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Trends in Private Fund Financings

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Speakers

Marion Giliberti Barish
+1.617.951.8801
marion.barish@morganlewis.com

Peter M. Phleger
+1.415.442.1096
peter.phleger@morganlewis.com

Daniel I. Papermaster
+1.860.240.2954
daniel.papermaster@morganlewis.com

Nichola Foley
+44.20.3201.5434
nichola.foley@morganlewis.com

Types of Fund Financings

Subscription Facilities

- Facility is used to bridge capital contributions from investors.
  - Often used to avoid timing issues between notice period for making calling capital and need to deploy funds. Also helpful to avoid having to return capital if investment does not occur or gets significantly delayed.
  - If the fund is very active, the facility can be used so the investors are not getting frequent capital calls. The fund will use the facility to fund investments in a particular period and then do one capital call at the end of the period to repay the loan.
- Lender looks at unfunded capital commitments of investors as source of repayment.
- Typically secured by unfunded capital commitments, right to make capital calls and capital call contributions. Rarely secured by underlying fund assets.
- Many credit facilities will contemplate future AIVs and parallel funds
- Master/feeder fund structures may necessitate the need for a "cascading pledge" structure.
- Be aware of other structural implications (for example, if a REIT is involved in the fund structure).

Types of Fund Financings

NAV Facilities

- Facility is used to fund investments and is often used when the investment period is over or close to being over.
- Lender looks at dividend/distribution income as source of debt service and repayment.
- Repayments often follow a waterfall structure.
- The facilities are usually secured by the dividend/distribution stream received from the underlying fund investments. Some may also be secured by the fund's investments.
- If the collateral consists of underlying investments, use of a custodian may be required.

Types of Fund Financings

Hybrid Facilities

- This is a hybrid of a subscription facility and a NAV facility.
- Some hybrid facilities switch from one type to another at a certain point, with pricing and terms tied to the type of facility.
- Some hybrid facilities permit the borrower to borrow against both unfunded capital commitments and underlying investments, with blended pricing.
- The facilities are typically secured by the unfunded capital commitments, right to make capital calls, and capital call proceeds as well as the dividend/distribution stream received from the underlying fund investments. Some may also be secured by the fund's investments.

Types of Fund Financings

Institutional Private Placements

- Private investment fund and asset manager facilities have been the hottest space in the institutional private placement market over the last two years.
- Market is led by the major life insurance companies, although the lines in which institutions invest in these transactions are constantly changing.
- Deal sizes have ranged from $250M to $3B (which was the largest private placement ever done).
- Documentation is done using a Model Form Note Agreement, which creates efficiencies in bringing these deals to market.

Types of Fund Financings

Other Types

- Warehouse facilities
- Liquidity facilities using repurchase agreements and securities lending

Structure and Key Terms

Subscription Facilities

- May have cascading pledges, AIV, and parallel fund co-borrowers
- Lenders will focus on creditworthiness of investors and concentration limits
- Typically the borrowing limit is tied to a percentage of the unfunded capital commitments of the "Included Investors"
- Oftentimes a fair amount of negotiation around exclusion events and investor transfers
- If the investors make their capital contribution with a combination of equity and debt, the lender will want certain protections

Structure and Key Terms

NAV and Hybrid Facilities

- Diligence will be on underlying fund assets.
- Key area of negotiation ties to borrowing base and "haircuts" when valuing assets.

Institutional Private Placement

- Deal comes together differently than a traditional bank facility and key differences (including tenor).
- Role of investment banker and note purchasers.
- Key financial covenants.
- Structural parity with other debt.
- Initial transactions were very aggressive in favor of the issuers, although issuers need to pick their battles.
- Key issues.

Views of the Parties and Hot Buttons: Lender Perspective

- **Subscription Facilities**
  - Viewed as a generally "safe" market.
  - Lender wants to grow with fund/fund complex.

- **NAV and Hybrid Facilities**
  - Needs to understand its exit strategy.
  - Will focus on liquidity of investments and revenue stream.

View of the Parties and Hot Buttons

Limited Partner Perspective

- Investors want no additional liability to lenders. They want no implication that they are guaranteeing the fund's debt.
- If a subscription facility lender wants an investor letter, does it expose the investor to any greater liability or duty than the investor has under the LPA (for example, delivery of financial information). Is the lender asking for unreasonable representations or waivers?
- If there are multiple funds involved in a financing (for example, if there are multiple feeder funds), is the risk allocated appropriately?
- How does use of leverage impact returns?

View of the Parties and Hot Buttons

General Partner Perspective

- What does the fund need? Is having a credit facility worth the cost?
- Do the organizational documents provide enough flexibility from the beginning to permit the fund to take advantage of various types of financings.
- Striking the right balance between the fund and investors.

Lawyer Biographies

Morgan Lewis

Marion Giliberti Barish

Boston

T +1.617.951.8801

marion.barish@morganlewis.com

Marion Giliberti Barish represents lenders and borrowers in financing transactions relating to mutual funds, hedge funds, and other private equity funds. Marion also represents entities in connection with structured finance transactions, including the use of various types of derivatives, and advises entities in connection with debt trading, both with respect to par and distressed debt trades. Her practice includes the representation of hedge funds, investment advisers, private equity sponsors, banks, surety companies, insurance companies, finance companies, and other financial institutions as well as corporate, limited liability company, partnership, and other types of borrowers in connection with a wide variety of financing transactions.

Marion has represented both borrowers and financial institutions in connection with the financing of mutual funds, hedge funds, venture funds, and other investment vehicles and has advised clients with respect to par and distressed debt trading, both in the United States as well as foreign jurisdictions. In addition, she has experience in cross-border financing transactions and has represented financial institutions in many international secured financing transactions. Marion also represents lenders and borrowers in a large variety of areas, including investment management, technology and energy. She represents various financial institutions in providing DIP facilities, including surety facilities, and is knowledgeable in domestic and international acquisition financing, leveraged recapitalizations, asset-based transactions, real estate–based financings, and tender offer financings.

Peter M. Phleger

San Francisco

T +1.415.442.1098

peter.phleger@morganlewis.com

Peter M. Phleger advises sponsors and institutional investors, including corporate strategic investors, on private investment fund formation, including venture and private equity funds, fund-of-funds, secondary funds, and captive corporate funds. He counsels on fund structure, formation, governance, and investing activities, including both primary investments and secondary transactions. His work encompasses fund structuring, partnership agreement terms and conditions, securities law compliance, investor relations, and general partner separations.

Peter's clients include fund sponsors of multibillion dollar partnerships and early–stage venture capital firms; strategic corporate investors such as pharmaceutical companies partnering with early–stage life science focused funds and energy companies partnering with renewable energy funds; and institutional investors such as public pension plans, insurance companies, fund-of-funds, family offices, and sovereign wealth funds. He also counsels both secondary buyers and sellers of portfolios of fund interests.

Daniel I. Papermaster

Hartford/New York

T +1.860.240.2954/
+1.212.309.6253

daniel.papermaster@morganlewis.com

Daniel I. Papermaster focuses on corporate finance and restructurings, primarily representing various types of financial institutions, hedge funds, and large corporations in financing and restructuring transactions. A significant portion of Dan's practice is concentrated on syndicated bank financings, representing hedge funds in debt and equity investments and cross-border financings as well as representing institutional investors of privately placed debt. Dan is head of the firm's private placement team and serves as the deputy leader of the finance practice, which includes the subgroups of international finance, restructuring & bankruptcy, and transactional finance.

Dan has long been active in Connecticut politics. In March 2009, he was appointed by Senators Christopher Dodd and Joseph Lieberman, and he continues to serve on the select committee to screen candidates for high-level federal appointments, including Connecticut's US Attorney, federal judicial nominations for Connecticut, and federal magistrates in Connecticut.

In 2018, Dan was appointed to chair Connecticut State Treasurer Shawn Wooden's transition team. In 2003, Dan was appointed by the mayor of the City of Hartford to chair a commission to reorganize the corporation counsel's office of the City of Hartford. Dan acted as senior adviser to Senator Lieberman's 2000 vice presidential campaign, as legal counsel to Senator Lieberman's 2006 US Senate campaign, and as lead negotiator of Senator Lieberman's Senate debates. In 2010, he served as legal counsel to Republican gubernatorial candidate Oz Griebel.

Nichola Foley

London

T +44.20.3201.5434

nichola.foley@morganlewis.com

Nichola Foley advises on a wide range of international banking and finance matters including leveraged finance, acquisition finance, trade and asset finance, aviation finance, project finance, private placements and insolvency, restructuring and workouts. She is also an experienced fund finance practitioner and has experience in advising clients on subscription line facilities, NAV facilities and hybrid facilities.

Nichola represents sponsors and their portfolio companies, borrowers and large corporates. She also frequently represents senior and mezzanine lenders ranging from large banks, non-bank direct lenders, hedge funds, private equity funds, institutional investors, corporate trustees and financial institutions.

Nichola has particular expertise in cross border financing and multijurisdictional transactions across Europe, Russia, Central Asia, Asia, North America, and the Middle East.

Nichola has extensive experience advising clients across a variety of sectors including retail, energy, entertainment, infrastructure, hospitality, aviation, shipping, automotive and healthcare. More recently, Nichola has advised clients navigating their transition to alternative rates prior to the discontinuation of LIBOR and she is a member of the Firm’s LIBOR Working Group.

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