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Contributing Editor: **Michael C. Mascia**

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Jan Sysel, Stewart Ross & Flora Go
Fried, Frank, Harris, Shriver & Jacobson LLP

Is 2021 more than 2020?

We started last year's chapter with a look at the stock market chart in 2020: (i) 28,868 – the DJIA figures at close of the first day of trading; (ii) 18,591 – the lowest DJIA figures at close (in March of that year); and (iii) 30,606 – the highest DJIA figures at close (in December of that year). While in 2021 DJIA staged much more of a steady upward climb, we were reminded in the weeks before the writing of this chapter just how volatile markets can be, when, in a matter of a few days, the average plunged by almost 2,000 points. Even so, on an absolute basis, public companies making up the index are trading at significantly higher valuations and are currently up to almost ~36,000 at the time of writing (from ~30,000 in January). Based on this indicator alone, it would seem that things have indeed calmed down since the panic of early 2020 and the hectic rebound in the second half of that year. The dips were much less pronounced, but in a number of instances still triggered by the consequences of the COVID-19 virus and its mutations, in particular the "delta" and "omicron" variants.

Last year, the global pandemic completely disrupted the global economy, and indeed impacted all of humankind. The effects are still very much felt today, and we are witnessing impacts that are likely to be long-lasting. While markets may have recovered, and even improved based on certain indicators, the picture is much more complex. A lot has been written about how the virus disproportionately affected people in different parts of the world, of varying social status, gender, age or race. While employment numbers are generally encouraging, they are still influenced by the ongoing battle with a mutating pathogen. Availability of vaccines and promising development of new treatments have provided much welcome tools to fight the effects of the virus. They are, however, not uniformly accepted and are even refused by a considerable number of people, weakening their efficiency. Significant geopolitical events (including the aftermath of the US presidential election, widespread supply chain disruptions, and continued socioeconomic unrest) have made their mark on our society, and will continue to do so for the foreseeable future. Gradual reopening of offices has accelerated in 2021, although most market participants seem to be adopting a hybrid model of remote work with expectations for only a limited return in-person, one to three days a week.

After a record-setting pace of growth in the pre-pandemic years, private capital fundraising was similarly affected in 2020, but many investors saw opportunities in the market dislocation and continued to pursue yields and assets in an environment where valuations first plunged but subsequently recovered to new highs. That trend has continued in 2021 so far, as deployment of capital appears to be on the rise, but a significant amount of committed "dry powder" remains uninvested. Fund finance has also enjoyed another year of very robust activity, and generally stabilised from the situation in 2020 when some lenders experienced temporary capital constraints, but even in that turbulent period other providers stepped up to fill the gap and meet the critical liquidity demands of borrowers.

This chapter explores some of these recent trends in the private capital markets, including the fund finance industry. We also address notable legal developments in this area and conclude with a brief outlook for the year ahead.

State of the market

Private capital had enjoyed a very successful fundraising period worldwide in the years recently passed, according to McKinsey. Since 2017, investors have poured over $1 trillion into buyout funds alone. Amounts available to be deployed soared: just for private equity in the United States, there was $841 billion of committed capital waiting to be invested earlier this year, according to PitchBook. Private equity funds had the highest first three quarters of inflows since the 2008–2009 global financial crisis, with approximately $535 billion raised, according to preliminary figures from Private Equity International. That is an increase of 40% over the equivalent period in 2020 and 33% more than the average capital raised per an entire year since 2016. Buyout fundraising dominated the private equity market in 2021 – approximately ⅕ of the 965 funds that closed from January to September 2021 were buyout-focused and accounted for nearly 50% of capital raised. Growth equity fundraising (which doubled from 2020) and venture capital followed as the next most popular strategies in 2021. Preqin reports that there is presently a record high of 2,386 funds in the market.

These figures, among others, demonstrate the popularity of the asset class whose returns in the United States have, over the past 10 years, outperformed various public equity benchmarks, sporting a 14.2% median annualised return. Despite its growth, private equity's share of total equity markets remained low – at 4.1% as of March 2021 – highlighting the vast amount of headroom that the industry still has for growth. Pandemic and other challenges notwithstanding, while there may have been an initial pause, it seems clear at this point that fundraising has again picked up and appetite for alternative investments remains strong among all investor categories, including sovereign and state governments, pension plans, university endowments and increasingly high-net-worth individuals and family offices. This is certainly a welcome development and may be a sign of investors' belief that alternative asset managers will be able to create value and achieve attractive returns despite the significant uncertainties still surrounding the global markets.

The market for subscription line facilities and other financing products that leverage private capital funds is closely linked to the success of those funds and, as such, has historically benefitted from the growth trends in that space. Separately, the proportion of funds utilising subscription lines as part of their cash flow management and/or capital structure has also been steadily increasing. Although there are no published reports on the aggregate amount of lender commitments under subscription line facilities, anecdotal evidence from market participants indicates that some estimate several hundred billion dollars of committed facilities.

Looking back at 2020, the months immediately following the COVID-19 outbreak in the United States were characterised by an unusually high volume of work, which primarily consisted of borrowers trying to avail themselves of as much liquidity as possible. Fund sponsors were eager to take advantage of any potential extensions of maturities and increases of facility sizes (whether pre-committed or not), and to do so as quickly as possible. This dynamic was an impetus to a number of facilities being partially or entirely refinanced with new lenders, and some banks in the space significantly increasing their exposure and visibility. But even in those difficult times, credit providers were instrumental in helping to address the needs and demands of fund sponsors for access to capital across the board.

While some of these trends continued into 2021, market activity this year looks to be more evenly paced and spread over time, as borrowers and lenders alike return to more of a "business as usual" mode.

Another positive contribution to the stability of the market is that consistent with previous years, significant defaults under subscription line facilities reported by lenders or their counsel in the United States remain an extremely exceptional event, especially when viewed in the context of the number and volume of facilities overall. These factors further support the proposition that, in the United States, subscription lines and other fund-level financing products play a key function in the operations of private capital funds and will almost certainly continue to do so.

Market developments: ESG is going viral (in a good way)

One positive development that has spread around the globe in recent years is an increased focus on environmental, social and governance ("ESG") issues. This development has "infected" the fund finance market as well. The recent trend for ESG-linked financings in the finance market for subscription credit facilities has continued and even accelerated. This trend has been most noticeable in European-based credit facilities, but we are also seeing a significant trend for ESG features in US-based credit facilities. Many sponsors are now targeting ESG-driven financing terms in order to align such terms with their funds' investment strategies and take advantage of potential pricing or term improvements. As ESG-compliant investments become more prevalent, the broader loan market is developing financing products that include ESG-linked criteria for borrowers to meet. In the fund finance market, ESG criteria are featured in some facilities, including recent examples where the interest rate is determined by a ratchet mechanism based on agreed key performance indicators referencing the fund's portfolio companies (or, in the case of debt funds, the performance or percentage of their own loans with such criteria), or external third-party ratings, in each case tested on a periodic basis. The variety of ESG metrics is also developing and covers areas from renewable energy investments to gender and race equality on management boards of portfolio companies.

While sustainability and ESG-linked financings are increasing in size and prevalence, market norms are still evolving in respect of measuring and assessing compliance with sustainability and ESG targets, and developments continue with a focus on ensuring a robust and transparent implementation of such terms. Certainly, these features have drawn the attention of market associations (such as the Loan Syndications and Trading Association) and regulators (including the Securities and Exchange Commission) who have come out with guidance in this area. However, ESG-linked investment strategies and debt products are as yet relatively new developments, and so we expect the market to evolve and align over time, gravitating towards increased consistency in principles and reporting standards. This general market development will in turn feed into and shape ESG-linked fund finance products and the fund finance market generally as such products proliferate over time. We also expect these trends in ESG-linked fund finance products in the European market to further evolve and develop as they become increasingly implemented in US- and Asia-based credit facilities, as each region customises the ESG features to its own conventions.

Market developments: The LIBOR endgame is here

Where in the world is LIBOR?

On November 30, 2020, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation issued a joint statement providing that by December 31, 2021, banks should cease originating new loans that use USD LIBOR. On March 5, 2021, the ICE Benchmark Administration issued a statement confirming its intention to cease the publication of one-week and two-month USD LIBOR after December 31, 2021 and of all other USD LIBOR tenors after June 30, 2023. On the same date, the Financial Conduct Authority announced that as of such dates, LIBOR would either cease to be provided or no longer be representative. Collectively, these events mean that banks generally cannot and will not originate new loans that use USD LIBOR starting on January 1, 2022 and, while any existing loans that use USD LIBOR have until June 30, 2023 to transition into a new benchmark, the "trigger event" requiring such transition under the credit agreements that use the fallback provisions recommended by the Alternative Reference Rates Committee (the "ARRC"), which are most agreements in the subscription facility market today, has now occurred.

In its March 2021 progress report, the ARRC wrote that these announcements effectively lay out an "endgame" for USD LIBOR. The cessation dates for LIBOR have now become clear, and the fallback provisions in most existing LIBOR loans will require transition on or before June 30, 2023 (if they do not mature prior to that point). In addition, on July 29, 2021, the ARRC formally recommended CME Group's forward-looking Secured Overnight Financing Rate ("SOFR") term rates ("Term SOFR"). This means that for credit agreements that use the "hardwired" fallback provisions recommended by the ARRC, the successor rate is now expected to be Term SOFR. It should be noted, however, that even though a "benchmark replacement trigger event" is now deemed to have occurred, under the ARRC recommended language, the actual switch from LIBOR to SOFR does not occur until a "benchmark replacement date" (meaning a date on which the relevant benchmark ceases to be available), which generally corresponds to the dates mentioned above (i.e., January 1, 2022 or June 30, 2023, as applicable).

Market acceptance and uniformity

There are, broadly speaking, two types of fallback provisions in syndicated or bilateral loan agreements: an "amendment" approach and a "hardwired" approach, each as recommended by the ARRC. On or after any "trigger event", the "amendment" approach provides for a process through which the parties select the successor rate, which is then applied by an amendment entered into by the parties that modifies the loan agreement. The "hardwired" approach, on the other hand, provides upfront for a "waterfall" of alternative benchmark rates that should be used as the successor rate (and the first step in the waterfall in the "hardwired" approach is the Term SOFR) without the need for a separate formal amendment to the loan agreement.

Last year, we wrote that while historically the lenders and borrowers in the fund finance space have used the "amendment" fallback provisions, we saw a number of transactions that adopt the "hardwired" provisions because of concerns that implementation of subsequent amendments could be challenging. This year, we saw a major shift, in that market participants have generally accepted the "hardwired" provisions with Term SOFR emerging as the prevailing market consensus and banks in particular significantly ramped up their efforts to institute Term SOFR fallback provisions in all legacy loans. In our experience, however, many institutions, both lender and borrower, have now developed a robust institutional preference for their own version of the fallback provisions, which may differ in some respects and the differences can often take time to resolve. While a typical lender and borrower will generally agree to use a "hardwired" transition to Term SOFR, there are a few provisions that frequently get negotiated. One such key point is the usage of the so-called "spread adjustment" (i.e., an additional component added to (or subtracted from) the successor rate, which is theoretically designed to make the all-in pricing equivalent to that of the original LIBOR-based rate, such that the transition should be neutral and neither lenders nor borrowers are put in a worse economic position).

Spread adjustment

Both the "amendment" and the "hardwired" fallback provisions have historically contemplated a spread adjustment once the transition from USD LIBOR took place. This is because, historically, USD LIBOR has been higher than SOFR. LIBOR represents the cost of unsecured funding in a specified currency and specified term in the London interbank market. Since the mid-1980s, a panel of banks submitted to the administrator the rate at which they could borrow funds by asking for, and then accepting, interbank offers in a reasonable market size. Therefore, LIBOR theoretically reflected some measure of bank credit risk and faced concerns (and subsequently criticism) that, because of a relatively small number of underlying transactions, the metric could be subjective or even susceptible to manipulation. SOFR, on the other hand, is a rate derived from the overnight repurchase agreement ("repo") market for Treasury securities. Therefore, SOFR is fully transaction-based and based on a deep market (i.e., the repo market for Treasury securities) underpinned by nearly $800 billion of daily transactions. Importantly, given that repos are effectively fully secured transactions backed by the highest quality collateral, SOFR is considered to be a nearly risk-free rate. The spread adjustment is intended to counter the inherent difference between the two rates in order to, as discussed above, minimise the economic impact of switching from one rate to the other.

The ARRC recommended that "hardwired" fallback provisions also provide a fixed spread adjustment, which is calculated based on the five-year historical median difference between USD LIBOR and SOFR. The March 5 announcement fixes the date on which the five-year lookback period ends, and accordingly specifies the recommended spread adjustments for credit agreements using the "hardwired" provisions. Those spread adjustments are (i) 11.448 bps for one-month USD LIBOR, (ii) 26.161 bps for three-month USD LIBOR, and (iii) 42.826 bps for six-month USD LIBOR. Over the course of the year, we saw implementation of these spread adjustments into credit agreements, under provisions that automatically apply them to SOFR at the point in time when LIBOR rates under such credit agreements transition to SOFR.

However, as noted above, the existing credit agreements generally are not required to transition from the most commonly used LIBOR rates to SOFR until June 30, 2023. Even so, the recommended fallback language includes an "early opt-in" provision, allowing the parties to accelerate the switch into SOFR either by mutual consent or an election by the lender, when certain criteria (such as wide usage of SOFR in the marketplace) are met. While most market participants expect to exercise the "early opt-in" to SOFR much earlier, the exact timing is still largely unclear. In addition, the current low-interest environment has resulted in the difference between USD LIBOR and SOFR towards the end of this year being much lower than the historical median noted above. This has led a number of borrowers to request a lower spread adjustment or no adjustment at all, and some banks have been receptive, which has led to a range of negotiated adjustments in order to respect the original intent of neutralising or at least minimising the economic impact of the transition, if it were to happen today as compared to using the spread adjustments recommended earlier in the year.

Testing SOFR

Transitioning from LIBOR to SOFR poses a number of practical and operational challenges. In addition, as noted above, Term SOFR was only endorsed by the ARRC in late July. While that has contributed to a significant increase in activity of market participants aimed at updating their loan agreements, the sheer volume of deals that require changes can seem daunting. As at the time of this writing, only a small portion of new loans in the fund finance space have been negotiated and priced with Term SOFR as the initial rate, and most new issuances still rely on the LIBOR replacement mechanics.

This will necessarily change in the new year, and will no doubt bring new challenges and considerations as the rate is tested in the market. A rate that reflects some measure of credit risk, like LIBOR, tends to increase in times of market stress. While some regulators have been critical of credit-sensitive rates that have also been suggested as alternatives to SOFR (most notably, Gary Gensler, the Chairman of the Securities and Exchange Commission, has expressed concerns about the Bloomberg Short-Term Bank Yield Index ("BSBY"), while Michael Hsu, the Acting Comptroller of the Currency, has expressed concern on the use of credit-sensitive rates generally), some market participants remain concerned that a risk-free rate such as SOFR will not follow the familiar pattern of LIBOR or even worry that they might act "in reverse". We expect that the discourse on the transition away from LIBOR will continue even as the market has coalesced around Term SOFR.

Market developments: Fund finance variety – rated notes

In addition to the pronounced growth in fund finance generally, and in the subscription credit facilities and ESG-linked fund finance products discussed above, we continue to see an ever-growing diversity of transactions within the broadening category of fund finance. One marked area of growth has been in the issuance of rated notes by investment funds to insurance company investors. These transactions are often structured with a feeder fund issuing the rated notes to these insurance company investors and securing the notes with a pledge of its limited partnership interests in the main investment fund. The issuer obtains a credit rating for the notes, which allows the notes to qualify for improved capital treatment under the National Association of Insurance Commissioners ("NAIC") capital requirements for insurance companies in comparison to the treatment of an equity investment by these insurance companies in the investment fund. Often the investment by the insurance companies in the feeder fund issuer is structured as a portion of debt (in the form of rated notes) together with a portion of equity (in the form of a subscription in the limited partnership interests of the feeder fund), such as 90% debt to 10% equity or 70% debt to 30% equity. In these situations, one challenge for the issuer and its counsel is to structure the terms of the rated notes to, as closely as possible, mirror the terms of a subscription in the equity of the feeder fund, as governed by the limited partnership agreement, while still preserving the fundamental characteristics of a debt instrument and satisfying the requirements of the applicable rating agency. But we also see issuances structured as 100% in the form of rated notes, without an equity component.

Another challenge arises if the investment fund intends to get credit for the commitments represented by the rated notes in the borrowing base of its subscription credit facility. To obtain such borrowing base credit, the commitment of the insurance company investors should be structured so that the holders of the notes are required to fund their commitments in respect of the rated notes to the same extent, and ideally with the same waivers and lack of any defences to such funding, as a subscription facility lender would expect to see from any borrowing base investor with a subscription in an investment fund. Furthermore, the investment fund and its counsel will need to get the subscription facility lender comfortable with the treatment of the debt commitments upon a bankruptcy of the investment fund. Debt commitments may be characterised differently in US bankruptcy proceedings than equity commitments for which there is favourable precedent that the subscription facility market has been taking into account (e.g., the *Chase Manhattan Bank vs Iridium Africa Corp.* case). Subscription facility lenders and their counsel could hold concerns that the investors could try to distinguish the treatment of the rated notes commitments by arguing that they constitute an "executory contract" under the bankruptcy code (i.e., where the parties to the contract have material unperformed obligations) and are therefore subject to avoidance in bankruptcy.

To address these concerns, the rated notes will often include a conversion feature, which will automatically convert the notes to an equity commitment in the issuer upon the occurrence of any bankruptcy event with respect to the investment fund or the feeder fund issuer (aligned with the bankruptcy events of default in the subscription facility credit agreement). These features have successfully obtained borrowing base credit for the rated notes commitments of the insurance company investors in a number of investment funds.

Note issuances are not new to the fund finance market, and have been used for the structuring of vehicles abroad – for example, Irish funds offer them to European insurance company investors – and some of these transactions have no, or only nominal, equity commitments and no conversion to equity upon a bankruptcy. In a number of instances, however, there is additional comfort provided by virtue of investor consent letters, where the insurance company investors agree to fund their rated notes commitments without any defences, effectively incorporating contractual waivers that are similar in the context of "ordinary" equity commitments. Other examples are Korean insurance/pension investors who have structured their investments through a special purpose notes issuer, often paired with a separate investment manager arrangement.

In addition, we have been seeing private placements of rated notes by fund managers, either directly by the fund manager or through a holding company or a newly formed special purpose entity created by the fund manager for such purpose. A common feature in these transactions is that they also require the notes to be rated so as to ensure favourable capital treatment under NAIC capital requirements for insurance companies. These private placements could be secured by the management fees and other revenue streams payable to the issuer and its subsidiaries, which will often be guarantors, or they are sometimes completed on an unsecured basis. In either case, the insurance company holders of these notes are protected by financial covenants to be maintained by the fund manager, such as a maximum leverage ratio covenant and a minimum fee-earning assets under management covenant. We have seen fund managers obtain large sums of capital through the issuance of rated notes, which they are then able to employ for financing their general partner commitments, expansion into new locations or new types of investment funds, succession planning for senior principals and general working capital for the fund manager and its subsidiaries.

Market developments: Fund finance variety – employee loan programmes

We have also noted increased demand for work on loan programmes for fund manager executives and employees who are given an opportunity to invest in the funds under management. The way this typically works is that the lending banks will finance a portion of each participant's capital contributions to a particular fund that has been designated for inclusion in the programme. The lending bank will then be repaid principal and interest largely from the distributions made to the participant borrower from the fund. These arrangements can be beneficial for all parties involved – the fund managers, their people, and the other investors in the relevant funds, as well as the lenders operating in this space – so we expect to see continued growth with this product.

For fund managers, an employee loan programme can allow the fund manager's personnel, either at a certain level of seniority, or in some cases more broadly, to co-invest alongside the funds' external investors. This aligns the interests of the individuals involved in managing and operating the funds with those of the other investors in ensuring that the funds are managed with the utmost skill and care. Indeed, we understand that potential investors will often ask fund managers about the extent of their employees' investments in the relevant funds to confirm this alignment of interests. These fund investments also provide long-term compensation that can draw talent to a fund manager and incentivise those who invested to stay with a fund manager as returns are realised over time. Lastly, for the lending banks, such programmes, in addition to generating interest and fees, help develop and enhance relationships with both the fund manager and a wide spectrum of the fund manager's executives and employees, which might allow the bank to offer a range of other products to these clients as well.

The employee loan programmes are most commonly structured with the employees as borrowers and with the fund manager as an administrator for the loan programme, agreeing to provide reports and to arrange for the funds to pay distributions (or, at minimum, sweep the applicable percentage of distributions required under the programme terms) into accounts maintained with the lending bank for each borrower. Historically, the fund manager was also often requested, or even required, to guarantee the loans, but as of recent years we are no longer seeing those guarantees being given, and we are even seeing existing loan programmes amended to remove the fund manager's guarantee. We believe this is at least in part driven by the 2017 addition of Section 1061 to the Internal Revenue Code (and finalisation of related regulations in January 2021). Under these rules, a three-year holding period requirement applies in order for employee investors to be taxed at the preferential rates applicable to long-term capital gain in respect of income and gain from certain fund interests (rather than the one-year holding period that would otherwise be required for long-term capital gain rates to apply). Tax specialists generally interpret the rules, in their current form, as applying to fund interests financed with employee loans that are supported by a firm guarantee, whereas if the relevant loan programme does not have the benefit of a guarantee, such interests may be eligible for an exception from Section 1061 such that the three-year holding period requirement would not apply.

The lending banks have gotten comfortable making these loan programmes available without a guarantee by the fund manager in various ways, including on the basis of the collateral provided by the employee borrowers, usually in their rights to receive distributions in respect of the fund interests being financed under the loan programme, and potentially in the actual underlying fund interests (although such a feature may require an additional layer of complexity in securing any necessary consents and analysing potential impact under any subscription facility that a fund might have). There is sometimes also an undertaking from the fund manager to cooperate in trying to remarket any defaulted loans or loans of departing employees to other employees or the fund manager itself.

Our work on these employee loan programmes has involved principally negotiating a master agreement or programme agreement between the fund manager and the lending bank, together with a form of individual loan agreement and a form of collateral document for each employee borrower to sign. And while this documentation may at first seem simple to put in place for these programmes, for some fund managers with employees in multiple jurisdictions, it has often proven to be more complicated. For the lending banks, it can be a challenge to offer a single, uniform loan programme across different jurisdictions, with foreign branches of the bank, different legal systems and varying market conventions. For employees located in remote jurisdictions, fund managers often face a challenge in getting such employees included in the loan programmes to begin with, and if they are included, the terms and documentation for these employees would likely need to be customised extensively, so the related expense is a consideration in these cases.

In certain situations, including when the participant borrowers for a loan programme are spread among multiple jurisdictions, another possible structure involves creating a special purpose vehicle by the fund manager, which then becomes the borrower *vis-à-vis* the bank. In this structure, the special purpose borrower could on-lend to the individual programme participants, or those participants could be several guarantors of the loans attributable to the financing of their individual capital calls. This type of structure could provide the benefits of employee loan programmes to a wider range of participants, but it may also require more active participation and potential liabilities on the part of the fund manager.

With the growth in popularity of these employee loan programmes and the obvious advantages to all participants, and given the global reach of many fund managers, we hope to see continued development of this product, increasingly tailored to the geographical footprint of the fund managers and their employees.

Legal developments: Anti-money laundering

On January 1, 2021, the Anti-Money Laundering Act of 2020 (the "AML Act") became law as part of the National Defense Authorization Act for Fiscal Year 2021. Once the Department of the Treasury promulgates implementing regulations on or before December 27, 2021, the AML Act will require "reporting companies" to submit a report containing certain beneficial ownership information to the US Financial Crimes Enforcement Network ("FinCEN") as part of the entity formation process. Existing reporting companies will have two years from the effective date of the implementing regulations to disclose their beneficial ownership information.

The definition of "reporting company" includes a corporation, limited liability company, or similar entity that is created in the United States or organised under the laws of a non-US jurisdiction and registered to do business in the United States. Certain entities, including non-profit, tax-exempt, charitable and political organisations and entities that (i) employ more than 20 full-time persons in the United States, (ii) have taxable revenue of $5 million or more, and (iii) maintain a physical office in the United States, are exempted from the definition of reporting companies. The AML Act defines "beneficial owner" to include a person who owns or controls 25% or more of the ownership interests of an entity and any person who "exercises substantial control" over the entity. Necessary clarity on what constitutes substantial control will likely come through the rulemaking process.

The new beneficial ownership requirements are a sweeping change in BSA/AML rules and represent a shift from reliance on financial institutions to maintain sufficient AML/KYC practices to FinCEN taking a more active role and imposing country-wide federal KYC requirements. In addition to these new disclosure obligations, the AML Act also increased penalties: first-time violators can now see fines equal to the profit gained as a result of the violation; and fines for repeat offenders have been increased to up to the greater of three times the profit gained or two times the maximum allowable statutory penalty associated with the violation.

On December 8, 2021, FinCEN issued a Notice of Proposed Rulemaking (the "Proposed Rule") to implement the expanded beneficial ownership disclosure requirements of the Corporate Transparency Act, which was included as part of the AML Act. The Proposed Rule specifies which entities must report beneficial ownership information, what information must be reported, and when reports must be made. In a press release, FinCEN stated that the Proposed Rule "is designed to protect the US financial system from illicit use and impede malign actors from abusing legal entities, like shell companies, to conceal proceeds of corrupt and criminal acts". Public comments may be submitted on the Proposed Rule until February 7, 2022, after which FinCEN will publish its final rule.

Will 2022 surpass 2020?

In February 2020, the Fund Finance Association (the "FFA") put together arguably its most successful symposium to date, with hundreds of market participants gathered to hear and see Earvin "Magic" Johnson and Hillary Rodham Clinton as keynote speakers. In November of that year, the European, Asia-Pacific and Global conferences were merged and had to be transformed into a week-long online event. It is heartening, in many ways, that the FFA is now planning to come back with an in-person conference next year, and the 2022 edition promises to be an exciting affair: based on indication of interest from sponsors and attendees so far, we have much to look forward to.

As many have noted, our industry is, if nothing else, and above all, collegial. The relationships and mutual support of people involved have no doubt contributed to the resiliency of this market and the rebound in activity that we have witnessed since the start of the pandemic.

As of the time of this writing, there are promising developments in vaccine availability – according to the *New York Times*' *DealBook*, today, 60% of Americans are fully inoculated. Together with new drugs developed over the course of the year for the treatment of COVID-19, the increasing vaccination rates will hopefully improve the prospects of "herd immunity" and provide the tools to beat the disease. We are cautiously optimistic that 2022 will continue on an upward trajectory.

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Aja-Fullo Sanneh – Associate, Finance

Email: aja.sanneh@friedfrank.com

The authors would particularly like to acknowledge the assistance and input provided by Aja-Fullo Sanneh in preparing this chapter. Aja is a corporate finance associate in Fried Frank's New York office and represents clients on a wide array of corporate matters including fund financings.

Jan Sysel
Tel: +1 212 859 8713 / Email: jan.sysel@friedfrank.com
Jan Sysel is a corporate finance partner resident in Fried Frank's New York office and co-heads the firm's Fund Finance Practice. Mr. Sysel represents sponsors, borrowers, arrangers and lenders on a wide variety of financing transactions primarily in connection with fund formation, as well as leveraged acquisitions, spinoffs, recapitalisations and restructurings, across a broad range of industries. He has extensive experience in structuring, negotiating, documenting and executing complex financings, including syndicated senior facilities, mezzanine facilities and private debt placements. His work includes unsecured and secured first and second lien facilities, both cash flow-based and asset-based, with particular focus on fund subscription facilities and other types of investment fund leverage.

Stewart Ross
Tel: +1 212 859 8216 / Email: stewart.ross@friedfrank.com
Stewart Ross is a corporate finance special counsel in Fried Frank's New York office and specialises in subscription credit facilities, asset-based financings, notes issuances, employee loan programmes and the wide array of other fund finance transactions. Mr. Ross has been practising law in the area of corporate finance since 2006 and joined Fried Frank in 2019.

Flora Go
Tel: +1 212 859 8152 / Email: flora.go@friedfrank.com
Flora Go is a corporate special counsel resident in Fried Frank's New York office. She joined the firm in 2011.
Ms. Go represents investment management firms, investment banks, private equity sponsors and other financial institutions in a wide range of financing transactions in connection with fund formations and leveraged acquisitions.
She also has extensive experience in advising private equity and credit funds in connection with financings incurred by the funds and their portfolio companies.
Ms. Go received her J.D. from Harvard Law School in 2011 and her B.A. from Yale College in 2008. She is admitted to practise in New York.

Fried, Frank, Harris, Shriver & Jacobson LLP
One New York Plaza, New York, NY 10004, USA
Tel: +1 212 859 8000 / Fax: +1 212 859 4000 / URL: www.friedfrank.com