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Introduction

The structures for fund finance transactions are as varied as the investment funds they finance. Depending on the structure, the entities serving as borrowers under the facility or whose capital commitments are serving as collateral for the facility may not be sufficiently creditworthy on their own to support the optimal level of financing on the desired economic terms. In these circumstances, lenders will look for – and the investment fund will achieve better terms by providing – additional credit support from related entities that have the wherewithal to provide it.

In this chapter, we will explore the structural circumstances that give rise to the need for additional credit support, both in the net asset value ("NAV") and the subscription line contexts, compare fund guaranties and equity commitment letters ("ECLs") as the primary forms of additional credit support and outline key documentation considerations to keep front of mind when drafting fund guaranties or ECLs.

Structural need for credit support

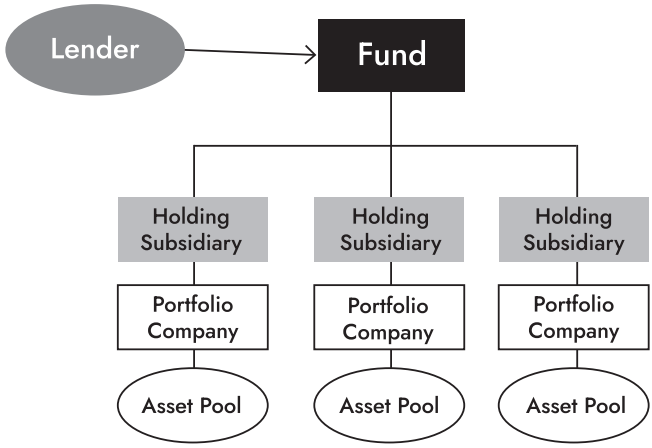
Fund credit support, whether in the form of a guaranty or an ECL, can be helpful in both NAV and subscription credit facilities, but their purpose in each type of facility is different.

Credit support in NAV facilities

In the NAV context, fund credit support is often provided when the borrower is a special purpose vehicle ("SPV") or other holding company beneath the fund. If the fund itself is the borrower, the lenders will have recourse, whether secured and/or unsecured, to all of the assets (i.e. the entire NAV) of the fund (see Figure 1). In this scenario, no further credit support from entities outside the fund is relevant.

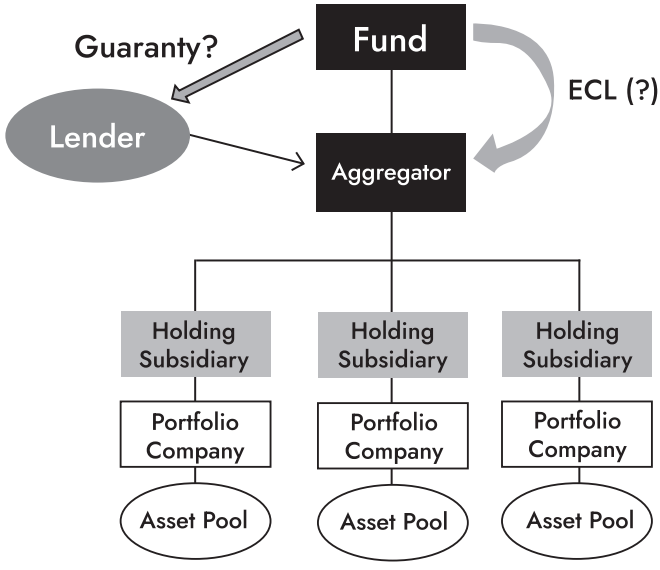
Continued overleaf

Figure 1:



By contrast, when an entity below the fund is the borrower, the lenders may look to the fund for additional credit support. If the borrower is an aggregator that holds all the fund's investments, recourse under the facility may be limited to the investments – in which case no additional fund credit support is warranted – or the facility may enjoy full recourse to the fund (see Figure 2). In the latter case, the borrower already provides the lenders with full recourse to the NAV of the fund, but the credit support provides the added benefit of an unsecured claim against the fund itself, giving the lenders indirect access to any remaining uncalled capital commitments of the fund.

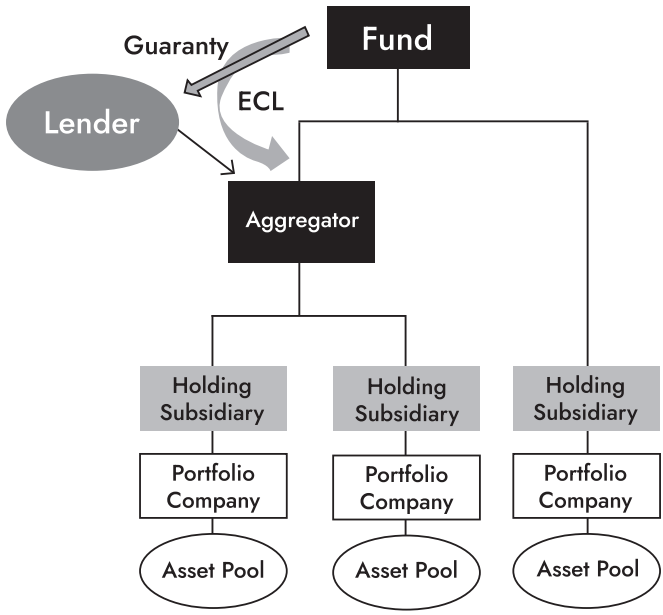
Figure 2:



Where the NAV facility borrower is an aggregator that holds only a portion of the fund's investments, fund credit support can be of even greater benefit (see Figure 3). In this case, the loan-to-value ("LTV") ratio used to size the facility is calculated by reference only to the investments owned by the aggregator borrower. Because of the additional investments held at the fund level, however, the NAV of the fund is

greater than that of the borrower. Like the scenario in Figure 2 above, a fund guaranty or ECL provides the NAV lender with an unsecured claim against the fund. Here, that includes not only the remaining uncalled capital of the fund but also the value of the fund's directly held investments.

Figure 3:



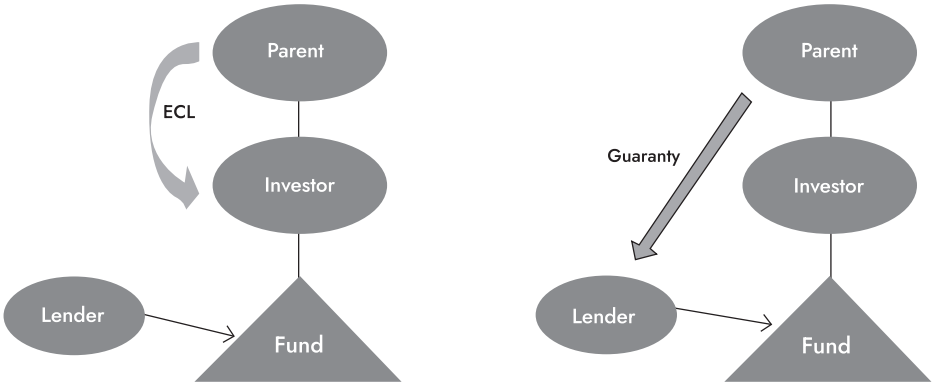
Credit support in subscription credit facilities

Credit support, including ECLs, in a subscription facility context serves a different purpose. In this case, the credit support does not come from the fund but instead comes from the direct or indirect owner(s) of a limited partner ("LP") of the fund for the benefit of the fund and, derivatively, its subscription facility lenders. When underwriting a subscription credit facility and determining which fund investors will be included in the borrowing base, lenders consider carefully the creditworthiness of the investors. If the investors are pension funds, insurance companies and other large institutional investors with high credit ratings, the lenders can be assured that, should the lenders need to issue capital calls following a default by the fund, those investors will have the ability to pay.

In some cases, for its own reasons, an investor will create a holding company to serve as the direct investor into the fund. These holding companies are typically newly formed SPVs with no assets other than the limited partnership interest in the fund in which they are set up to invest. From a lender's perspective, this SPV investor by itself is not creditworthy, and the lender would not be willing to lend against its capital commitment. In a large fund with a diversified pool of investors, such SPV investors often will not comprise a significant enough portion of the LP base to warrant further consideration.

In a separately managed account ("SMA") – that is, a fund vehicle set up to manage investments on behalf of a single investor – or other fund with a concentrated LP base, on the other hand, excluding such investors from the borrowing base may render it impossible to put in place a subscription facility of meaningful size (if at all) to manage the fund's operating cash needs. A guaranty or ECL from a creditworthy parent of the investor SPV(s) can solve this issue by providing the subscription facility lender, directly (in the case of a guaranty) or indirectly (in the case of an ECL), assurance that someone with the financial ability to satisfy a capital call will be obliged to do so should the need arise (see Figure 4).

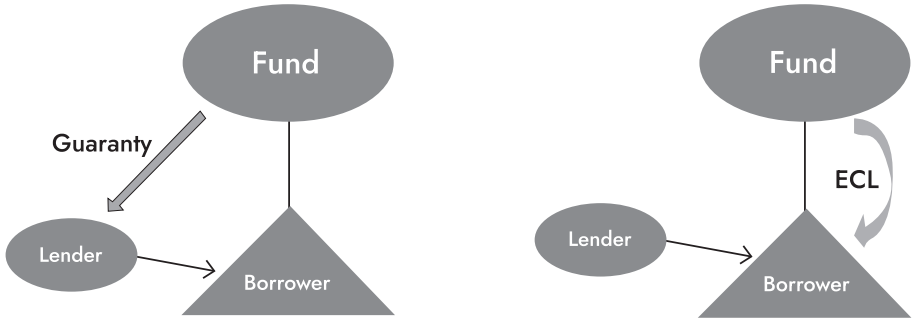
Figure 4:



Comparing fund guaranties and equity commitment letters

Now that we understand the purpose of credit support in a fund finance transaction, we can explore the differences between guarantees and ECLs and why (or whether) one may be preferred over the other.

Figure 5:



A guaranty is a contractual obligation of the fund that runs directly to the lender. In the event a default by the borrower occurs under the facility, the lender has privity of contract with the guarantor and is entitled (subject to any trigger events or other limitations – see more on this topic below) to demand payment of the guaranteed obligations directly from the guarantor (see Figure 5). Should the guarantor fail to make the requisite payment, the lender may bring a claim in its own name against the guarantor to collect what it is owed.

By contrast, an ECL is a contractual obligation owed by the provider of the ECL (typically a direct or indirect parent of the recipient) to the recipient of the ECL. The ECL provider agrees to make a cash capital contribution into the recipient upon written notice from the recipient or the occurrence of other stated trigger events. The ECL is thus a contractual obligation from the ECL provider to its subsidiary; it is not a direct obligation of the ECL provider to the lender. It should be noted here that ECLs are deployed by investment funds in a myriad of other circumstances, including to provide comfort to a seller that an SPV set up as the purchaser in an M&A context will be able to pay the purchase price on closing, or to the purchaser in an M&A transaction to provide assurance that a creditworthy entity will stand behind any seller indemnities provided for in the purchase agreement. The use of ECLs in a fund finance context is an expansion of their utility but not anything inherently new to the investment fund toolkit.

A key distinction between guaranties and ECLs from a lender's perspective is the process for enforcement. As noted above, a lender is the named beneficiary of a guaranty and can bring a claim directly against the guarantor to collect payment. With an ECL, however, the party with the right to bring a claim to collect payment is the borrower under the fund financing, not the lender. The lender must thus ensure that the credit documents provide it the right to compel the borrower to make a demand for payment under the ECL or, failing that, permit it to act in the shoes of the borrower to initiate and prosecute any claim for enforcement.

All things being equal, a lender to a fund will prefer to receive a guaranty rather than an ECL, as enforcement is less cumbersome and subject to risk. All things often are not equal, however. Whether a fund or LP parent is able to provide a guaranty will depend in the first instance upon any limitations contained in its organisational documents. To assess this, we need to take a closer look at the fund limited partnership agreement ("LPA") or other relevant organisational documents. Most fund LPAs contain limitations on the type and amount of debt the fund can incur. For example, the LPA may contain a cap on borrowings and guaranties that is set as either a stated amount or a percentage of capital commitments. The LPA may also restrict the fund's ability to guarantee certain types of debt. An ECL, as a commitment to fund an investment into a portfolio company, is not a debt obligation and is not typically subject to these limitations. Therefore, when a fund is unable to provide a guaranty due to debt limitations in its LPA, an ECL would be considered instead.

Even if it is legally able to provide a guaranty, a fund or LP parent may prefer not to for other reasons. First, because a guaranty is treated as debt and reflected as such in the fund's financial statements, a guaranty may negatively affect the fund's reported leverage in a way that an ECL would not. In addition, certain classes of investors may be restricted from investing in funds that utilise "leverage" as part of their funding strategy. The use of guaranties by a fund to support debt obligations of its subsidiaries may potentially preclude those investors from investing in that fund. Wanting to maximise the universe of potential investors from whom it may seek capital commitments, a fund may understandably prefer to use an ECL rather than a guaranty in its fund finance activities. Finally, if the fund provides a guaranty, certain classes of investors may have tax concerns that are not present if it provides an ECL. The specifics of those potential tax concerns are beyond the scope of this chapter, but it suffices to say here that they exist and may weigh in favour of an ECL over a guaranty for relevant investment funds.

Key documentation considerations

Whether credit support takes the form of a guaranty or an ECL, it is important for the parties to clearly define the obligations of the credit support provider. In addition, there are certain customary "bankable" provisions that are included in guaranties and/or ECLs to ensure the guaranty or ECL provides the intended protection to the lender. Set out below is a brief explanation of the key terms to be covered.

Issuer

First, it is important to determine who will provide the guaranty or ECL. As discussed above, the need for the credit support most often arises because the fund finance borrower or an investor is an SPV or otherwise not sufficiently creditworthy on its own to obtain the desired credit. It is thus crucial for the parties to ensure that the entity providing the credit support is a creditworthy entity that is able to fill that gap. Determining this will involve both a credit analysis on the part of the lender to determine the financial condition of the proposed issuer as well as legal due diligence by counsel to confirm that the entity is legally able to provide the credit support and in what form.

Recipient

In the case of a guaranty, the beneficiary will be the lender. For an ECL, on the other hand, it will be the borrower (in a NAV) or an investor into the borrower (in a subscription facility). Depending on the fund

structure, an ECL may need to be cascading in nature, with the ultimate creditworthy party providing an ECL to its direct subsidiary, which in turn provides an ECL to its subsidiary, and so on, until the ECL reaches the entity, which is the NAV borrower or fund LP, as applicable.

Identification of the supported obligations, including any limitations

Where credit support is provided in connection with a subscription credit facility, the amount of the guaranteed obligations or the ECL commitment, as applicable, will be the amount of the underlying LP's uncalled capital commitment to the borrower. It is not determined by reference to the quantum of borrowings under the subscription credit facility.

In a NAV context, fund credit support can generally be classified as "full recourse" or "limited" obligations. A full recourse guaranty or ECL will cover the aggregate amount owed from time to time under the NAV facility, including interest, fees, expenses and indemnification obligations.

A limited guaranty or ECL, as the name suggests, will provide coverage for some amount less than the total outstanding NAV obligations. The type of protection may be negotiated where the fund is unable to provide support for the full amount (for instance, due to a cap on such obligations in its LPA) or where it is unwilling to provide greater support, reasoning that the limited amount, when taken together with the portfolio assets of the NAV borrower, is sufficient support for the NAV loan. This type of credit support may also be used where the credit support is intended to protect the lender only for specific obligations of the NAV borrower. As an example, in the context of a NAV for a secondaries fund, the guaranty may cover only the amount of uncalled capital commitments in the portfolio, ensuring the lender that should capital calls in the underlying portfolio outpace the borrower's ability to generate cash, the fund will be obliged to call capital from its investors to satisfy those capital calls. The amount of a limited credit support obligation may be stated as a flat amount or determined by a formula, depending on what is permitted by the fund's LPA and its other obligations.

In addition to specifying the amount being covered by the guaranty or ECL, it is also important to pay careful attention to how the obligations are shared amongst guarantors or ECL providers when there are more than one. This will often be the case, as fund structures typically include a main fund vehicle and one or more parallel or alternative investment vehicles that funnel the investments of different classes of LPs into the underlying investment portfolio to optimise tax and regulatory treatment for the investors. The lender's preference will be for all of the fund entities to be jointly and severally liable for the full amount of the covered obligations, enabling the lender to proceed against any or all of them in order to enforce the guaranty or ECL. This may not be possible, however, as the LPAs of one or more of the fund vehicles may prohibit them from incurring obligations on a joint and several basis with related fund vehicles. If this is the case, the guaranty will provide for several, but not joint and several, liability of the credit support providers. Each fund entity's share of the total obligations will most often be equal to the percentage of relevant NAV facility obligations equal to such entity's *pro rata* share of the equity in the NAV borrower. For example, if Fund A owns 30% of the NAV borrower, it will be responsible for guarantying or providing an equity contribution to the NAV borrower in an amount equal to 30% of the relevant NAV facility obligations. In an enforcement scenario, the lender (or the borrower, in the case of an ECL) would need to proceed against all of the credit support providers in order to collect the full amount of the guaranty or ECL and, should one or more of those entities have insufficient resources to satisfy its obligation, the lender will not be able to pursue the remaining solvent entities for any deficiency.

Trigger conditions

In addition to specifying the quantum for which a credit support provider is at risk, a guaranty or ECL must set out the triggering events the occurrence of which will enable the lender or ECL beneficiary to demand payment.

In the case of a guaranty or ECL supporting the obligations of a fund LP to fund its capital commitment if and when called, the triggering event will simply be the failure of the underlying LP to satisfy a capital call within the relevant capital call period.

For guarantees and ECLs provided in a NAV context, however, the triggering events can be more nuanced and heavily negotiated. Payment may be triggered upon any event of default under the NAV facility or upon certain events of default, such as payment and bankruptcy events of default.

Some guarantees or ECLs – known as "bad boys" – will be triggered only if the fund has committed a specified "bad act". These bad acts typically include fraud, intentional misrepresentation, misappropriation of funds, unauthorised transfers of collateral, and voluntary bankruptcy filings. The purpose of this type of credit support is to ensure that the fund's interests as the general partner or other controlling person of the NAV borrower are aligned with the interests of the lender. It is important to note that bad boy guaranties may limit NAV lender recovery to losses arising as a direct result of the specified bad acts. It is critical in these cases to pay careful attention to the drafting to ensure that, if triggered, the lender's losses are automatically deemed equal to the full amount of the NAV facility outstandings or such lesser amount as it intended to be protected by the credit support. Unless expressly agreed by the parties, the lender should not be required to pursue collection and/or exhaust remedies against the NAV borrower before seeking payment under a guaranty or ECL.

Timing and mechanics of payment; termination

Both guaranties and ECLs should specify the way the beneficiary may demand payment, the time during which the credit support provider must satisfy any payment demand, what constitutes valid payment and the conditions for termination of the guaranty or ECL. Typically, the guaranty or ECL will require the beneficiary to deliver a written notice demanding payment, though some may provide that payment becomes due automatically upon the occurrence of a relevant triggering event, on the theory that the credit support provider is in as good or better position than the lender to know when a triggering event occurs and so should not require notice of that from the lender. As with acceleration of the underlying credit facility, in a transaction with any nexus to the United States, the guaranty or ECL should provide that the credit support provider's payment obligations arise immediately and automatically if it becomes insolvent. This ensures so far as possible that the ability to enforce the credit support provider's obligations is not blocked by the operation of a stay of enforcement under Section 363 of the United States Bankruptcy Code.

If payment is demanded under a guaranty or ECL, the agreement will provide a deadline within which the credit support provider must make payment. These agreements recognise that the credit support provider is often a fund itself and so will provide sufficient time for the credit support provider to issue a capital call to its investors to procure the funds needed to make payment. Often, the agreement will provide that payment is due within two to three business days, but that deadline will be extended for a further period (often 10–12 business days) if the credit support provider delivers evidence that it has initiated a capital call from its investors in the requisite amount.

In a guaranty where the lender is entitled to enforce payment directly, the guarantor will be required to pay the demanded amount directly to the lender to be applied in satisfaction of the guaranteed obligations. In an ECL, while the lender may sometimes negotiate the right to directly receive payment on behalf of the borrower, most often payment will be required to be paid to an account in the name of the borrower. It is critical that the lender ensures that payment is required to go to an account over which the lender has exclusive control and that payment by the ECL provider to any other account or person does not satisfy its obligation under the ECL.

Finally, the guaranty or ECL should clearly identify when the credit support provider is discharged from its obligations and the guaranty or ECL terminates. For a full recourse guaranty or ECL, this will be when the underlying credit facility is repaid in full (except for unasserted contingent indemnification or other similar reimbursement obligations) and any commitments to provide further loans or credit extensions

have terminated. In a limited recourse guaranty, termination will occur when the guarantor has paid an amount equal to the cap, even if other obligations remain outstanding. A limited recourse ECL will similarly terminate when the ECL provider has contributed an amount sufficient to satisfy the limit. In this case, however, great care is needed in the drafting to ensure that only contributions that are intended to count toward the cap do so; the ECL obligations should be separate and distinct from other infusions of capital that may be made by the ECL provider. Any purchase of equity interests or debt securities, shareholder loans, capital contributions or other payments by the ECL provider to the NAV borrower (other than any such payments that are contributed to pay NAV facility obligations following a payment demand) should not constitute a payment made under the ECL and would not be credited against the agreed capital contribution amount or otherwise reduce the capital contribution payable under the ECL.

Lender protections ("bankable provisions")

Guaranties should always include waiver of suretyship defences and other protections to ensure that the guaranty provides the lender the intended protection. Although ECLs are not guaranties and so are not technically subject to such defences, best practice is to nevertheless include them to protect the lender in case a court were to recharacterise the ECL as a guaranty or simply to expressly set out the understanding of the parties. There are also certain additional provisions, such as executory contract disclaimers, that are unique to ECLs. Set out below is a brief summary of these provisions.

Waiver of suretyship defences

As noted above, both guaranties and ECLs should contain a waiver of defences and rights the credit support provider may otherwise have because of or in connection with:

- renewal, increase, extension or other modification of the credit facility;
- forbearance, adjustment or full or partial release of liability given to any other person obligated to pay the credit facility obligations;
- insolvency or bankruptcy of any person obligated to pay the credit facility obligations;
- illegality or unenforceability of any party of the credit facility obligations against any other obligor;
- actions taken or failed to be taken with respect to the credit facility obligations or security therefor; and
- any other circumstance that might give rise to a defence to payment by the guarantor or ECL provider under applicable suretyship principles.

Waiver of setoff

Both guaranties and ECLs should be expressed to be absolute, irrevocable and unconditional obligations of the credit support provider. They should not be impaired by the existence of any claim, setoff or other right that the credit support provider may have against the NAV borrower or the lender. Any rights of setoff may separately be asserted against the NAV borrower or lender, but the lender will be paid in full separate from such claims.

Acknowledgment of lender reliance

Under the Delaware Revised Uniform Limited Partnership Act, if a limited partnership has uncalled capital but the general partner fails or refuses to issue capital calls for contributions needed to satisfy liabilities of the partnership, a creditor of the partnership may bring suit against the LPs and obtain a court order requiring the LPs to fund their remaining capital commitments or the portion thereof needed to satisfy the creditor's claim. To do so, the creditor must demonstrate to the court that it relied on the existence of the uncalled capital commitments in deciding to extend credit to the partnership. For a lender to maximise its ability to ensure that uncalled capital commitments will be funded if needed to

satisfy its credit facility, the guaranty or ECL should state, and all parties acknowledge, that the lender is relying on the uncalled capital as a condition to lending.

Acknowledgment of consideration

In most cases (absent the protection of an English law deed), the provider of a guaranty or ECL must receive consideration in order for its guaranty or ECL to be valid and enforceable against it. The guaranty or ECL should therefore contain an acknowledgment of the relationship between the credit support provider and the borrower, that the credit support provider will receive not insignificant benefits because of the extension of credit to the borrower and that the credit support provider has received sufficient consideration in exchange for its obligations.

Subordination of claims

The lender will want to ensure that to the extent the credit support provider is itself a creditor of the borrower, its claims will be subordinated to those of the lender. This would include any subrogation claims a guarantor may become entitled to because of making payment under a guaranty, or any inter-company liabilities that may exist. Some funds may be set up such that capital contributions of the investors are funded mostly in the form of debt rather than as common equity contributions. The lender should ensure that any such obligations are expressly subordinated, whether pursuant to the terms of the LPA or otherwise, to the lender's claims.

Reinstatement

A guaranty or ECL, including a limited guaranty or ECL, should contain a customary reinstatement clause providing that the obligations of the credit support provider are reinstated if the lender is obliged to disgorge any payments it has received as a result of a fraudulent conveyance or similar claim.

Non-petition

In a fund finance transaction, it is imperative that the lender can enforce its collateral, whether uncalled capital or investment assets of its borrower, upon an event of default. Were the borrower to file for insolvency and take the benefit of a stay of enforcement, the lender may face material delays in accessing its collateral, during which the value of the collateral could decline. In certain types of credit facilities, particularly asset-based facilities for credit funds, it is customary to require the borrower to be a "bankruptcy remote" SPV. It must have an independent director whose consent is required for key specified activities, including initiating an insolvency proceeding. This provides the lender some assurance that the financial sponsor of the fund will not place the borrower into bankruptcy as a mechanism to retain control over the borrower and control its activities following a default.

More often, lenders do not require borrowers to go to these lengths and incur the attendant costs. Instead, the parties will agree upon a "bankruptcy remote lite" arrangement, pursuant to which the borrower is an SPV that is not permitted to have other creditors who might compete with the lender in an insolvency and the general partner or other controlling entities of the fund agree contractually that they will not institute or join any bankruptcy proceeding against the borrower until the credit facility has been repaid in full and any applicable preference periods have expired. As a drafting matter, it is imperative that this covenant expressly survive termination of the guaranty or ECL to ensure that the lender is protected or the duration of any applicable preference periods. As an accommodation to the fund, the borrower and other relevant entities may be permitted to be wound up following repayment of the credit facility but before expiration of applicable preference periods, so long as it is on a solvent basis such that no further disgorgement claims against the lender are possible.

Not an executory contract or "financial accommodation" (ECLs only)

Under the United States Bankruptcy Code, a debtor in bankruptcy has the option to accept or reject

certain executory contracts, which are contracts under which the counterparty has not yet fulfilled its obligations. Since the borrower under a fund finance transaction is the beneficiary under an ECL, treating the ECL as an executory contract would enable the fund to evade its obligations under the ECL should the borrower enter bankruptcy by causing the borrower to reject the ECL. Consequently, it is important for an ECL to include express language tracking the applicable provisions of the United States Bankruptcy Code and providing that (i) the borrower is not obligated to issue additional equity interests to the ECL provider in exchange for amounts contributed to it pursuant to the ECL, (ii) the ECL is not a contract to issue a security of the borrower or to make a loan, or to extend other debt financing or financial accommodations, to or for the benefit of the borrower, as referenced in Section 365(e)(2)(B) of the United States Bankruptcy Code, (iii) the ECL provider and its affiliates, by virtue of their interest in the borrower, will not cause the borrower to reject the ECL in a case under the United States Bankruptcy Code or similar proceeding in which the borrower is a debtor, and (iv) any such rejection of, or the failure or inability to assume, the ECL in a case under the United States Bankruptcy Code or similar proceeding in which the borrower is a debtor will not eliminate, reduce, limit or otherwise affect the ECL provider's obligations under the ECL.

Third-party beneficiary (ECLs only)

While lenders may sometimes be (and would prefer to be) direct signatories to an ECL, it is more common for the ECL to be strictly between the ECL provider and the recipient as discussed above. To obtain the right to cause the recipient to enforce the ECL and to do so on its behalf, the lender will require that it be named in the ECL as a third-party beneficiary. This provides the lender a direct mechanism for enforcement.

Collateral assignment (ECLs only)

In addition to being named as a third-party beneficiary under an ECL, a lender will also want to take security over the borrower's rights via a collateral assignment. This ensures that the lender has a first priority security interest in the borrower's rights under the ECL, including its right to receive payment, which will provide it protection *vis-à-vis* any other creditors of the borrower and a trustee in bankruptcy. The limitations on assignments of rights under the ECL will need to carve out collateral assignments by the recipient to its lenders. The actual collateral assignment is contained in the security agreement between the borrower and the lender.

Prohibition on amendments and assignments without lender consent (ECLs only)

Having carefully negotiated the ECL provider's obligation to contribute capital and the third-party beneficiary rights of the lender to enforce that obligation, all would be for naught if the ECL provider and recipient could simply amend away the lender's protection in an agreement between themselves. For that reason, an ECL in a fund finance transaction should always provide that it is irrevocable and may not be terminated, amended or modified and that the ECL provider may not assign its obligations to any other party, in each case without the written consent of the lender.

Conclusion

A guaranty or ECL is a valuable tool to enhance the credit profile of a borrower in a fund finance transaction. As can be seen above, these agreements may be tailored in innumerable ways to solve specific credit concerns of a lender and/or concerns of a fund and its investors. However, that same flexibility creates numerous opportunities for imprecise drafting or inattention to legal nuances to result in unintended consequences, either for the lender or the credit support provider. It is thus incumbent upon the parties and their counsel to pay careful attention to the agreement and its terms to ensure that the intentions of all parties are accurately reflected.

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- Subscription lines
- Enforcement
- Secondaries
- Ratings
- Collateralised fund obligations

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