

## NEW FRONTIER: CAYMAN LLCs?

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There is eager anticipation in the private equity and fund industry around the creation of the Cayman Limited Liability Company (“Cayman LLC”). The implementation of this corporate entity should have a noticeable impact on the formation of Cayman private equity funds, where the Cayman exempted limited partnership (“ELP”) is currently the preferred vehicle. Given the US market’s familiarity with a Delaware LLC, it is likely that we will come to see the Cayman LLC in private equity structures going forward.

Appleby’s Subscription Finance Team considers the potential impact of the use of a Cayman LLC in the subscription credit facility and, in particular, how effective security over the capital call rights of such a vehicle might be obtained.

Currently, the typical collateral package in a subscription credit facility includes the relevant Cayman fund securing its right to make capital calls on its investors. The loan documents for these facilities typically secure the borrower’s obligations by providing for a pledge of (i) the right of the fund to make and enforce a call upon the capital commitments of investors and (ii) the account into which corresponding capital contributions are made.

As the Cayman LLC is essentially expected to be a hybrid between the ELP and a Cayman exempted company, there is much discussion as to how (i) the contractual obligations of members to fund the Cayman LLC and (ii) the security over such obligations, will be documented.

## LLC AGREEMENT AND SUBSCRIPTION DOCUMENTATION

The LLC Agreement as the main constitutional document of the Cayman LLC will set out a member's rights in the Cayman LLC, much like the Memorandum and Articles of Association of an exempted company and the Limited Partnership Agreement of an ELP. As industry players are aware, taking security over the capital call rights of a Cayman exempted company presents certain challenges however such issues are not expected to arise with respect to an LLC Agreement.

Separately, each member in the Cayman LLC would enter into a subscription agreement setting out the terms on which it agrees to be a member and fund the Cayman LLC.

In order to ensure that a Cayman fund may participate in a subscription financing, the constitutional documents and subscription agreement must contemplate the related collateral arrangements. A Cayman LLC is no exception. If the adoption of the Cayman legislation results in the use of Cayman LLCs as the new vehicle of choice then the following items must be included in the formation documents of a Cayman LLC:

1. Express, and ideally broad, wording as to the ability to incur indebtedness in connection with a subscription credit facility as borrower or guarantor;
2. The express ability to assign the rights to call for and enforce capital contributions and apply the proceeds towards the satisfaction of the Cayman fund's secured liabilities; and
3. The acknowledgement by members of such assignment.

Appleby's Subscription Finance Team continues to be in front of the Cayman LLC's role in the subscription credit facility collateral package and will continue to provide updates as this develops.



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