creditor's cause of action against an Investor to compel the funding of its Capital Commitment under Delaware statutory law. In *In re LJM2 Co-Investment, L.P.*, a Delaware limited partnership was formed by Andrew Fastow, the then-CFO of Enron, for the purpose of making investments in energy and communications businesses related to Enron. The Fund secured nearly $400 million in Capital Commitments and entered into a $120 million syndicated Facility, in what appears to have been a "No Investor Letter" transaction.

The Facility included an "Undertaking" pursuant to which, if the Fund defaulted, the Creditors could issue Capital Calls to cure any payment default. When Enron went bankrupt, the Fund defaulted and the Investors declined to fund Capital Calls issued by both the general partner and subsequently by the Creditors. Instead, the Investors amended the Partnership Agreement, in violation of the Facility provisions, to compromise and rescind the Capital Calls. Without additional Capital Contributions, the Fund could not meet its obligations and filed for bankruptcy. The bankruptcy trustee issued an additional Capital Call—which the Investors again declined to fund—and then commenced litigation against the Investors.

The Investors moved to dismiss the statutory cause of action under Title 6, Section 17-502(b)(1) of the Delaware Code based on a variety of arguments, including that the Creditors could not demonstrate "reliance" on their Capital Commitments as required by the statute. The court ruled in favor of the Creditors, holding that they stated a claim for relief under Section 17-502(b)(1) and that the Creditors adequately alleged reliance on the Capital Commitments.[5] While not an ultimate ruling, the framework set forth by the court looked quite favorable for the Creditors, and the case appears to have been resolved prior to the issuance of any subsequent opinions.

New York Statutory Law. New York law imposes a similar duty on Investors for "unpaid contributions" to the Fund, and this obligation extends for the benefit of the Fund's Creditors.[6] Additionally, an Investor may be liable with respect to its unfunded Capital Commitment even after exiting the Fund. In *In re Securities Group 1980*, the trustee of the Fund's bankruptcy estate brought an action seeking to enforce the Investors' Capital Commitments, which they had declined to fund after principals of the Fund sponsor were convicted of tax fraud. The Federal Court of Appeals, affirming the Federal Bankruptcy Court, held that the Investors were obligated to fund their Capital Contributions irrespective of the alleged fraud committed by the Fund Sponsor: "Under the statutory provision [of New York law], even if a debt to a partnership creditor 'arises' after the limited partner's withdrawal, the withdrawn limited partner is nevertheless liable for the debt if the creditor 'extended credit' before the amendment of the limited partnership certificate."[7] The court went on to uphold the liability of the Investors to the Fund's Creditors reasoning that "the limited partners should bear the risk that the partnership's assets could become worthless."[8]

CONTRACTUAL RIGHT TO CAPITAL COMMITMENTS

Breach of Contract. Under a theory of contract liability, an Investor's obligation to fund its Capital Commitment is an enforceable contractual obligation pursuant to the terms of the partnership agreement (the "Partnership Agreement"). An Investor is held accountable for its Capital Commitments on the ground that it has entered into a contractual relationship with the other partners to make Capital Contributions or contribute other property to further the Fund's financial growth. Accordingly, the failure of an Investor to honor its obligations would constitute a breach of contract, and the Investor would be liable for such a breach.[9]

To rely on a theory of contractual liability, the Creditor needs to have standing to assert the claim for breach. To help establish standing, the Partnership Agreement and the Facility documents should contain affirmative language evidencing: (i) the right of the Fund or general partner to make Capital Calls on the Investors and their obligation to fund their related Capital Contributions and (ii) a pledge by the Fund of its right with respect to such Capital Calls and the enforcement thereof to Creditors. If the Partnership Agreement provisions create the contractual obligation and the Facility documents contain the requisite pledge, the Creditors will be well-positioned legally to enforce the Investor's Capital Commitments.[10]

Iridium. A federal district court's ruling in *Chase Manhattan Bank v. Iridium Africa Corporation* illustrates the importance of the Partnership Agreement in protecting the rights of Creditors. In this case, the Creditor entered into a $800 million Facility with Iridium LLC based on provisions in the Iridium LLC agreement (the "LLC Agreement") that the Creditor had the right to call on Iridium's members' Reserve Capital Call obligations ("RCC Obligations"), and a certificate from the secretary of Iridium LLC certifying that the LLC Agreement was "true and correct." Under the terms of the Facility, the Creditor was assigned Iridium's RCC Obligations. When Iridium defaulted on its loan, the Creditor sought to enforce the assignment of the RCC Obligations. In resolving the dispute, the district court reviewed the language of the LLC Agreement, which contained provisions stating that a member's duty to perform its RCC Obligations was "absolute and unconditional" and that each member "waived in favor of [the Creditor] any defense it may have or acquire with respect to its obligations under the [RCC]." Therefore, the court granted summary judgment in favor of the Creditor on its breach of contract claim against the Investors.[11]

Material Breach. An Investor may argue, under contract law, that it should be excused from

further performance of its obligations to a Fund in instances where there has been a material breach by the Fund or its General Partner. This is a relatively well-established general legal principle.[12] However, this release of an Investor's liability has been held not to extend to the obligations the Investor owes to Fund Creditors. In distinguishing the relationship between an Investor's duty to the Fund and other parties contracting with the Fund, a Massachusetts Court of Appeals held that "relations of a limited partner to the partnership … are more complex in that other limited partners and third parties *rely on an expressed obligation*, made public by filing, *to contribute resources to the partnership.*"[13] The court further noted that the Uniform Partnership Law places an emphasis on protecting the rights of outside parties that rely on the commitments of limited partners in extending credit to the partnership, because, without this guarantee, Creditors would be unlikely to enter into the loan with the limited partnership.[14] In fact, in a different case, even where the Fund's principals were convicted of fraud in relation to the Fund, a court has held that the obligation to pay Capital Commitments to Creditors was not excused.[15] These case precedents provide strong authority supporting the enforceability of Capital Commitments—even in the case of a material breach by the Fund. However, it is still advisable to require language in the Partnership Agreement and, if applicable, the Investor Letter, that Capital Contributions will be funded by the Investor "without set-off, counterclaim or defense" to further weaken any material breach defense.

ENFORCEABILITY OF CAPITAL COMMITMENTS IN BANKRUPTCY PROCEEDINGS

In the event of the bankruptcy of the Fund, the causes of action entitling the Creditor to relief will not change—they will still be based on the same statutory and contractual theories. But the context of the proceedings, and the potential defenses asserted by the Investors, will likely change. A Creditor's rights will be subject to the applicable provisions of the U.S. Bankruptcy Code (the "Code") and will likely be represented by the Fund itself, as debtor-in-possession ("DIP") or a bankruptcy trustee (the "Trustee"). Within a bankruptcy, the DIP or the Trustee acts on behalf of the Fund and seeks to maximize the value of the Fund's estate to pay off its obligations to its creditors. As such, the Trustee typically seeks to marshal Fund assets by making a Capital Call and bringing litigation against the Investors if necessary.[16]

In a Fund bankruptcy, an Investor's primary argument is likely to be that its remaining Capital Commitment is an "executory contract" under Section 365(c)(2) of the Code, rendering the obligation voidable. An "executory contract," although not specifically defined in the Code, is generally considered to be a contract where both counterparties have material, unperformed obligations. Generally, in bankruptcy, the DIP or the Trustee gets to decide whether to assume an executory contract (and be bound thereunder) or to reject it and thereby effectively disaffirm any such continuing obligations. However, under Section 365(c)(2) of the Code, a DIP or Trustee is prohibited from assuming an executory contract if it is by a third party to "make a loan, or extend other debt financing or financial accommodations to or for the benefit of the debtor, or to issue a security of the debtor."[17]

In *Iridium*, the Investors argued that the LLC agreement containing their RCC Obligations was a financial accommodation contract that the Code prohibited from being assumed. The court rejected this argument, noting that the purpose of Section 365(c)(2) of the Code is to protect parties from extending additional credit or funding whose repayment relies on the fiscal strength of an already bankrupt debtor. The court held that the RCC Obligations, in contrast, were not "new" obligations, having long since been committed by the members: "In these circumstances, the Court concludes that the [members] are not within the class of creditors

Congress intended to protect under Section 365(c)(2) of the Bankruptcy Code."[18]

This ruling leaves an important consideration from a practitioner's perspective, as tax considerations have caused some Funds to allow for Capital Contributions to be funded in the form of loans instead of equity. While we would be hopeful a court would look through this phraseology to the substance of what an Investor's Capital Contributions are, the "loan" language might give an Investor a stronger basis to argue that the applicable agreement was one to extend a loan or financial accommodation, and thus non-assumable under Section 365(c)(2). To help better protect the Creditor against this possibility, we prefer to see explicit language in the applicable Partnership Agreement and, if applicable, in the Investor Letter, substantially to the effect that, in the event that any loans funded in lieu of Capital Contributions under the Partnership Agreement would be deemed to be an executory contract or financial accommodation in connection with a bankruptcy or insolvency proceeding, each Investor irrevocably commits to cause any amounts that would otherwise be funded as loans to be made as a Capital Contribution to the Fund.

Conclusion

While there is not a definitive case fully vetting and dismissing every argument Investors could potentially assert in attempting to avoid honoring their Capital Commitments, the existing statutory and case law provide significant comfort that Investors' Capital Commitments are enforceable obligations, even in a Fund bankruptcy context.

Endnotes

[1] DEL. CODE ANN. tit. 6, § 17-502(a)(1) (2010) (emphasis added).

[2] DEL. CODE ANN. tit. 6 § 17-502(b)(i) (2010).

[3] *See* UNIF. P'SHIP LAW § 502(c) (provisions allowing a Creditor to enforce its rights against a limited partner, even if a limited partner's obligations to the limited partnership have been compromised).

[4] *See* DEL. CODE ANN. tit. 6, § 18-502 (2010).

[5] *See* In re LJM2 Co.-Investment, L.P., 866A. 2d 762 (Del. Super. Ct. 2004).

[6] N.Y. P'SHIP LAW § 106(1)(b) (limited partner liable for "any unpaid contributions which he agreed in the certificate to make in the future at the time and on the conditions stated in the certificate"); *see also* § 106(3) ("[T]he liabilities of a limited partner … can be waived or compromised only by the consent of all members; but a waiver or compromise shall not affect the right of a creditor of a partnership, who extended credit … to enforce such liabilities.").

[7] *In re Sec. Group 1980*, 74 F.3d 1103, 1110 (11th Cir. 1996); *see also Int'l Investors v. Bus. Park Fund*, 991 P.2d 219 (Alaska 1999) (limited partners liable to creditors who extend credit based on limited partners' capital commitments).

[8] *Id.* at 1111 (citing *Kittredge v. Langley*, 252 N.Y. 405, 169 N.E. 626 (1930)).

[9] Each case cited hereunder was decided under Delaware or other U.S. law. While applicable local counsel should be consulted in connection with funds that have parallel or feeder vehicles formed in other jurisdictions, other jurisdictions do have precedent consistent with these holdings. For example, Appleby has confirmed that, assuming that the New York law Facility documentation creates a valid and enforceable security interest over the Capital Commitments, Creditors will be well placed legally to enforce the Investor's Capital Commitments in a Fund governed by the laws of the Cayman Islands (Mayer Brown LLP does not opine on the laws of the Cayman Islands). *See also Advantage Capital v. Adair* [02 Jun 2010] (QBD) Claim no. HQ10X01837 (Order for breach of contract granted in favor of private equity fund that sued a limited partner for repudiation under English law).

[10] *See NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 434 (Del. Ch. 2007) ("As a general rule, only parties to a contract and intended third-party beneficiaries may enforce an agreement's provisions."); *see also Insituform of N. Am., Inc. v. Chandler*, 534 A.2d 257, 268 (Del. Ch. 1987) ("It is universally recognized that where it is the intention of the promisee to secure performance of the promised act for the benefit of another, either as a gift or in satisfaction or partial satisfaction of an obligation to that person, and the promisee makes a valid contract to do so, then such third person has an enforceable right under that contract to require the promisor to perform or respond in damages.").

[11] *Chase Manhattan Bank v. Iridium*, 307 F.Supp 2d 608, 612-13 (D. Del. 2004). Similarly, the Bankruptcy Court in

In re Securities Group 1980 held that the Investors were liable under a contractual theory of liability under the applicable Partnership Agreement. See 74 F.3d at 1108.

[12] *Partnership Equities, Inc. v. Marten*, 15 Mass. App. Ct. 42, 45, 443 N.E.2d 134, 136 (Mass. App. Ct. 1982) ("If [limited partner's] enrollment were merely a bilateral agreement between the defendants and the general partners, the principle of contact law upon which the defendants rely, that a material breach excuses nonperformance might well apply.").

[13] *Id.* (emphasis added).

[14] *Id.* at 45.

[15] *In re Securities Group 1980*, 74 F.3d at 1109 ("[A] material breach of the partnership agreement … would not excuse a limited partner's commitment to contribute additional capital on the conditions stated in the certificate [of limited partnership].").

[16] *See Lowin v. Dayton Sec. Assoc.*, 124 B.R. 875, 892-93 (M.D. Fla. Bankr. 1991); *see also In re LJM2 Co-Investment, L.P.*, 866A.2d 762, 781 (Del. Super. Ct. 2004).

[17] 11 U.S.C. § 365(c)(2).

[18] *Chase Manhattan Bank v. Iridium Africa Corp.*, 2004 WL 323178 at *4 (D. Del. 2004); *see also Lowin*, 124 B.R. at 901 (stating that a Trustee's enforcement of the limited partners' Capital Commitments "is not the equivalent of requiring the limited partner defendants to extend new credit to the debtors in the form of loans, lease financing or purchase of discount notes").

For more information about the enforceability of Capital Commitments, or any other matter raised in this Legal Update, please contact any of the following lawyers.

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Fact Sheet

Subscription Credit Facilities

Mayer Brown has represented the lead agent and lenders in over 70 subscription credit facilities since 2007 alone, including facilities for many of the world's largest and most sophisticated real estate and private equity funds. We have working relationships with nearly every major lending player in the US market and the majority of active lenders in the UK and European markets.

We have represented the lead agent and lenders in several of the largest subscription credit facilities ever consummated, including multiple facilities with in excess of $3 billion of lender commitments. We have closed transactions across from many of the world's preeminent fund sponsors, including facilities with Goldman Sachs, Blackstone, Morgan Stanley, Fortress and others. We have led transactions funded by balance sheet lenders and commercial paper conduits, as well as large syndicated facilities designed to accommodate both lender types, as well as insurance companies.

We are experienced documenting a variety of fund financing products, including subscription credit facilities and underlying asset-level leverage facilities for mezzanine and other loan funds, as well as the hybrid facilities which are again starting to surface in the market. We maintain a database of investor documentation including subscription agreements, investor letters, side letters and legal opinions for more than 1,200 distinct investors.

Mayer Brown's European, Asia and Brazil offices coordinate seamlessly on cross-border transactions, and we have an experienced network of tax-haven jurisdiction firms (Caymans, BVI, Luxembourg, Guernsey, Canada, etc.) that we coordinate with extensively. Many of our transactions are multi-currency with respect to investor commitments, advances and/or letters of credit, and we are fluent in the related reserve and swap mechanics.

We have represented the lead agent and lenders in several of the largest subscription credit facilities ever consummated.

We bring a unique market perspective to fund financing based upon our extensive experience in representing fund sponsors, general partners and limited partners. Over the last five years, we have

represented a broad range of general partners in the formation of over 200 various debt, infrastructure, private equity and real estate funds and over 500 limited partners in connection with their investment in various funds. As a result, we have represented over 60 fund sponsors in connection with subscription credit facilities and other fund financings during that 5-year period. A few of the fund sponsor borrowers we have represented include LaSalle Investment Management, ING Clarion, Equity International, Heitman, Walton Street Capital and CB Richard Ellis.

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Practice Overview

Banking & Finance

With more than 200 finance lawyers in offices across the Americas, Asia and Europe, Mayer Brown has one of the largest finance practices in the world—and with that size comes the knowledge, experience and resources to tackle transactions of any scale in almost any jurisdiction.

BANKING & FINANCE

Banking and finance is a founding practice of Mayer Brown and continues to represent one of the firm's signature strengths. Many of the firm's largest clients are bank holding companies, commercial banks, investment banks, insurance companies, asset-based lenders, leasing companies or institutional real estate companies.

"The firm's encyclopedic knowledge of financing transactions is incredible"
~ Chambers USA 2009

Our banking and finance practice also represents numerous finance companies and fixed income funds, mezzanine investors, hedge funds, financial service boutiques, and other financial institutions, as well as a large number of borrowers operating in many different businesses and industries.

With more than 200 banking and finance lawyers across the Americas, Asia and Europe, our strength is based on our global platform and our balanced and integrated practice, which encompasses all the focused skill sets that our clients demand — from cross-border acquisition finance and international capital markets work, through to project finance, structured finance, and derivatives. Chambers and Partners has described the firm as a "banking 'powerhouse' for its sheer manpower and global coverage" and we are regularly ranked in the key league tables for legal representations in both banking and securitization transactions.

As financial institutions become one-stop shops, and transactions increasingly combine a broader range of products, including securitization and derivatives, the number of law firms that can meet all of these requirements is declining. Mayer Brown is one of the few that has both the breadth of offering and the international platform to service these needs — particularly when markets are volatile and deal structures can change overnight.

Asset Finance

Mayer Brown has an active asset finance practice with experience across industries, asset classes and product lines. Our experience includes leveraged leasing and structured finance, lease and equity portfolio transfers, as well as debt financing and Islamic finance. In Asia, Mayer Brown JSM has the leading aviation and ship finance practice in the region, particularly in relation to LNG (Liquid Natural Gas) transportation, where the

firm has had a role in the acquisition, financing and operation of approximately 30 percent of the total world fleet. Recent award-winning work includes the Odebrecht S.A. $1.5 billion financing of two deep sea drilling vessels, which was named "Americas Deal of the Year 2009" by *Project Finance International*, and the ICBC cross-border vessel leasing transaction which was named Asset Finance Deal of the Year 2011 by *Asian Legal Business Awards*.

Leveraged Finance

Mayer Brown is one of the most active law firms representing lenders, sponsors and borrowers in an extensive and wide range of leveraged finance transactions across all parts of the capital structure. We routinely represent banks and other institutional lenders in the negotiation of secured and unsecured general corporate and working capital facilities of varying complexity, including competitive-bid facilities, multicurrency facilities and, particularly, cross-border facilities. Work includes syndicated credits, multi-currency loans, letter of credit and guarantee facilities, sub-participations, assignments and transfers, guarantees, letters of comfort and all forms of security.

"Fully deserving of its place among the elite."
~ Chambers Global 2009

We have represented agent banks and bank syndicates in financings for virtually all major LBO sponsors and private equity firms, including hostile tender offers and multi-jurisdictional cross-border transactions. Working with our high-yield and subordinated debt team, we are a "one-stop shop" for bank/bond acquisition and leveraged financings, including the provision of bridge commitments and facilities and first lien/second lien financings.

ASSET-BASED LENDING AND RECEIVABLES FINANCING

Mayer Brown has one of the leading international practices in asset-based lending (ABL), with transatlantic coverage and experience across numerous jurisdictions and industries. Our ABL attorneys represent a wide range of asset-based lenders and are highly skilled in documenting and structuring the most complex ABL transactions involving all types of collateral. We have particular experience with first lien/second lien transactions and have been involved in complex intercreditor issues around the world. Our experience across jurisdictions has given us an understanding of the issues surrounding the granting and perfection of security interests and recoveries on insolvency in the many jurisdictions in which ABL lenders operate.

RESTRUCTURING AND WORKOUTS

We represent secured and unsecured creditors extensively, acting individually and on behalf of lending syndicates and committees of creditors, in numerous corporate and real estate bankruptcies. We cover every phase of client representation, including the structuring of workouts, the negotiation and preparation of transactional and financing documents, and all aspects of bankruptcy proceedings, US Chapter 11 and Chapter 7 cases and their European and Asian equivalents, including debtor-in-possession (DIP) financing, negotiation and preparation of plans of reorganization, and adversary litigation in connection with or related to insolvency issues.

DISTRESSED DEBT AND NON-PERFORMING LOANS

We are recognized as one of the leading law firms in the European distressed debt and non-performing loans (NPL) market. We regularly represent sellers and buyers in major NPL transactions as well as in their day-to-day trading activities. Documents created by our firm have established market standards, particularly in Germany, and are indirectly used by a variety of participants. Our experience includes financing NPL transactions via leveraged loans and securitizations.

Debt Capital Markets

We regularly represent issuers and underwriters in the US, Europe and globally in connection with issuances of fixed-income securities in public offerings, including shelf takedowns, in Rule 144A offerings, in international offerings and in private placements. Our attorneys are regularly involved in complex high-yield transactions and have broad experience in multi-tiered financings as well as intricate subordination and intercreditor issues. Our experience also encompasses hybrid capital product structuring and execution for financial institutions to bolster regulatory or rating agency capital ratios. These securities combine elements of both debt, such as fixed payments and tax deductibility, and equity, such as qualifying as capital.

We also represent issuers and financial advisers in connection with asset liability and capital management transactions. With respect to debt securities, these transactions include privately negotiated and open market purchases and/or tender or exchange offers to retire or replace debt with new debt or common or preferred equity, consent solicitations to modify the terms or covenants of the debt or a combination of both.

Structured Finance

With more than 100 structured finance lawyers in offices across the Americas, Asia and Europe, Mayer Brown has one of the largest structured finance practices in the world. We can tackle transactions of any scale in almost any jurisdiction. We are one of a handful of international law firms that have securitized virtually every asset type that can be securitized, including auto loans and leases, credit cards, student loans, mortgage loans, insurance, intellectual property and a variety of alternative asset classes. We also have one of the largest asset-backed commercial paper practices in the world and represent virtually every major bank sponsor in at least some of their conduit transactions.

We have been at the leading edge of the securitization industry from its early days and continue to be at the forefront of new developments — whether it is the securitization of intellectual property or non-performing loans, securitization as an acquisition financing tool, or issuances under the US Federal Reserve's Term Asset-Backed Securities Loan Facility (TALF). A key factor in our ability to structure transactions globally is the depth of knowledge within the firm of the relevant regulatory and international accounting standards issues, and the close cooperation between our finance and regulatory attorneys. The firm's unparalleled regulatory knowledge is the result of decades of industry leadership on a range of securities, bank capital, consumer protection and accounting issues and provides us with a perspective that can give clients a critical edge in deal structuring.

"Mayer Brown remains on the top of its game with its global securitization practice. With structured finance lawyers in the Americas, Asia and Europe, the firm has built an international reputation that is hard to rival"

~ Legal 500 USA 2010

DERIVATIVES AND STRUCTURED PRODUCTS

We have an active derivatives and structured products practice, representing sponsors, arrangers, placement agents, collateral managers, derivative counterparties, investors, credit and liquidity providers and ratings agencies. We also act as US counsel to the International Swaps and Derivatives Association (ISDA) in a variety of matters.

Our lawyers understand the world of equity and index derivatives, derivatives-linked securities, fund-linked derivatives, commodity-linked derivatives, constant proportion portfolio insurance (CPPI) products, hybrids and other exotic derivatives. We are regularly called upon to bring the two worlds of hedge fund and financial institutions together by structuring leveraged total return swap programs linked to loan portfolios, indices, hedge fund portfolios and other asset pools. We combine our derivatives experience with our extensive private investment fund practice to create a variety of fund structures for facilitating synthetic investment opportunities. Few other firms have the lawyers on the ground in the major markets of Europe, Asia and the Americas with our derivatives experience.

Projects and Infrastructure

Mayer Brown has an award-winning Global Projects group that is regularly involved in some of the largest and most innovative projects across the globe. In the last ten years, we have participated in over 20 award-winning transactions across five continents, spanning all sectors, including power, oil and gas, renewable energy, mining, roads and motorways, ports, water, industrial, manufacturing and other infrastructure facilities. We represent developers, sponsors, investors, contractors, operators, governments and public agencies, commercial and investment banks, and bi- and multilateral agencies such as the Export-Import Bank and the International Finance Corporation.

On every project we bring together an experienced cross-disciplinary team of lawyers to provide integrated legal advice to meet our clients' needs, from structured finance through to infrastructure, energy, government and regulatory, tax, construction and engineering, environmental, corporate and securities and real estate.

> "Able to put together exceptionally talented teams that will get the job done creatively, promptly and—above all—efficiently."
>
> ~ *Chambers USA* 2009

Real Estate Finance

We regularly represent individual lenders, syndicates and other market participants in all types of real estate finance transactions. These transactions include investment property funding, construction funding, and predevelopment commitment funding. As part of these deals we are often involved in structuring the relevant financing arrangements (including creating synthetic leases, participating, convertible and other "equity kicker" loans, "credit-enhanced" revenue bond financings and multi-tranched/layered debt arrangements). Our practice covers origination as well as the subsequent distribution (whether by way of syndication, securitization or otherwise) of real estate transactions. We believe that our experience in advising lenders and investors on real estate finance transactions is enhanced by our regular representation of some of the most significant real estate developers, institutional advisers and investors and lessors.

Emerging Markets

Mayer Brown has been active in the emerging markets for many years and has developed significant transactional experience in every region. The areas in which we most often work are bank financing/debt trading, capital markets, securitization and global projects.

While transactions in the emerging markets can be as straightforward as in other jurisdictions, they often are far more complex. We are constantly investing in our capability to provide our clients with both comprehensive advice and strong execution in these dynamic markets. We offer:

- Fluency in local languages, including Cantonese, French, Gujarati, Hebrew, Hindi, Korean, Mandarin, Polish, Portuguese, Punjabi, Spanish, Thai and Vietnamese
- Understanding of the cultural nuances with implications for business activities in a given country
- Familiarity with jurisdictional regulatory and international trade laws
- Understanding of market-access issues and ability to identify points of entry for clients

In addition to our on-the-ground presence in China, Singapore, Thailand and Vietnam, we have formed an association with the Brazilian law firm, Tauil & Chequer Advogados (T&C), which has offices in São Paulo and Rio de Janeiro. Through T&C, our clients have access to a full service Brazilian domestic law practice.

About Mayer Brown

Mayer Brown is a global legal services organization advising clients across the Americas, Asia and Europe. Our presence in the world's leading markets enables us to offer clients access to local market knowledge combined with global reach.

We are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest banks. We provide legal services in areas such as banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory & enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

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Practice Overview

Global Private Investment Funds

Mayer Brown has an extensive global private investment funds practice involving more than 100 lawyers from across the firm's worldwide offices.

GLOBAL PRIVATE INVESTMENT FUNDS

Mayer Brown has an extensive global private investment funds practice involving more than 100 lawyers from across the firm's worldwide practice areas. Our lawyers' broad market experience enables fund sponsor, adviser and investor clients to structure funds and investments creatively and efficiently to maximize fundraising flexibility and opportunities.

Our lawyers advise fund sponsors in connection with the structuring, marketing, regulation and operation of public and private investment funds in a range of jurisdictions worldwide, including markets such as China, Latin America, India, Central Asia and Africa. The funds we have structured include limited partnerships, authorized and unauthorized unit trusts, and closed-end and open-end investment companies with a wide range of investment styles and objectives, including private equity, infrastructure, real estate, mezzanine and venture funds.

Fund clients of the practice include major and boutique fund management companies, investment banks and insurance companies.

A core strength of the global investment funds practice is the provision of transactional and regulatory support for established funds, including advising on investments, secondary market transactions, leveraged financing, admission of new investors and recent and impending regulatory developments. Our lawyers also advise institutions seeking to invest in a wide range of established funds and funds in formation on the potential tax, regulatory and other legal implications of those investments.

For the past three years, Mayer Brown has ranked as one of the top 10 "most active law firms by number of funds" in the Dow Jones Private Equity Analyst survey.

The Private Investment Funds team includes Mayer Brown lawyers from a variety of practices who work closely

together to ensure readily available corporate, securities, real estate, investment management, financial services, ERISA and tax capabilities. We have offices in many of the jurisdictions in which our clients invest and have established alliances with leading law firms in many other jurisdictions, thus enabling us to provide informed, comprehensive tax and other legal advice in connection with fund formation, structures, acquisitions and dispositions. Our broad market experience enables us to assist fund clients to plan and implement creative and flexible fund structures.

Experience

BREADTH

Mayer Brown regularly handles a wide range of global private investment fund matters, from the formation of multibillion dollar funds with global investors to the review and negotiation of fund terms for institutional investors. We advise fund sponsors on tax, structuring, securities, employee benefits and ERISA, banking, communications and other regulatory issues in connection with the structuring and offering of their domestic and offshore funds. The funds we represent include closed-end and open-end direct funds, fund-of-funds, master-feeder parallel funds, and multi-manager investment funds. They include the full range of investment styles and objectives, including:

- Leveraged buyout funds
- Venture capital funds
- Infrastructure funds
- Real estate funds
- Mezzanine funds
- Hedge funds
- International funds
- Opportunity funds
- Commodity funds
- Risk arbitrage funds
- Absolute return funds
- Collateralized loan and bond funds
- Distressed debt funds
- Emerging markets funds
- Technology
- Other sector funds

We are also involved with innovative private fund products, such as insurance-wrapped funds and private funds that increase their potential investor base by registering under the US Investment Company Act of 1940.

Mayer Brown was named "Law Firm of the Year" in 2009 by Private Equity Magazine in France, an award honoring the most proactive capital investment professionals operating in Europe during the preceding 12 months.

GLOBAL REACH

We have offices in many of the jurisdictions in which our clients invest, enabling the provision of local law and tax advice in connection with fund formation, structure acquisitions and dispositions. In Asia, Mayer Brown JSM was named the 2010 "Asia Law Firm of the Year – Fund Formation" by *Private Equity Real Estate* who also noted that "*Mayer Brown is growing a reputation for its fund formation services.*" Our Brazil office represents sponsors, investors and pension funds in Brazilian private equity funds (FIPs), Brazilian real estate funds (FIIs) and Brazilian receivables investment funds (FIDCs). Lawyers in our European offices have experience in structuring and establishing funds in England, Ireland, the Channel Islands, France, Luxembourg and Germany, and

handling fund listings on the Irish Stock Exchange, the Luxembourg Stock Exchange and elsewhere. In Germany, we provide advice both on the largely unregulated funds side and with respect to funds regulated by the German Investment Act. For the first time, *Décideurs Juridiques*, a leading French publication, ranked Mayer Brown's Paris office in the fund formation category, noting our "*strong reputation.*"

In 2009, for the third consecutive year, IFLR Asian Awards recognized Mayer Brown JSM as the "National Law Firm of the Year for Hong Kong"

REPRESENTATION OF FUND SPONSORS

We represent fund sponsors in the organizing and raising of private funds that range in size from US$100 million to several billion dollars in capital commitments. Our familiarity with investor and fundraising market issues, combined with our broad substantive and geographic capabilities and our practical approach, enables us to help clients to market and close substantial funds despite difficult fundraising market conditions.

We recognize the importance of structuring the participation by the fund principals and other insiders to maximize their after-tax returns and to align their interests with fund objectives. We have extensive experience in creating complex investment programs, leveraged co-invest programs and other tax-advantaged and estate-planning investment structures for principals of the fund sponsor, as well as for officers and employees of the sponsor and financial institutions affiliated with the sponsor.

After the closing of a fund, we advise our fund clients in connection with portfolio investments, which often, depending on the nature of the fund investments, require support from a variety of our leading practice and industry groups.

REPRESENTATION OF MANY LEADING FUND INVESTORS

We represent a number of leading investors in their private investment fund investments, including private and government pension plans, financial institutions, universities, sovereign wealth funds and other foreign investors, insurance companies, religious and charitable organizations, high net worth individuals and family businesses. Our lawyers have developed efficient methodologies to analyze and review private investment fund terms for our investor clients. Because of our work with a wide variety of private investment funds, we are able to quickly advise investors as to market terms and practices and the customary range of solutions to issues that arise.

"Clients include funds, banks and private equity firms. Many enthused that 'Mayer Brown is our first choice. It has all the expertise we need and understands our business.' The team is also appreciated for its prompt responses, pragmatism and big-picture approach."
—*Chambers Europe* 2009

Complementary Practices

Portfolio Company Transactions. We are one of the world's leading international legal advisers to private equity funds and their portfolio companies and management teams in private equity investments and exits. We have represented private equity clients in management and leveraged buyouts, follow-on acquisitions, real estate investments, public-to-private transactions, private investments in public companies, seed and venture capital investments and all forms of exit transactions including auction sales, recaps and IPOs.

M&A and General Corporate. The firm has more than 300 lawyers in our Corporate and M&A practice. We represent a broad spectrum of public and private companies, including many Fortune 500 and FTSE 250 companies, as well as private investment and leveraged buyout firms, joint ventures, individuals, and institutional investors in connection with mergers, acquisitions, divestitures, joint ventures and strategic alliances. *Chambers USA* 2008 states that the practice *"has depth, and talent within the depth – the work is of a very high quality,"* while attorneys are *"easy people to deal with, with good client skills."* Additionally, *Chambers* states that *"clients value the ingenuity with which it puts together the most expansive transactions."* The firm acts for 87 of the Fortune 100 and has developed industry-specific experience in areas such as automotive, chemicals, infrastructure and retail.

Our London Corporate group has been ranked as the "No. 1 corporate team" for its market size by *Chambers UK*, calling it "*a collection of strong individuals with a flourishing practice.*" *Chambers Global* 2010 stated that Mayer Brown's London office is "*ultra-responsive and dedicated to the achievement of its clients' goals. London office is definitely proving a useful stepping stone to the European market.*"

Our European practices combine an intimate knowledge of their local laws and markets with the resources of a major international practice to provide advice on a full range of domestic and cross-border transactions, as well as all aspects of local business law. *Chambers Global* 2008 says "*The global expansion of this 'excellent firm' attracts an ever-increasing number of clients seeking assistance with cross-border corporate/M&A matters.*"

Senior Debt Finance. Our senior debt and acquisition finance lawyers represent many of the most active financial sponsors and money center lenders and investment banks that provide related bank debt and high-yield financing to private equity representation of senior and subordinated lenders in leveraged buyouts, recapitalizations, restructurings and other change-of-control financings. *Legal 500 USA* 2009 stated that the firm's "*flourishing banking and finance practice 'does outstanding work' for numerous leading financial institutions...[T]he team is praised for its 'very high-quality service levels.'*"

High-Yield and Debt Securities. Our high-yield work has involved a large number of project financings, new issuances and refinancings, as well as restructurings and consent solicitations. We represent a variety of underwriters and issuers in the Rule 144A market and otherwise in connection with the offering of high-yield debt securities. *Chambers Global* 2008 commented that issuers and underwriters endorse Mayer Brown attorneys as "*business-oriented and dedicated to the success of the deals and growth of our business.*"

Employment. Executive compensation, employment and ERISA issues frequently arise in private equity transactions, and employment issues can be among the most contentious aspects of complex acquisitions and exits. With our in-depth understanding of pension, benefits and personnel issues, our team can create effective executive retention and investment programs and executive employment arrangements.

Tax. Our global private investment fund team includes members of Mayer Brown's internationally recognized Global Tax practice, which provides tax planning and structuring advice in connection with private equity investments and dispositions, including

advice to management teams to help motivate them to achieve the best results in their portfolio companies. The July 2008 issue of France's *Magazine des Affaires* ranked the firm's French tax practice as the second leading tax practice in France in relation to tax planning and tax structuring in investment fund work.

Mayer Brown was named "North American Infrastructure Law firm of the Year" for 2009 in the inaugural Infrastructure Investor Awards.

Infrastructure. Our global infrastructure practice comprises attorneys in the Americas, Europe and Asia who advise on the full range of infrastructure transactions. We help clients with the financing and development of new infrastructure projects, as well as on the financing, acquisition or leasing of existing infrastructure assets. We also advise on the formation of the infrastructure funds that invest in these assets. Our clients include developers, sponsors, investors, contractors and operators as well as commercial and investment banks, international financial institutions, export credit agencies, rating agencies and government and public agencies.

We offer the depth of knowledge and resources required to advise on any phase of the financing, development or operation of major projects. We regularly assist clients in developing the financial structures that drive infrastructure investment, whether through senior and subordinated lending, equity investments, securitization or leveraged lease transactions.

Regulatory Practice

Mayer Brown offers a broad global financial services regulatory and enforcement practice involving lawyers in the Americas, Europe and Asia who work with leading global financial services firms to provide thoughtful and creative solutions to complex issues. This experience, coupled with our geographic scope, enables us to advise our private fund clients on a wide range of increasingly complex regulatory, tax and other legal issues that affect private funds and their sponsors and investors. We counsel our clients in virtually every interaction they may have with a regulatory agency. This includes preparing and filing registration statements and forms for licenses, and negotiating with regulators about everything from customer complaints to regulatory inspections to administrative actions.

We provide ongoing counsel on compliance issues affecting investment advisers, broker-dealers and commodity pools and advice on compliance with specific laws and regulations applicable to broker-dealers. We regularly advise our clients as well as other industry participants on emerging regulatory issues, including ERISA and pension issues, securities registration exemptions, privacy regulations and Sarbanes-Oxley and Patriot Act compliance. Some of the topics about which we regularly advise our private hedge fund clients include soft dollars, private offerings and the use of the Internet, new issues regulation, capital introduction programs, anti-money laundering regulation compliance, performance advertising issues, Sarbanes-Oxley Act, trade allocations, Forms 13D, 13G, 3, 4 and 5 filings, and privacy regulations. A number of our lawyers previously worked with the regulatory agencies that oversee the private fund business, and we are frequently consulted by those agencies as they review and consider changes to fund regulation.

Practical Market Knowledge

Our lawyers not only possess outstanding legal qualifications but also have a broad understanding of investor-specific issues, including side letter provisions, the trend towards the requisite public disclosure of fund results, preferred return, management fee and carry terms and calculations, and investor demands for greater protection for clawback claims. Our experience and global perspective provide insight into the market terms, trends and emerging issues in the private investment fund market, and our representation of leading institutional investors and "gatekeepers" for private investment funds enables us to anticipate major issues and investor initiatives and to better structure market-tested solutions.

Industry Experience

The lawyers in our Global Private Investment Funds practice come from, and have represented companies in, a variety of industries. This practical experience allows us to quickly and seamlessly provide the proper context for the regulatory, disclosure and other commercial issues that arise during the course of fund formations and portfolio company transactions. Among the industries where we have extensive experience are the following:

- Automotive
- Chemicals
- Consumer Products and Retail (including Food, Beverage, and Packaging)
- Energy
- Financial Institutions (including Banking and Insurance)
- Gaming/Gambling
- Health Care and Pharmaceuticals (including Biotechnology)
- Information Technology
- Infrastructure
- Media and Telecommunications (including Entertainment)
- Real Estate and REITs
- Sports (including Sporting Goods)
- Transportation

Related Practice Areas

- Collateralized Debt Obligations
- Derivatives
- Financial Services Regulatory and Enforcement
- Investment Management
- Private Equity
- Real Estate
- Tax Transactions & Planning

About Mayer Brown

Mayer Brown is a leading global law firm with offices in major cities across the Americas, Asia and Europe. Our presence in the world's leading markets enables us to offer clients access to local market knowledge combined with global reach.

We are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide. We serve many of the world's largest companies, including a significant portion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest investment banks. We provide legal services in areas such as Supreme Court and appellate; litigation; corporate and securities; finance; real estate; tax; intellectual property; government and global trade; restructuring, bankruptcy and insolvency; and environmental.

OFFICE LOCATIONS

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- Palo Alto
- São Paulo
- Washington DC

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- Beijing
- Guangzhou
- Hanoi
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EUROPE
- Berlin
- Brussels
- Cologne
- Frankfurt
- London
- Paris

TAUIL & CHEQUER ADVOGADOS
in association with Mayer Brown LLP
- São Paulo
- Rio de Janeiro

ALLIANCE LAW FIRMS
- Spain, Ramón & Cajal
- Italy and Eastern Europe, Tonucci & Partners

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Subscription Credit Facilities

OVERVIEW

Our subscription credit facility practice spans both our finance team and our funds team, and draws upon the expertise of each. In Cayman, we closed in excess of 20 transactions in 2011, involving funds that have ranged from a hundred million to billions of dollars in subscribed investor commitment. Likewise, the size of the credit facility has ranged from tens of millions to billions of dollars of lender commitments.

Appleby has developed a defined and highly productive role in the subscription finance market in acting primarily for lenders. Appleby is the only offshore law firm whose primary focus is representing the lenders in subscription credit facilities and has a depth of knowledge and unrivalled expertise in this area.

Appleby has advised on numerous structures including (i) multiple fund structures, (ii) different types of legal entities as borrowers and guarantors, and (iii) multi-currency facilities and multiple loan tranches with multiple levels of collateral.

Appleby has an almost exclusively lender-driven practice. The other firms in Cayman are regularly conflicted from acting for lenders, Appleby have chosen to make this their focus, and consequently act for the majority of lenders.

KEY CONTACTS

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OUR ORGANISATION

Appleby is a leading provider of offshore legal, fiduciary and administration services. With an unparalleled presence in the key offshore jurisdictions of Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey, Isle of Man, Jersey, Mauritius and the Seychelles, the group offers advice on offshore law. We also have offices in the international financial centres of London, Hong Kong and Zurich.

Over 800 lawyers and professional specialists deliver sophisticated, specialised services, primarily in the areas of Corporate and Commercial, Litigation and Insolvency, Private Client and Trusts and Property. We advise global public and private companies, financial institutions, and high net worth individuals, working with them and their advisers to achieve practical solutions, whether in a single location or across multiple jurisdictions.

Subscription Financing – Are Side Letters Binding?

Side letters are commonly used as ancillary agreements to Cayman exempted limited partnership agreements and often form an important part of the documents reviewed in subscription financing transactions. They can serve to affect the economic relationship between an investor and the partnership and supplement the obligations or grant exemptions as between the partnership and a particular partner. But are they enforceable?

Although it is usually intended that side letters will give rise to legally enforceable rights and obligations, unless carefully drafted, they may have no more than moral effect. The recent English case of *Barbudev v. Eurocom Cable Management Bulgaria EOOD and others* [2011] EWHC 1560 illustrates this problem and provides some useful guidance as to what the English courts will consider when deciding whether, and to what extent, to enforce the terms of a side letter. Although not binding, the *Babudev* case would serve as persuasive authority before the Cayman courts.

Four key factors were identified as follows:

1. Has there been offer and acceptance as between the partnership and the investor? This is generally easy to establish and does not typically cause problems.

2. Is there a clear intention to create legal relations? Following *Barbudev*, this depends not on the parties' subjective opinions but on "a consideration of what was communicated between them by words or conduct, and whether that leads objectively [to the appropriate conclusion]" (*RTS Flexible Systems Ltd. v. Molkerei Alois Muller GmbH & Co KG [2010] 1 WLR 753*). There is a strong presumption that parties to a commercial transaction intend to create legal relations (*Esso v. Courts of Customs and Excise [1976] 1 WLR 1*). However, the court will look to all the circumstances of the case, including to provisions in the side letter and whether it is signed by both parties, in determining whether the relevant intention exists.

3. Is there certainty? The side letter must be sufficiently complete and amount to more than an "agreement to agree", and the language must be certain. The courts will interpret a contract but cannot go so far as to create one.

4. Is the side letter supported by consideration? This means that sufficient consideration must move from the person to whom the promise is made. It need not move to the person making the promise.

As such, the courts treat the enforceability of side letters like any other contract. The fundamentals of offer and acceptance, intent, certainty and consideration remain essential elements to the enforceability of the side letter.

The Cayman Islands provides an excellent legal framework for the formation of private equity structures. Nevertheless, it is important to bear in mind that as a common law jurisdiction the fundamentals of contract law still apply, before one simply assumes that the side letters being reviewed are enforceable.

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Winner 2010
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We hope you enjoyed reading this Offshore eAlert. If you would like to submit comments or suggestions, please email us at info@applebyglobal.com.

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Seychelles
Zurich

Private Equity Funds Advisory Team

The Private Equity Funds Advisory Team is part of Appleby's Funds & Investment Services Group.

The Team has a dedicated focus on the offshore legal, administrative and fiduciary needs of managers and sponsors of private equity, venture capital and real estate funds domiciled in the leading offshore funds centres: the Cayman Islands, the British Virgin Islands, Bermuda, Jersey and Guernsey. The Team also benefits from the local expertise in Appleby's offices in the Isle of Man, Mauritius and the Seychelles.

Structures

Our expert funds lawyers in each of these jurisdictions are well versed in the legal and operational implications for managers, sponsors and service providers of private equity, venture capital and real estate investment funds, and provide expert advice on the formation, structuring and funding of all types of investment fund structures:

- Limited partnerships
- Limited companies
- Unit trusts
- Cell structures, such as Segregated Portfolio Companies, Protected Cell Companies and Incorporated Cell Companies
- Listed funds
- Hybrid investment vehicles
- Acquisition vehicles

We implement the formation of vehicles for general partners and carried interest partners, together with management and advisory companies.

In addition, the resident funds lawyers in Appleby's offices in London, Zurich and Hong Kong are uniquely positioned to identify and implement offshore solutions to suit local commercial objectives.

Life Cycle Advisory Service

Our Private Equity Funds Advisory Team advises managers and sponsors throughout a fund's life cycle, beginning with an analysis of the investment opportunity and target investor base, then domicile selection and design of the fund and carry structure. Ultimately we assist with product implementation: establishing the fund and general partner, carried interest partner and management/advisory entities, preparing the offering document and service agreements, advising on funding arrangements and side letter terms, and obtaining regulatory approvals. We can provide managers and sponsors with a holistic solution throughout this process or with a tailored solution at selected stages.

We advise on post-launch legal and operational issues, including portfolio funding, acquisitions and disposals, capital raising, side letters, reserved matters, modification of investor rights, changes of investment strategy or service providers, listings, AML compliance, restructurings and liquidation/wind-down.

We can provide managers, sponsors and general partners with access to Appleby's industry-leading Funds Disputes Team. This unit works closely with the Private Equity Funds Advisory Team and has represented clients in many high profile fund disputes, particularly over the crisis of 2008/2009 and its aftermath.

Fund Administration, Fiduciary & Director Services

The Private Equity Funds Advisory Team can provide clients with access to an integrated fiduciary and administration solution provided by Appleby's fund administration units operating in the Cayman Islands, Isle of Man, Jersey and Mauritius.

The primary areas of service are:

- Fund and Trust administration
- Independent, non-executive directors
- Corporate and secretarial
- Registered office
- Bookkeeping and accounting
- Regulatory and compliance
- Investor reporting
- Maintenance of corporate & statutory records
- Share trustee and nominee
- Employee Benefit Trusts
- Listing Services

Using the industry-leading Geneva automated accounting platform designed by Advent Software, Inc., Appleby can provide registrar, transfer agency, NAV calculation, GAAP/IFRS accounting, investor reporting and AML processing services to open- and closed-ended investment funds investing across most asset classes, together with general operational support for managers.

Each Appleby office can also provide access to these administration services. In this way, the Private Equity Funds Advisory Team is positioned to provide managers and sponsors in all locations with a value-added, "one-stop-shop" approach to legal, administrative and fiduciary solutions.

OUR WORK

Primary Transactional Work

- Establishing and structuring private equity, venture capital, real estate and other types of closed-ended investment funds, general partners, carried interest partners, management and advisory vehicles in Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Isle of Man, Jersey, Mauritius and the Seychelles
- Establishing Shari'ah-compliant and "hybrid" investment vehicles
- Preparing primary fund documentation: offering/placement memorandum, constitutional documents, partnership agreements, subscription agreements, investment management/advisory agreement, carry agreements, board minutes, side letters

- Reviewing debt and equity funding documentation
- Reviewing service provider documentation: investment management/advisory agreement, administration, custody, prime broker, distribution agreements, audit engagement letters
- Advising managers and sponsors on legal and regulatory issues
- Working with external legal and product development teams on new funds and structured products
- Provision of legal opinions to general partners and investors
- Primary and secondary listings of closed- and open-ended investment funds on leading stock exchanges

Secondary Transactional Work

- Providing advice in connection with portfolio funding, acquisitions and disposals, secondary transactions; preparation of transactional documentation
- Capital raising; subsequent closings
- Negotiation and preparation of side letters
- Provision of advice in relation to reserved matters, modification of investor rights, changes of investment strategy or service providers, listings, AML compliance, liquidation/wind-down
- Fund restructurings, redomiciliations, spin-outs
- Fund disputes: advice on investor rights, manager and general partner duties, distressed funds, asset protection, winding up
- Legal due diligence on offshore funds
- Advising on distribution issues, and implications for fund structures

Representative Matters

- Advising on the establishment of J Rothschild Creat Partners, a first of its kind joint venture fund management company, providing a ground-breaking and unique opportunity for China's private sector to invest in the Western economy whilst providing Western companies with access to Chinese capital
- Advising the Carlyle Group in connection with its £450 million acquisition of Integrated Dental Holdings from Bank of America Merrill Lynch and the proposed merger with Associated Dental Practices
- Advising on the high profile launch of CEE Special Situations Fund, a €200 million private equity turnaround fund with investment backing from the European Bank for Reconstruction and Development and the International Finance Corporation
- Acting for funds advised by Blackstone Investment Group and advising the joint venture company in Blackstone's acquisition of 50% of the £2.1 billion Broadgate Estate in the City of London from the British Land Company Plc. This was the largest UK property transaction in 2010, and received extensive media coverage
- Providing Jersey legal advice to Blackstone Real Estate Advisers LP on the acquisition and financing arrangements arising in connection with the widely-reported £480 million acquisition of the Chiswick Park Unit Trust, owner of the 1.8 million square foot office park in London
- Advising on the joint venture between British Land Plc and Oxford Properties and the acquisition of the Leadenhall Building in the City of London and its development of the £340m "Cheesegrater" building
- Acting for BV Investment Partners, the US$2.6 billion private equity firm, in their acquisition of fund administrator Butterfield Fulcrum from 3i and other backers
- Advising two bid teams in relation to the purchase of clothing retailer Phase Eight from Kaupthing Capital Partners II Master LP Incorporated (a Guernsey authorised closed-ended investment fund) and subsequently advising the successful bidder in respect of the Guernsey law aspects of the purchase
- Acting for leading gas and private equity firm EnCap Investments L.P. in respect of the high profile US$3.5 billion closing of EnCap Energy Capital Fund VIII, L.P., which provides growth capital to proven management teams focused on the upstream sector of the oil and gas industry

- Advising Strathclyde Pension Fund, on its investment into a Partners Group Fund via an ICC structure which issued loan notes
- Advising the general partners of two private equity funds in respect of the consequences and resolution of issues arising following a dispute between the promoter and the key executives employed by the investment adviser
- Advising in connection with closed-ended listed private equity permanent capital vehicle structured as a Luxembourg company and listed on the CISX. The transaction involved innovative offshore structuring arrangements to avoid UK close company rules.

PRIVATE EQUITY FUNDS ADVISORY TEAM: KEY CONTACTS

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