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Fund finance update: Capital call security, notices, and investor portals

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Most market participants are already well aware that capital call security is perfected, as a matter of Cayman Islands law, by delivering notice of the grant of such security to the relevant grantor's investors (a general overview of the topic can be found in our prior note).

As time, technology, and practice march on however, an issue we are seeing arise with greater regularity relates to the *method* of delivery used and, in particular, the use of investor portals.

The benefits of investor notice

As a brief recap, the authority on which the perfection process is based requires that investors each obtain a reasonable understanding of the nature of the security granted. That is to say, it is doubtful that "deemed" or "constructive" (as opposed to actual) notice will be sufficient (regardless of provisions in investor documents to the contrary).

While it is worth noting that perfection in this instance goes solely to the security's priority rather than its validity (such that, in the absence of prior security and any breach of the negative pledge, a lack of perfection may not impact a lender's practical position) it is also worth noting that notice may provide other benefits, including:

- a bar to subsequent rights of investor set off;
- improved protection from "Abraaj risk" i.e., "the unilateral waiver or release of commitments" (please see our prior note for further discussion on this point); and
- a reduction in the ability of investors to obtain good discharge for their obligations by payment to a third party.

Practical considerations in the context of investor portals

Given the above, lenders will generally want to ensure that notice is delivered in a manner that provides reasonable evidence that each investor has indeed acquired the relevant knowledge, or at the very least, in a manner that does not actively evidence the contrary.

In the context of an investor portal, much then will come down to how it is operated. In particular:

- *Does it record whether an investor has accessed the notice?* Where the portal does not record investor access, one might take the view that its use is on par with the delivery of notice by email (although we would not necessarily agree). Where however the system does make record of access (as many increasingly do) it is, in our view, doubtful that perfection can be demonstrated in relation to investors that can be shown never to have logged on and/or never to have accessed the notice at all.
- *How are investors notified of the posting of the notice?* Often, any posting will result in an email to investors notifying them of the same and providing a link for access. The nature and scope of information included in such an

email may help some lenders to get comfortable with the use of a specific portal where they might not otherwise. For example, we have seen some lenders rely, in certain circumstances, on emails that include explicit mention of the grant of security (whether in the subject line or otherwise), even if the more detailed information in the notice is accessible solely in the portal posting. It is worth noting however that this may not offer lenders some of the non-perfection related benefits mentioned above.

- *When are investors notified of the posting of the notice?* Even where a lender takes the view that a specific use of a portal is sufficient (perhaps because of the nature of the email notification) it is important that investors joining after the initial notification are provided with their own prompt or notification at that time or within the period permitted by the finance documents. Recently we worked on a matter where the fund had taken the view that a single posting of the investor notice on the portal at the outset was sufficient even though subsequent investors had received no notification of that posting, and regardless of how much time had elapsed. As above, in our view it is doubtful whether this would suffice as a matter of Cayman Islands law.

A balanced approach

Ultimately the nature of Cayman Islands law is such that a "perfect" perfection is often impractical as an evidential matter (investor acknowledgements are of course a rarity these days). As such, parties are generally guided by a balance of convenience and what is reasonable and practical in the circumstances.
There is of course a clear convenience to the use of investor portals for funds, and indeed, where investors can be shown to have accessed the notice, it is an approach that is demonstrably beneficial for lenders.

Where however a system clearly shows that an investor has not accessed or read the relevant information, in our view the parties should consider whether this is a concern that warrants an alternative approach or a secondary action (e.g., the sending of the notice by email). This will help ensure that lenders are better protected and that fund parties are in clear compliance with their obligations under the finance documents.

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