



# Fund Finance

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# Cayman Islands

Simon Raftopoulos, Benjamin Woolf & Anna-Lise Wisdom  
Appleby

## Overview

The Subscription Credit and Fund Finance markets have continued to grow steadily into the fourth quarter of 2017. Strong credit performance is still the norm in this market, and although the authors are aware of a couple of technical defaults, it remains the case that there have been no publicly reported events of default. Indeed, the use of subscription lines has expanded and this use has “become one of the most talked-about issues in the private funds universe in the last year”.

The Cayman Islands continues to be a pre-eminent offshore jurisdiction for the establishment of private equity funds, particularly for North American fund managers, and the exempted limited partnership (**ELP**) continues to be the private equity fund vehicle of choice. According to figures published by the Cayman Islands Registry of Exempted Limited Partnerships, at the end of 2016, there were 19,937 active ELPs in the jurisdiction, reflecting a 29% growth rate for this type of vehicle. 3,277 ELPs were registered in the Cayman Islands in 2016, and 2,442 ELPs have been registered in the Cayman Islands through August 2017.

No doubt buoyed by the familiarity of US counsel and fund managers with Delaware LLCs, the use of the Cayman limited liability company (**Cayman LLC**) as a business vehicle has also increased since its introduction in July 2016. According to figures published by the Cayman Islands Companies Registry, 417 Cayman LLCs were registered in 2017 through August. This represents a significant increase in the use of this vehicle over the period starting with its introduction through December 2016, which saw 205 Cayman LLCs registered. The relative success of the Cayman LLC can, at least in part, be attributed to the decision by legislators, in collaboration with the private sector, to introduce a vehicle that is similar to the Delaware LLC. Familiarity with this type of vehicle facilitates usage and offers the benefit of operational consistencies across the onshore and offshore segments of fund structures. One year after its introduction, we note that Cayman LLCs are being most commonly used as joint venture vehicles, carried interest vehicles, downstream blockers, and investment management vehicles. The authors are also aware that a handful of Cayman LLCs have been used as investor-facing fund vehicles, including by Asian-based fund managers.

Successful public and private sector discussion and collaboration are some of the factors contributing to Cayman’s market leading position in this space. Others include: (i) historical familiarity with the jurisdiction by investors and fund sponsors; (ii) the increasing convergence of hedge fund and private equity sectors, as more fund managers offer and operate both products from the same platform; and (iii) Cayman law’s English common law roots, supplemented, as necessary, by local legislation, which ensures that Cayman Islands funds are recognised as internationally accepted vehicles.

Globally, Preqin's Q3 2017 Updates report that while the total capital raised by private equity funds has been lower in Q3 than in Q2, Q3 2017 saw \$38bn more capital raised compared to Q3 2016, even though 51 fewer funds held a final close. This supports the view that the more established general partners continue to account for the largest proportion of aggregate capital raised by funds closed. In addition, the number of private equity funds in the market continued to grow in Q3 2017, with 2,022 funds having come to market by the beginning of Q4 2017, targeting \$706bn in institutional capital. The continued growth in this area correlates with growth in the fund finance space, where Appleby's Cayman office has seen steady growth over last year in the subscription credit facility market. Indeed, Appleby's Cayman office continues to be a market leader in this area, representing 19 of the 20 largest global banks on a variety of different financing structures.

## Fund formation and finance

### Lending to Cayman Islands funds

Cayman Islands private equity funds have historically been registered as ELPs under the Exempted Limited Partnership Law, as amended (**ELP Law**). The Cayman LLC, registered under the Limited Liability Companies Law, as amended (**LLC Law**), is a relatively new hybrid form of business vehicle, merging certain characteristics of a Cayman Islands exempted company and an ELP.

Though registered pursuant to the ELP Law, an ELP is not a separate legal entity. Rather, an ELP reflects a contractual agreement between the partners, where the general partner is vested with certain duties and powers with respect to the business and its assets. Any rights and obligations of the general partner and the limited partners are therefore contractual in nature and will be governed by the provisions of the limited partnership agreement and any subscription agreements (and/or side letters) signed by the limited partners. The ELP's rights and property of every description, including all *choses in action* and any right to make capital calls and to receive the proceeds thereof, are held by the general partner in trust as an asset of the ELP. A Cayman LLC, on the other hand, is a body corporate with separate legal personality and limited liability. It can therefore hold such property and assets and incur obligations and liabilities in its own name.

The legal treatment of an ELP and the corresponding role of the general partner has a number of implications for lenders (**Lenders**) offering subscription credit facilities to Cayman Islands vehicles when structuring the related security package. Limited partners of an ELP will usually commit in the partnership agreement and/or subscription agreement to fund investments or to repay fund expenses when called upon to do so by the general partner from time to time. This contractual obligation of a limited partner to fund its capital, to the extent that it has not already been called (**Uncalled Capital**), and the corresponding right of the ELP to call for Uncalled Capital (**Capital Call Rights**) are the backbone of the subscription credit facility. Given that these rights, or *choses in action*, are contractual in nature, the appropriate form of security over such rights is an assignment by way of security. As discussed above, legal title to such assets ultimately vests in the general partner of the ELP, and being contractual in nature, such rights are exercisable by the general partner for the benefit of the ELP.

Consequently, the proper parties to any grant of security are the general partner as well as the ELP (acting through the general partner), as the ultimate beneficiary of such assets. Where the obligor in a subscription-secured credit facility is a Cayman LLC, however, legal title to Uncalled Capital and to Capital Call Rights should vest in the Cayman LLC

itself, with the manager having such power and authority as set out in the LLC agreement to make calls for Uncalled Capital and to receive capital contributions from the members in accordance with the terms of their subscription agreements. Accordingly, where a Cayman LLC is the obligor, the security package could be simplified in that only one entity – the manager on behalf of the Cayman LLC – need be a party to the relevant security agreements. The LLC Law allows considerable flexibility in the structuring, governance and administration of the Cayman LLC, as it defers in many instances to the LLC agreement. Members of a Cayman LLC will therefore have relative freedom to introduce features typically associated with ELPs such as capital accounts, capital commitments and capital calls, provided that the provisions of the LLC agreement do not contravene the LLC Law or any other laws of the Cayman Islands. Each member of the Cayman LLC will also typically enter into a subscription agreement setting out the terms on which it agrees to be a member and to fund its capital commitment to the Cayman LLC.

In all instances, the optimal security package would incorporate an express irrevocable power of attorney in favour of the Lender to exercise effectively the general partner's or the Cayman LLC's Capital Call Rights following the occurrence of an event of default.

In addition, the security package will typically include the grant of a security interest over a designated bank account under the control of the Lender. Although the security over Capital Call Rights can be granted under a Cayman law document, it is increasingly common for such security to be granted under a New York or English law-governed security agreement. Assuming that the grant of security is permitted under the Cayman law-governed limited partnership agreement or the LLC Agreement, Cayman courts would recognise the grant of security even if such security were granted under a foreign law-governed security agreement. However, in such a situation, the Lender will need to ensure that the local law opinion covers not only the assignability of the Capital Call Rights, as a matter of Cayman law, but also the recognition of the security assignment, the choice of foreign law to govern same, and the steps taken to establish priority as a matter of Cayman law.

The terms of the limited partnership agreement or the LLC Agreement play an integral role in the structuring of the collateral package and must be reviewed in detail in order to ensure a number of key elements are present, including but not limited to: (i) the ability of the ELP or the Cayman LLC to incur indebtedness and enter into the transaction; (ii) the ability to grant security over (x) the Uncalled Capital, (y) the right to make and enforce capital calls, and (z) the related contributions; (iii) the ability to apply the capital contributions towards the secured obligations; and (iv) acknowledgment by the limited partners or the members of the Cayman LLC of the security assignment and their obligation to fund their capital commitments.

#### Perfection of security

With the exception of land located in the Cayman Islands, vessels flagged in the Cayman Islands, Cayman Islands-registered aircraft and interests of limited partners in an ELP, generally no perfection steps are required in Cayman and, further, there is no general register of security interests in the Cayman Islands accessible to the public.

Perfection over the Capital Call Rights is achieved through the delivery of written notice of the grant of security (**Notice**) to the ELP's limited partners or the members of the Cayman LLC. According to conflicts of laws principles, the priority of two competing security interests in a *chase in action* is determined by the law governing that *chase in action*. Where a security interest is granted over Capital Call Rights set forth in a Cayman law-governed

limited partnership agreement or LLC Agreement, priority of the security interest as against any competing security interest will therefore be determined in accordance with Cayman Islands law. As a matter of Cayman Islands law, where successive assignments of a *chose in action* are concerned, priority as between creditors is determined based on the English court decision in *Dearle v Hall* (1828) 3 Russ 1, according to the order in which written notice is given to a third-party obligor (i.e. the limited partners or the members of a Cayman LLC). Priority is not established in accordance with the time of creation of the relevant security interests. A delay in the delivery of the Notice will therefore open up the Lender to the possibility that the Cayman LLC, or a general partner on behalf of the ELP, may (quite unintentionally) grant a competing security interest or an absolute assignment over Capital Call Rights to a subsequent assignee. Provided that Notice of the second assignment is given to the limited partners or to the members of the Cayman LLC ahead of Notice of the first assignment, the subsequent assignee will rank for repayment ahead of the first assignee.

Equity holders in Cayman Islands vehicles are increasingly aware of subscription facilities and familiarity with the product means that there is now much less resistance by such vehicles to giving Notice to their equity holders. This has led to Notices typically being circulated to the equity holders immediately upon execution of the security documents, in order to ensure priority is achieved at closing of the subscription credit facility.

Given the importance of actual delivery of the Notice to equity holders, evidence of the Notice having been received also assumes some importance. It is increasingly common for partnership agreements or LLC Agreements to include provisions that specify the circumstances in which Notices delivered in accordance with their terms are “deemed” to have been received by the equity holders. Where a partnership agreement or an LLC Agreement contains such provisions, a Lender can take some comfort in proof of delivery of the Notices in accordance with the provisions of such partnership agreement or LLC Agreement, rather than proof of receipt by way of a signed acknowledgment by the equity holders. In all cases, the recommendation would be that the general partner or an authorised person on behalf of the Cayman LLC sign and deliver the Notices to the equity holders in accordance with the provisions of the limited partnership agreement or the LLC Agreement governing service of Notices on the equity holders, with a copy delivered to the Lender.

Apart from establishing priority, delivery of a Notice to equity holders of an assignment of Capital Call Rights has other distinct advantages, two of which are discussed below:

- It prevents equity holders from obtaining good discharge for their obligations to fund their Uncalled Capital in any manner other than as specifically indicated in the Notice. Once notice of the assignment has been delivered to each equity holder, indicating that equity holders are to make all payments with respect to Uncalled Capital into a designated Lender controlled account, the equity holders will not be in a position to discharge their obligations to make such payments in any other manner.
- It prevents set-offs from arising after the date of service of such Notice. This rationale is based on the common law principle that set-off works between the same parties in the same right. If there is notice to one party of the assignment of a right to a third party (i.e. a Lender), set-off will no longer operate in the same manner. However, the service of notice on equity holders does not have the same effect with respect to claims which might have arisen prior to the date of service of the Notice. Most limited partnership agreements, LLC Agreements and/or the accompanying subscription documents will now incorporate express waivers on the part of equity holders confirming that they will not rely on any right of set-off in order to reduce their obligations to fund their Uncalled

Capital. Usefully, these contractual waivers survive the insolvency of the ELP, as the insolvency provisions of the Cayman Islands Companies Law (which apply to ELPs by virtue of Section 36 of the Cayman Islands ELP Law and to Cayman LLCs by virtue of Section 36 of the LLC Law) expressly provide that the collection in and application of property on the insolvency of a company (or partnership, as the case may be) is without prejudice to and after taking into account, and giving effect to, any contractual rights of set-off or netting of claims between the entity and any persons, and subject to any agreement between the entity and any persons to waive or limit the same.

Although there is no public registry relating to the grant of such security in Cayman, there is a statutory requirement for Cayman Islands exempted companies and Cayman LLCs to enter particulars of all mortgages and charges created over their assets (wherever located) in a register of mortgages and charges maintained at their registered office. Importantly, the statute does not aim to impose perfection requirements, and failure to enter such particulars will not invalidate the security. However, exempted companies and Cayman LLCs are expected to comply with the requirement and failure to do so will expose such companies to a statutory penalty.

While there is no corresponding requirement for a Cayman Islands ELP to maintain a register of mortgages and charges with respect to charges over its assets, where the general partner of an ELP is incorporated as a Cayman Islands exempted company or a Cayman LLC and such general partner has granted security in its own right, the general partner will be subject to the statutory requirement discussed above. In the context of a subscription credit facility secured by an ELP's Capital Call Rights, given that legal title to the ELP's assets will be held by the general partner, details of security granted by the general partner in its own right and on behalf of the ELP should therefore be recorded in the register of mortgages and charges of the general partner. In practice, this puts any person inspecting such register on notice as to the existence of the security.

### Key developments

On 1 July 2017, legislation requiring Cayman Islands companies and Cayman LLCs to maintain registers of beneficial ownership at their registered offices (the **New Regime**) came into force. As a result, barring any applicable exemptions, such companies must now take "reasonable steps" to identify individuals qualifying as "beneficial owners" or corporate vehicles qualifying as "relevant legal entities". Beneficial owners are defined as those individuals who hold (i) directly or indirectly, more than 25% of the shares, Cayman LLC interests or voting rights in the company, or (ii) the right to appoint or remove a majority of the board of directors or managers of the company. If no individual meets these conditions, the New Regime looks to those persons who directly or indirectly exercise significant influence or control over the company through direct or indirect ownership or interests. Generally, "relevant legal entities" are intermediate holding companies registered in the Cayman Islands through which beneficial owners hold their registrable interests.

The New Regime extends the Cayman Islands' commitment to help combat tax evasion, terrorist financing, money laundering and other serious and organised crimes, by providing greater transparency on beneficial owners, as was initially agreed with the UK Government and other Crown dependencies and overseas territories in April 2016.

The potential significance of the New Regime for lenders in a fund financing transaction lies in the remedy available to a company in the case of non-compliance by an equity holder with a request for beneficial ownership information. If a company does not receive such



information within one month of requesting it, it may issue a “restrictions notice” in respect of the relevant interest held by the equity holder. Until such notice is withdrawn by the company or ceased by court order, any transfer or agreement to transfer the interest is void, no rights are exercisable in respect of the interest, no shares may be issued or additional rights granted in respect of the interest or in pursuance of an offer made to the interest holder, and no payment may be made from the company in respect of the interest, whether in respect of capital or otherwise. Further, other than in a liquidation, an agreement to transfer a right to be issued any shares in respect of the relevant interest or a right to receive payment in respect of the interest will be void.

Given that (i) the New Regime currently applies only to companies and Cayman LLCs (and not to ELPs) and only where an exemption from the New Regime is not applicable, (ii) regulated investment funds and funds (including private equity funds) having a manager or administrator who is regulated in Cayman or in a jurisdiction approved by the Cayman Islands’ Anti-Money Laundering Steering Group fall outside the scope of the New Regime; and (iii) a restrictions notice may not be served in respect of an interest that is subject to the security interest of an arm’s length security holder, the enforceability of an unaffiliated lender’s security package in subscription financing transactions should remain relatively unaffected by the New Regime.

### **The year ahead**

As fund managers seeking opportunities to access the wider European Union market establish funds in AIFMD-compliant jurisdictions such as Ireland and Luxembourg, and market parallel funds in jurisdictions where Cayman funds have traditionally been prominent (such as the USA and Asia), we have seen an increasing number of Cayman/Irish and Cayman/Luxembourg parallel structures in the market. We believe that opportunities for Lenders to partner with fund sponsors as they seek to make returns on their investments will continue to grow on a global scale.

The demand for fund finance solutions has increased to unprecedented levels, and is being satisfied by an increasing number of sophisticated lenders willing to offer attractive and diverse financing options which include not only lending against the Capital Call Rights and Uncalled Capital, but also against the net asset value of a fund’s investments. Such evolution and innovation are testament to the sophistication of the market players and the strong collaborative relationships between Lenders and fund sponsors alike. The market will continue to evolve and is poised for continued growth in 2018 and beyond.



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