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Credit Facilities for Registered Investment Funds


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While registered investment funds are primarily capitalised by the sale of equity securities to public investors, the liquidity afforded through use of credit facilities can provide important benefits to these funds.

Registered fund credit facilities differ for open-end and closed-end funds, given their different capitalisation, regulatory requirements and liquidity needs.

Open-end funds, which issue an unlimited number of daily redeemable shares, utilise revolving credit facilities to ensure sufficient liquidity to finance share redemptions and to meet other short-term liquidity needs. They may also take such facilities into account as part of their liquidity risk management programmes under liquidity risk management rule and related requirements mandated by the Securities and Exchange Commission ("SEC").[1]

Closed-end funds, which issue a limited number of shares that are not redeemable by the investor, use revolving and term loan facilities to seek greater investment returns through the leverage that these facilities provide, and to help provide short-term liquidity, including to effect issuer tender offers or open market share repurchase programmes and, in the case of interval funds (which offer periodic share redemption opportunities), to fund share repurchases.

The use of credit facilities by both open-end and closed-end funds is regulated by Section 18 of the Investment Company Act of 1940 (the "'40 Act"), although the requirements differ for open-end *versus* closed-end funds. These regulatory requirements, coupled with the unique nature of registered '40 Act funds, make it critically important for a fund's business team and its compliance and finance legal teams to work in close coordination. The purpose of this chapter is to highlight the principal issues that arise for a registered fund borrower proposing to enter into a credit facility.

Regulation Under Section 18 of the '40 Act

Asset Coverage Test

One of the primary restrictions on use of a credit facility by a registered fund is the applicable asset coverage test imposed by Section 18. This test requires that a fund's total assets *minus* liabilities (other than "senior securities representing indebtedness") cannot be less than 300% of the fund's "senior securities representing indebtedness". "Senior securities representing indebtedness" is defined generally as any bond, debenture, note or similar obligation or instrument constituting a security and representing indebtedness. The '40 Act definition of "security" includes notes and other evidence of indebtedness that would not necessarily constitute securities under the Securities Act of 1933 or other contexts. As a result, credit facilities constitute "senior securities representing indebtedness" for purposes of the asset coverage tests.[2]

Derivatives covered by segregated assets are generally disregarded for purposes of the asset coverage test, with the segregated assets in respect of such derivatives and the liability represented by the derivatives ignored for purposes of the calculation. We note that under re-proposed Rule 18f-4 that has been promulgated by the SEC, this treatment would change for reverse repurchase agreements and "similar financing transactions" such that any related liabilities and segregated assets would be included in the asset coverage calculation.[3] To the extent that the rule is adopted, and following a contemplated one-year transition period, calculations of the asset coverage test will need to reflect such transactions.

Differences in Regulation of Open-End and Closed-End Funds

The restrictions under Section 18 differ for open-end and closed-end funds.

Section 18(f) permits open-end funds to borrow only from a "bank" (as defined in Section 18(f)), and prohibits open-end funds from issuing preferred stock or any other type of "senior security". Open-end funds are required to comply with the 300% asset coverage test at all times, although the '40 Act permits a three-business-day cure period for the fund to bring itself back into compliance.

In contrast, Section 18(a) requires compliance by a closed-end fund with the 300% asset coverage test only at the time of the incurrence of indebtedness or at the time of the declaration of a dividend or of a share repurchase. Section 18(c) prohibits any closed-end fund from issuing more than a single class of indebtedness, although, for purposes of this restriction, two or more issuances of debt which are *pari passu* with one another (i.e., having equal and ratable rights against the assets of the fund) are generally considered to be a single class, notwithstanding that the debt instruments may have different economic and other characteristics.[4]

Other Credit-Type Obligations

Both open-end and closed-end funds may routinely incur other credit-type obligations such as currency hedging exposure, reverse repurchase and securities lending transactions (where a fund either lends or sells (subject to repurchase rights) portfolio assets to a third party or borrows or purchases (subject to repurchase rights) assets from a third party), dollar rolls (where a securities lending or repurchase financing automatically extends for

subsequent terms), derivative exposure and similar credit-type devices. Under SEC Release 10666, these items are generally not considered senior securities representing indebtedness for purposes of Section 18 if such exposure is adequately covered by liquid portfolio assets or by offsetting positions.

In addition, many fund groups with the same investment advisor obtain authorisation by SEC exemptive order to lend amounts to each other as a supplement to their third-party credit facilities and other credit-type arrangements. Funds utilising interfund lending must adopt policies with respect to interfund lending arrangements and observe other conditions required by their applicable SEC exemptive order.

Fund Level Restrictions

Other important sources of restrictions on fund borrowing may be found in the governing documents and investment policies of the fund itself. These must be reviewed in connection with a contemplated credit facility to ensure compliance with their requirements.

Registered investment funds are required to adopt as part of their "Fundamental Investment Policies" (i.e., policies that cannot be altered without a shareholder vote) a Fundamental Investment Policy with respect to borrowings by the fund. Such Fundamental Investment Policies may impose specific asset percentage or other limitations on borrowings by the fund that are more restrictive than those imposed by Section 18, or could prohibit borrowing altogether. Restrictions on borrowings may also be imposed by a fund's charter, bylaws or non-fundamental investment policies. The charter can generally be modified only by shareholder action, while bylaws and non-fundamental investment policies may be modified by action of the board.

Board approval is required for the fund's entry into borrowing facilities and, where a credit facility has multiple affiliated borrowers, the boards of each applicable borrower must also approve the methodology of allocating commitment fees and borrowing opportunities. Since legal opinions of finance counsel to the fund are generally required by lenders in connection with the entry into a credit facility and may be required in connection with annual renewals or other amendments, it is important that finance counsel to the fund be involved in reviewing the relevant board materials and resolutions prior to their adoption in order to avoid the need for supplementary board action prior to the completion of the facility or amendment.

Characteristics of Registered Fund Credit Facilities

General Structure

Credit facilities differ for open-end and closed-end funds. Open-end funds typically borrow only to fund daily redemptions and to satisfy other short-term liquidity requirements. In addition, as discussed below, open-end funds are required to adopt liquidity risk management programmes, and may regard the liquidity provided by revolving credit facilities to be an element of their backup liquidity planning.

Given that open-end funds utilise revolving credit facilities for short-term liquidity and risk management, rather than to provide permanent or significant leverage, the borrowing commitments under open-end fund credit facilities are typically small relative to the assets of the fund and are usually (but not always) unsecured. In many cases, these open-end fund revolving facilities are seldom drawn, and serve primarily as a backstop in case redemptions reach unusual levels. In order to save on transaction costs and unused commitment fees, multiple open-end funds (in some cases over 100 funds) with the same investment advisor may borrow separately under a single umbrella credit facility.[5]

The maturity of open-end fund credit facilities is generally limited to 364 days, so that the fund receives a lower interest rate resulting from the lower capital reserve requirements for bank commitments of less than a year.

In contrast to open-end funds, closed-end funds use leverage as a more significant part of their capital structure. Their credit facilities may be either revolving credits or term notes. The facilities are typically secured and subject to a borrowing base with differing advance rates for different categories of portfolio assets. Term notes may be part of a bank credit facility or may be issued to insurance companies and other institutional lenders, and would generally have a maturity of several years.

Organisational Structure of Open-End Funds

Credit facilities for open-end mutual funds raise special issues because of the unusual organisational structure of such funds. Open-end funds are frequently organised as multiple series of segregated assets under a single business trust, statutory trust or corporation (closed-end funds typically do not employ the series structure). This series option is also available under certain corporate (e.g., Maryland) and limited liability company statutes. Under these series structures, the trust or other entity is the only legal entity for all its separate series (or funds) and enters into the debt agreements on behalf of its various series, which may be quite numerous (often dozens). Because a business trust is typically governed by contract with the trustees and not by corporate statute, provisions stating expressly that the borrower obligations are non-recourse to the individual trustees should be included in debt agreements with business trust borrowers.

Because open-end fund credit facilities often include many separate funds, each with its own shareholders, all borrowings must be on a several basis with respect to each individual series, and not jointly with the other borrowers. Fund counsel must take care that covenants, representations, warranties and defaults apply only to the affected fund borrower, and not to all borrowers under the facility.

Where multiple funds are co-borrowers under a common credit facility, the trustees for the various funds must adopt procedures to fairly allocate borrowing opportunities and payment of shared expenses, such as upfront fees, unused commitment fees, indemnities and obligations to reimburse lender expenses. The allocation procedures must be satisfactory to the lenders as well. Most often, these allocations are based either on the relative net asset value of the fund borrowers and/or on the anticipated relative levels of use of the facility by the different borrowers, with relative net asset value being the more common approach.

Borrowing Base

For closed-end funds (and some open-end funds), a borrowing base governs the amount of credit available, with different "advance rates" or borrowing availability for various categories of portfolio assets. The borrowing base, which dictates how much credit will be advanced against particular types of assets, involves complicated business negotiations between the fund manager and the lender, and is one of the most important terms in a credit facility.

The advance rates applicable to different assets are based on varying measures of credit-worthiness for different types of portfolio assets, such as the nature of the investment (e.g.,

whether it is secured or unsecured), credit rating, jurisdiction of issuer, concentration limits, issuer eligibility requirements and other factors, such as relative liquidity. Recent proposed rules which would impact investments by mutual funds in other mutual funds by limiting redemptions by the top-tier fund have caused some lenders to restrict borrowing base credit for such "fund-to-fund" investments. As such rules become finalised, lenders will refine their own approach to fund-to-fund investments for borrowing base purposes.

Interest Rate

Typically, credit facilities bear interest at a floating rather than a fixed rate, though closed-end funds may have fixed rate term notes that bear interest at a fixed rate. Floating rate loans typically use the London Interbank Offered Rate ("LIBOR") as a benchmark for determining fluctuating interest rates on loans. This rate is the average interest rate at which banks borrow funds from other banks in the London market. Due to concerns regarding manipulation of this rate, LIBOR is in the process of being discontinued as an available benchmark. This change has necessitated credit agreement provisions, which in existing credits are put in place via amendments, to accommodate the transition as the market migrates to another standard benchmark. While the market has not yet fully settled on a replacement rate, it is likely that the benchmark will be tied to the Secured Overnight Financing Rate ("SOFR") which is based on the overnight repurchase market. During the transition period, credit facilities generally provide language that allows the borrower and agent to agree on a new benchmark rate when the agent determines that LIBOR is no longer the appropriate standard for determining the interest rate on the loan pending resolution of the new SOFR benchmark formulation, subject to a negative majority lender consent. Given that registered fund credit facilities usually maintain a 364-day tenor, this issue is of less import than in facilities with longer maturities.

Covenants: Asset Coverage Ratio

Both open-end and closed-end fund credit agreements typically include a covenant requiring the fund to comply with an asset coverage test that is similar to the '40 Act test, but which may impose a greater asset coverage level than the 300% level required by Section 18. The credit agreement will typically require compliance with the asset coverage test at all times even though, for closed-end funds, Section 18 imposes the test only upon debt incurrence and declaration of or payment of dividends. Lenders often seek an immediate event of default if the asset coverage test is violated, while Section 18 provides a three-business-day cure period for an open-end fund to sell portfolio assets in an orderly manner to resume compliance. Borrowers prefer for the credit facility to provide for the same cure period as afforded by Section 18, though not all lenders will agree.

Finance counsel for the fund borrower should carefully check the defined terms used in the credit agreement asset coverage test to ensure that the test will work as expected. For example, many credit facilities specify that the amount of debt is deemed to be the greater of (a) the outstanding principal amount, or (b) the value of collateral securing such debt. This formulation works reasonably well when only specific assets are pledged to secure liabilities. But where liabilities are secured by a blanket lien on all assets, the effect of this language is to cause the amount of the liabilities for purposes of the calculation of asset coverage to be equal to the entire amount of the fund's assets. Because settlement advances, hedging obligations, overdrafts and administrative fees owing to the fund custodian, and borrowings under a secured credit facility are all by their terms typically secured by all assets of the fund, exceptions to this test will be required to avoid such liabilities being deemed to equal the value of the fund's entire portfolio.

Covenants: Permitted Indebtedness and Liens

Credit facilities impose negative covenants restricting indebtedness and liens for both open-end and closed-end funds. These covenants should permit as "permitted indebtedness" the various credit-type obligations that the fund might incur, such as hedging exposure, custodian overdraft and settlement financing, securities lending and reverse repurchase agreement transactions, dollar rolls, derivatives and similar items and the "permitted liens" should include segregated assets that cover these obligations for purposes of Section 18. Many credit facilities limit these obligations to a certain percentage of fund assets.

Covenants: Interfund Lending

Interfund lending programmes (referred to above) raise special issues for open-end and closed-end fund borrowers, and the investment and indebtedness covenants of the credit facility must be carefully reviewed to ensure that appropriate carveouts exist to facilitate interfund lending and borrowing. Lenders typically permit interfund lending programmes so long as asset coverage compliance is maintained, though it is common for lenders to preclude borrowings by a fund while that fund has loans outstanding to another affiliated fund. Lenders also typically restrict the proceeds of their facility from being on-lent to another fund.

Unsecured credit facilities typically require that the credit facility receives equal and ratable security in the event interfund borrowing is secured, which would require that an intercreditor agreement be put in place. Alternatively, given the complexities of putting in place intercreditor arrangements, lenders may simply preclude a fund from being a borrower under the credit facility when the applicable fund is a borrower under secured interfund loans.

As noted, credit facilities often preclude funds from making interfund loans (or having interfund loans outstanding) when those funds have outstanding borrowings under the credit facility. Less commonly, lenders may prohibit borrowers from being borrowers under a credit facility and under interfund loans at the same time.

Covenants: Restrictions on Dividends and Share Repurchases

As with most credit agreements, lenders to a registered investment fund do not want the borrower to make "restricted payments", that is, to pay dividends on its equity or to repurchase shares of equity if an event of default exists. For open-end funds that are subject to daily redemptions and may seldom have outstanding borrowings, funds should ensure that this prohibition on making equity distributions or redemptions should apply only when the particular fund has outstanding loans – not any time that a default exists. In addition, since registered funds generally must distribute to shareholders at least 90% of their net investment income in order to maintain tax pass-through

status as a "regulated investment company" pursuant to Section 851 of the Internal Revenue Code, restricted payment covenants ideally contain an override exception that permits restricted payments to the extent necessary for the fund to maintain its status under Section 851.

Covenants: Restrictions on Creation of Non-Guarantor Subsidiaries

Lenders often prohibit registered fund borrowers from creating subsidiaries to hold portfolio assets which do not become guarantors under the credit facility. However, open-end and closed-end funds will sometimes want to transfer portfolio assets (typically bank loans or bonds) to a special purpose subsidiary which obtains independent debt financing that is non-recourse to the parent fund (though the assets and indebtedness of the subsidiary will be consolidated with the fund for Section 18 purposes). Open-end and closed-end funds may also create subsidiaries to hold futures and commodities investments to avoid excess non-qualifying income for purposes of Regulation M under Section 851 of the Internal Revenue Code that would arise if these investments were held directly by the fund itself. If credit facilities permit subsidiary drop-down structures, the covenants will typically impose limitations on the amount of portfolio assets that can be contributed to non-obligors and on the level of debt that can be incurred at that level given that the holders of such debt have structural priority on the assets of those entities.

Covenants: Restrictions on Changes to Fundamental Policies, Investment Advisor and Custodian

Because the lender bases its credit analysis on a fund's fundamental investment policies (including use of leverage), credit facilities for open-end and closed-end funds restrict the ability of the fund to alter these policies. Any change to such policies that is sufficiently material to require shareholder approval under the '40 Act will likely require consent of the lenders under the credit facility.

Similarly, the identity of the fund's investment advisor and, particularly for a secured credit facility where the lender and the custodian are affiliated, the custodian is so central to the lender's credit analysis that lender consent (or termination of the credit facility) must be obtained before either the investment advisor or custodian is changed (other than to an affiliated entity).

If a change to a fund's investment policies or to the fund's advisor or custodian is contemplated, lender consent to the change should be obtained at an early stage of the process, or arrangements should be made to refinance the facility.

Special Issues with Collateral

Secured credit facilities for closed-end funds (and, when applicable, open-end funds) involve special issues. Section 17(f) of the '40 Act generally requires all funds to keep portfolio assets with a bank custodian. As a result, in order to have a perfected security interest in such assets, the secured lender must either be the custodian itself or enter into an account control agreement with the custodian. The custodian will mark a portion of the portfolio assets as a "memo pledge" or, particularly in the case of prime broker advances that finance specific portfolio assets, may create a separate account or subaccount for such assets, and the credit facility will impose borrowing restrictions that are tied specifically to the borrowing base afforded by such memo pledged collateral.

The credit facility should not restrict the fund borrower's ability to withdraw assets from and deposit assets to the pledged accounts, unless and until the lenders issue a "notice of exclusive control" as a result of an event of default. The SEC created uncertainty about secured borrowing by registered funds in two no-action letters for the *Stagecoach Fund, Inc.*,[6] in which the SEC staff questioned whether a fund that pledged all its portfolio assets to secure borrowings, even where the borrowings did not result in a violation of the 300% asset coverage requirement, satisfies its duty to hold portfolio assets for the benefit of its shareholders under the '40 Act. The *Stagecoach Fund, Inc.* letters have not been cited by the SEC since their issuance, however, and the widespread use of secured borrowing in the past 45 years suggests that a credit facility with customary advance rates and collateral cushions will not result in a violation of the fund's duties to its shareholders under the '40 Act.

Regulation U

Since borrowings by a fund that invests substantially in publicly traded equity securities will likely be directly (in the case of secured facilities) or indirectly (in the case of unsecured facilities) secured by margin stock under Regulation U of the Federal Reserve Board, fund credit facilities typically require the borrower to submit a Form FRU-1 at the initial closing. For unsecured open-end fund facilities, Regulation U contains an express exemption for temporary advances incurred for redemption or trade settlement purposes.[7] This will often be additionally reflected through requirements that advances be repaid within a specified period (e.g., 60 or 90 days) in unsecured open-end fund facilities.

Hybrid Revolving Credit and Rehypothecation Facilities

In a relatively recent market development, some credit facilities for closed-end funds combine a customary revolving credit with the ability of the lender-to-broker securities lending or repurchase transactions with the borrower's portfolio assets. These transactions are referred to as "rehypothecation" or "repo-type" financings. The borrower receives a lower interest rate for its revolving borrowings if the lender has the right to use the borrower's assets for these third-party financings. The lender may share with the borrower a percentage of its profits from the repo-type financings or provide indemnity to the borrower if the counterparty defaults on its obligations and causes a loss to the borrower.

Securities lending and repurchase transactions raise additional regulatory requirements relating to the segregation of assets for repurchase transactions, and custody requirements for securities lending transactions. For these and other considerations, the borrower may wish to restrict the lender as to the duration and type of these financings and reserve the right to exclude certain assets or counterparties from this type of programme.

These hybrid facilities often provide for long termination periods for the fund borrower, some have up to 364 days' prior notice, so that the lender has time to unwind the underlying repo-type financings at the end of their term. Care should be given by the borrower's counsel to negotiate a termination period that provides enough notice to protect the lender while allowing the fund to operate in the ordinary course and in compliance with Section 18 asset coverage and other '40 Act requirements.

Because fund borrowings, securities lending and repurchase transactions are all regulated in a different manner by the SEC, a fund should work particularly closely with its compliance counsel when considering such a hybrid credit facility.

Potential Impacts of Liquidity Risk Management Programmes

Open-end funds are now required to implement liquidity risk management programmes under an SEC rule enacted in December 2018 with an extended compliance deadline of June 1, 2019 for larger funds. As part of these programmes, funds that do not invest primarily in highly liquid assets must set and observe a minimum amount of the fund's net assets that are comprised of highly liquid investments (a so-called "high liquid investment minimum"). It is not entirely clear how credit facilities may factor into liquidity risk management programmes, including with respect to meeting the fund's highly liquid investment minimum. The SEC has indicated that it does not view availability under credit facilities as the same as cash for such liquidity purposes, and has cited factors including the financial health of the institution providing the facility, the terms and conditions of the facility, and fund families often sharing credit lines, as calling for a more nuanced analysis.[8] In addition to raising concerns around whether credit facilities might not be fully available when needed, the SEC has expressed concern that credit facilities can sometimes benefit redeeming investors at the expense of non-redeeming investors since if a fund uses a credit facility to bridge redemptions, the risk of the resulting additional leverage could reside with the non-redeeming investors. The SEC has opined that this factor should be taken into consideration (along with the other overall benefits and risks) when determining how to account for leverage in a liquidity risk management programme. Each fund must make a bespoke analysis of its own credit facility and likely credit availability in determining whether and to what extent such a facility may play a role in the fund's liquidity risk management programme.

As part of liquidity risk management programmes, the SEC requires additional reporting. Open-end funds must confidentially notify the SEC when the fund's illiquid investment holdings exceed 15% of its net assets or if its amount of highly liquid investments declines below its highly liquid investment minimum for more than a brief period of time. Banks should be interested in knowing whether any of these notifications have taken place and what is being done to remedy any breach, and we expect that similar reporting requirements may become part of fund liquidity facilities.

Additionally, the classification of assets (*ex.* "highly liquid") that the new SEC rule requires for open-end funds may be a convenient way for a bank to monitor their collateral and may become a factor in the setting of advance rates, and may accordingly become an element of the formulation of borrowing bases.

Conclusion

Credit facilities are an important source of liquidity and leverage for registered investment funds. The regulatory landscape that applies to registered investment funds and their lenders continues to evolve. While this chapter provides an overview of some of the issues that are presented by registered fund credit facilities, given the highly regulated nature of open- and closed-end funds, the complicated and sophisticated nature of their investment techniques, and continuing developments in the regulatory landscape, ongoing close cooperation between the fund regulatory counsel, fund lending counsel and the fund's business team is essential.

Endnotes

1. See Rule 22e-4 under the '40 Act. SEC Release 33019233l UC – 32315.
2. Section 18(g) defines "senior security" generally as any note, bond or other evidence of indebtedness and any stock of a class having priority over any other class as to distribution of assets or payment of dividends. Similar provisions apply to preferred stock issued by a closed-end fund, although with an asset coverage test of 200% rather than 300%. The '40 Act imposes various other requirements that are not of practical relevance to credit facilities. Such restrictions include required remedy triggers for closed-end funds whose asset coverage ratios fall below 110% or 100%.
3. Publicly available November 25, 2019.
4. See SEC no-action letters *In the Matter of Israel Development Corporation* (publicly available March 16, 1961), and, following *Israel, In re Philadelphia Investment Company* (publicly available August 27, 1972).
5. Since these multi-borrower facilities contemplate each fund paying a portion of the commitment fee required under such credit facilities and bearing a share of other expenses of the facility, legal advisors to such funds have considered whether such arrangements could raise issues under Section 17(d) of the '40 Act and Rule 17d-1 thereunder. Section 17(d) and Rule 17d-1 prohibit an affiliated person of an investment company from participating in a joint enterprise or other joint arrangement without first obtaining an order from the SEC. In no-action letters issued in the late 1990s, the SEC confirmed that no enforcement action would be recommended on account of such multi-borrower credit facilities where each affiliated fund was liable only for its own borrowings under such facilities and would not provide collateral for the liabilities of another affiliated fund, and under the other terms described in the requests for such no-action letters. As such, while exemptive orders are required for intra-fund borrowing arrangements, they are not generally required for multi-fund credit facilities, so long as they are structured in a customary manner.
6. Publicly available May 12, 1973 and August 18, 1973.
7. See 12 CFR 221.6(f).
8. See note 1.

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