ALSO IN THIS ISSUE: THE DE MINIMIS EXEMPTION AND INTERVIEW WITH OTTERBOURG ATTORNEYS

THE SECURED Lender

JAN/FEB 2025 WWW.SFNET.COM

Putting Capital To Work

TSL INTERVIEW

Wingspire Capital Continues to Soar

WINGSPIRE CELEBRATES FIVE YEARS OF DIVERSIFIED SOLUTIONS AND A LONG-TERM VIEW

PICTURED FROM LEFT TO RIGHT: ERIC FREEMAN, DAVID WISEN, JAMES GARLICK

A publication of: Secured Finance Network

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TOUCHING BASE

THE YEAR AHEAD

Keeping an Eye on Possible Policy Changes in 2025

As 2025 unfolds, SFNet is keeping an eye on the numerous possible regulatory and policy changes that could affect members. This year, Washington faces a policy realignment under a returning Trump administration, with slim Congressional margins and pressing deadlines complicating legislative efforts. Banking regulators are preparing for an immediate overhaul as new leadership takes control at the FDIC, OCC, and CFPB. The Basel 3 Endgame rules, which aim to significantly increase bank capital requirements, are expected to be softened or reversed entirely. SFNet has highlighted that these rules fail to account for the lower risk profile of asset-based lending, which could lead to unnecessary capital burdens and discourage lending to small and medium-sized businesses.

Bank merger activity is expected to accelerate, with antitrust reviews returning to a more traditional focus on competitive effects rather than rigid market concentration standards. Consumer protection policy shifts as the CFPB retreats from its enforcement-first approach. The agency will likely withdraw its credit card late fee rule and revise policies on overdraft fees and data-sharing requirements, changes that will affect traditional banks, fintech companies, and payment processors alike.

The expiration of key provisions from the 2017 Tax Cuts and Jobs Act, including individual tax benefits and corporate provisions, will prompt urgent tax reform efforts. Republicans may use the budget reconciliation process to address these issues, with a first package expected by March 2025. Meanwhile, trade policy will shift toward strengthening domestic manufacturing, with aggressive tariff proposals targeting Chinese imports, foreign goods, and automotive imports from Mexico and the EU, though such tariffs carry significant economic risks.

SFNet will keep you abreast of relevant regulatory and policy changes which may impact your business.

In this issue, we examine one of the possible changes that could have an impact: The de minimis exemption, which allows low-value international shipments to enter the U.S. duty-free, is under scrutiny in Congress. With proposals to eliminate or reduce this exemption, both Democrats and Republicans seem to agree on the need for change. If implemented, this could lead to higher costs for businesses and consumers alike, particularly impacting the e-commerce sector. On page 14, SFNet members discuss the potential consequences of this shift on the secured finance industry.

RICHARD D. GUMBRECHT
SFNet Chief Executive Officer

On page 18, *TSL's* editor-in-chief sits down with Otterbourg attorneys Allen Cremer, Dan Fiorillo, Pauline McTernan and Lena Surilov to discuss the firm's secret to success over the past 200 years as well as what lenders should look out for in 2025.

Our cover interview features David Wisen, founder & CEO of Wingspire Capital, who discusses Wingspire's evolution and keys to success as well as his outlook for the future on page 8.

In Part Two of his *Reflections on the Year of Elections* series, on page 32, David Chmiel delves into the potential impacts of the new administration on economic regulation, international relations, and the evolving dynamics of conflicts in Ukraine and the Middle East, making it a crucial read for understanding future geopolitical shifts.

As the market grapples with increased restructurings and rising bankruptcy costs, asset-based lenders face significant risks if they fail to understand the true position of their collateral within a timely manner. Across industries, asset values are declining rapidly. On page 24, in *Is Your ABL Collateral Covered? Why Action and Close Monitoring Are More Critical Now Than Ever Before*, authors Ian Fredericks, Michael McGrail, Rick Edwards, and Scott Carpenter, explore the challenges and evolving trends across asset classes and the implications for asset-based lenders.

On page 28, Maria Dikeos of LSEG provides readers with the highlights of 2024 and explores the trends, insights, and what's ahead for the leveraged lending market in 2025 in *Refinancings Dominate 2024 ABL Loan Market: Well-Capitalized Bank Lenders Look to Grow New Assets in 2025*.

As we look forward to the coming year, the possibilities are intriguing. Together, we will continue to accelerate growth, drive positive change, and shape the future of secured finance. We are excited to continue this journey with you.

THE SECURED Lender
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An association of professionals putting capital to work

The Secured Finance Network is the trade group for the asset-based lending arms of domestic and foreign commercial banks, small and large independent finance companies, floor plan financing organizations, factoring organizations and financing subsidiaries of major industrial corporations.

The objectives of the Association are to provide, through discussion and publication, a forum for the consideration of inter- and intra-industry ideas and opportunities; to make available current information on legislation and court decisions relating to asset-based financial services; to improve legal and operational procedures employed by the industry; to furnish to the general public information on the function and significance of the industry in the credit structure of the country; to encourage the Association's members, and their personnel, in the performance of their social and community responsibilities; and to promote, through education, the sound development of asset-based financial services.

The opinions and views expressed by *The Secured Lender's* contributing editors and authors are their own and do not necessarily express the magazine's viewpoint or position. Reprinting of any material is prohibited without the express written permission of *The Secured Lender*.

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Cadence Bank Welcomes Brad Silcox as President of Asset Management & Trust Group

Brad Silcox has spent the past 20 years at Wilmington Trust, a subsidiary of M&T Bank, in various executive leadership roles including president of the Southeast region and chief administrative officer of wealth markets.

Change Capital Appoints Bill Kirth as Senior Regional Vice President

Based in Salt Lake City, UT, **Bill Kirth** brings over 30 years of experience in business development and commercial finance, with a strong focus on sales strategy and client relationships. His expertise will play a key role in strengthening Change Capital's efforts to enhance its presence and drive continued growth across key markets nationwide.

Dare Business Capital Welcomes Brandy McCurdy-Lozano as SVP, Portfolio Manager

Brandy McCurdy-Lozano joins with over two decades of experience in the commercial finance industry, specializing in general factoring and transportation. Her extensive expertise in managing operations, credit, and underwriting is set to further strengthen Dare Capital's commitment to providing top-tier outsourced back room services to the factoring industry.

eCapital Welcomes Chris Huntington, SVP, Business Development Officer to its ABL Group

eCapital Corp. has appointed **Chris Huntington** as SVP, business development officer within its ABL Group. Based in Boston, MA, Huntington will enhance the company's presence on the East Coast, bringing a wealth of specialty finance experience to the role.

Encina Lender Finance Bolsters Senior Management Team with Three Promotions and Two Key New Hires

Encina Lender Finance, LLC ("ELF") announced several senior executive promotions and key new hires to support the company's next stage of growth.

Geoff Beard – chief executive officer & chief investment officer: Beard joined ELF in June 2024 as co-CEO to lead the firm's Consumer/SMB Vertical. In his new expanded role as CEO and CIO, Beard will have responsibility for ELF's investment, credit risk, asset management, operations and finance functions.

Joe Ressa – chief financial officer & chief operating officer: Ressa joined ELF in October 2023 as the firm's CFO. In his new expanded role as CFO and COO, Ressa will have responsibility for ELF's finance and operations functions, including accounting, reporting, FP&A, tax, treasury and borrowing base management.

Jeff Carbery – managing director, co-head of Asset Management: Carbery joined ELF in April 2023 as managing director, Risk for the firm's Commercial Vertical. In his new role, Carbery will co-lead ELF's Asset Management function, which includes monitoring asset-level and enterprise-level covenant compliance, tracking broader enterprise-level financial trends at the originator/servicer.

Neha Banthia – chief risk officer: Banthia will lead ELF's Credit Risk function, which is responsible for conducting rigorous asset-level collateral analysis in support of new investments as well as post-close surveillance of existing investments.

Chris Pickett – principal, co-head of Asset Management & Infrastructure: Alongside Carbery, Pickett will co-lead ELF's Asset Management function. In addition, Pickett will be responsible for implementing cutting-edge technologies that will streamline pre-closing collateral and transaction analysis and post-closing investment surveillance.

ELF also announced that **Edward Chang**, who previously served as the firm's co-CEO with responsibility for the Commercial Vertical, has transitioned into a senior advisor role.

Encina Lender Finance Expands Investment Team and Hires Controller

Encina Lender Finance, LLC has expanded its investment team with the addition of two structured credit industry veterans. The new hires – **Ashish Sinha** (managing director) and **Avi Azour** (principal) – report directly to Geoff Beard (ELF's CEO & CIO) and are responsible for sourcing, underwriting and executing senior credit facilities and forward flow purchase programs for both emerging and established specialty finance companies.

FGI Risk Expands West Coast Presence with Hiring of Sara Bell

Based in Los Angeles, **Sara Bell** will focus on developing relationships and new business opportunities on the West Coast for FGI's credit insurance brokerage and risk advisory division.

First Citizens Bank Names Michelle Draper Chief Marketing Officer

Most recently, **Michelle Draper** served as chief marketing and sales strategy officer of Silicon Valley Bank (SVB), a division of First Citizens Bank. In her role, Draper leads a marketing organization nationwide dedicated to building upon the company's customer-centric vision that delivers solutions, experiences and capabilities based on customers' needs.

Bob Seidenberger Joins Franklin Capital as Vice President of Sales

Bob Seidenberger will focus on advancing Franklin Capital's growth strategy and growing its sales team. With almost 20 years in commercial finance, including recent roles at Bridgeport Capital and Bay View Funding, and a strong commitment to helping businesses secure working capital, he brings substantial industry knowledge to our senior team.

Gordon Brothers Welcomes Julie Dobler as Director, North America Real Estate Services

Gordon Brothers, the global asset experts, has welcomed **Julie Dobler** as Director, North America Real Estate Services. In this

role, Dobler supports Real Estate Services' daily operations and helps implement streamlined processes, procedures and methodologies to enhance the operational platform.

Jeffrey Tyo Joins Gordon Brothers as Managing Director, Commercial & Industrial

Jeffrey Tyo has joined Gordon Brothers, the global asset experts, as managing director, Commercial & Industrial.
In this role, Tyo will expand Gordon Brothers' presence on the West Coast by developing and strengthening the firm's relationships with corporate clients, lenders, private equity firms, investment bankers and restructuring advisors focused on the consumer-packaged goods industry.

Hilco Expands Team Further with Appointment of Senior Lending Specialist

Specialist real estate lender Hilco Real Estate Finance (HREF) has appointed London-based development and bridge lending specialist **Simon Pollins** to join its rapidly growing UK team. A qualified chartered accountant for over 35 years, Pollins joins HREF as senior business development consultant, bringing over 30 years' experience in residential property lending to the expanding HREF team.

Holland & Knight Welcomes Financial Services Regulatory Partner Eamonn Moran in Washington, D.C.

Holland & Knight continues to strengthen its national Financial Services Team with the addition of **Eamonn Moran** as a partner in Washington, D.C. Prior to joining Holland & Knight, Moran was a senior counsel at Norton Rose Fulbright.

Holland & Knight Grows Project Finance Capabilities with Addition of Patricia "Tricia" Duffy in Washington, D.C.

Holland & Knight has strengthened its Financial Services team with the addition of **Patricia "Tricia" Duffy** as a partner in Washington, D.C.

Tom Harris Joins Iron Horse Credit

Iron Horse Credit is proud to announce the addition of **Tom Harris** as business development officer. In his role, Harris will be responsible for identifying new territories, partnership channels and building new client relationships.

KeyBank Expands Commercial Banking Teams in Chicago and Southern California to Serve the Middle Market

Ben Van Vlerah has been appointed Illinois market president and regional commercial leader for Illinois and Northern Indiana.

Gavin Newman joins as commercial leader with a focus on privately owned businesses based in Chicago.

Ryan Ferris serves as a commercial leader with over 10 years of banking experience working with a variety of businesses, family offices and financial sponsors throughout the Midwest to provide financial services.

Taylor Fraleigh joins the team as senior relationship manager with more than 13 years of experience in commercial banking.

Anthony Balthazor also serves as a senior relationship manager.

Robert Besser has been promoted to commercial leader and is responsible for leading a team serving the Southern California market.

Erica Elsasser joined the team in May as a senior relationship manager responsible for managing existing clients in California and developing new prospects in the Southern California market.

James Gibson joins KeyBank as a senior relationship manager responsible for expanding the bank's relationships with financial services partners and middle market companies primarily in the Orange, Inland Empire and San Diego counties in Southern California.

Trevor Mates serves as a senior payments advisor, partnering with the senior relationship team to optimize client cash management solutions.

Elizabeth Bui joins the team as an associate to support the California market expansion, having previously served as an equity research associate with KeyBanc Capital Markets.

Prominent Structured Finance Partner Joins Latham & Watkins in New York

Latham & Watkins LLP is pleased to announce that **Jim Fogarty** has joined the firm's New York office as a partner in the Structured Finance Practice.

Preeminent Restructuring Partners to Join Latham & Watkins in New York

Formidable practitioner **Ray Schrock** will serve as the firm's new Global Chair of the Restructuring & Special Situations Practice; **Andrew Parlen** will serve as head of US Restructuring; Candace Arthur and Alexander Welch bring leadership from some of the United States' most significant and complex restructurings.

MidCap Business Credit Adds Ryan Ray to New Business Team

Ryan Ray has spent the last 15 years in asset-based finance in business development, most recently with Accord Financial. Ray will be in Chicago and will cover the Midwest market further cultivating relationships with asset-based lenders, private equity sponsors, investment bankers, advisors, and other financial institutions.

MidFirst Business Credit Appoints John Nooney as President

John Nooney brings over 30 years of experience in commercial finance working with portfolio, origination, operations and administrative responsibilities for national asset-based lending platforms.

Michael Ollio Joins Mitsubishi HC Capital America as Director of Capital Markets

Michael Ollio will be focused on funding equipment finance transactions and portfolios for capital markets partners, particularly those involving industrial, IT, medical, transportation and construction equipment.

Mitsubishi HC Capital America Strengthens Channel Finance Capabilities with Hiring of Paul Slocum

Paul Slocum has joined as vice president of Sales for the technology finance team. Slocum will be responsible for the origination and structuring of supply chain and purchase order finance opportunities for channel partners, including technology and other solution providers, in industries with two- step distribution models.

David J. Borkon Joins Moritt Hock & Hamroff as a Partner

David J. Borkon has joined the firm as a partner in its Corporate, M&A and Securities practice group. He is in the firm's Garden City office.

Peapack-Gladstone Bank Hires Michael Anthony Guarino, Esq., CRCM as Senior Vice President

Peapack-Gladstone Financial Corporation and Peapack-Gladstone Bank are proud to announce that **Michael Anthony Guarino, Esq.** has joined as a senior vice president, attorney.

Provident Expands Commercial Lending Team as Part of Regional Growth Strategy for Eastern Pennsylvania

Provident Bank is pleased to announce the addition of six experienced lenders in the commercial banking space: **Matthew Moresco, Matthew Skilton, Gerald Bresser, Michael Valenzano, Patrick Beaner** and **Daniel Decker**. These strategic hires come as part of the company's efforts to strengthen its presence and commitment to businesses throughout eastern Pennsylvania.

SLR Business Credit Adds Braff as Managing Director of Business Development

David Braff has joined SLR Business Credit as a managing director of Business Development. Based in the San Francisco Bay Area, Braff will assist in expanding the Company's presence by providing asset-based lending and invoiced-based financing.

Travis Pocock Joins SLR Business Credit

SLR Business Credit, and its parent company SLR Capital Partners, is proud to announce the addition of **Travis Pocock** as senior vice president. In his role, he will be responsible for identifying and engaging asset-based lenders, accounts receivable factoring companies, and portfolios for acquisition.

SLR Business Credit Adds Mark J. Simshauser as Senior Vice President Supporting Growth in Northeast US

In this role, **Mark J. Simshauser** will have the responsibility of supporting and financing SME's through the Northeast United States.

TD Bank Announces Andy Bregenzer and Jill Gateman as Co-Heads of U.S. Commercial Banking

Andy Bregenzer and **Jill Gateman** have joined as co-heads of U.S. Commercial Banking. The appointments follow the Spring 2024 announcement of Chris Giamo's retirement from TD Bank after 26 years of service to TD and more than 30 years in banking.

Truist Hires Kerry Jessani to Lead new Mid-Corporate Banking Team

Kerry Jessani will build and lead a coverage team focused on delivering industry-based expertise and solutions to private and public companies across the U.S.

US Capital Global Expands European and Middle Eastern Operations Under New Partner Prodi Bhattacharya

US Capital Global is pleased to announce the elevation of **Prodi Bhattacharya, Ph.D.,** to the distinguished role of partner, Structured Credit and Equity. In this capacity, Dr. Bhattacharya will spearhead US Capital Global's European and Middle Eastern operations from the group's London headquarters, which was established in 2020.

US Capital Global Appoints Marta Gelencser as Managing Director, Expanding UK and European Operations

In this role, **Marta Gelencser** will spearhead strategic initiatives to provide customized financial solutions, including equity investments, credit facilities, and M&A advisory services, to mid-market companies across global markets.

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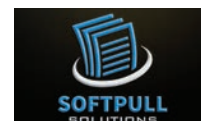


WINGSPIRE CAPITAL CONTINUES TO SOAR AFTER FIVE YEARS WITH DIVERSIFIED SOLUTIONS AND A LONG-TERM VIEW

BY MICHELE OCEJO

In October, Blue Owl Capital Corporation announced the five-year anniversary of its investment in Wingspire Capital, a premier asset-backed direct lender that operates two business units, Wingspire Corporate Finance and Wingspire Equipment Finance.

Blue Owl Capital Corporation launched Wingspire in the fall of 2019 and has increased its support steadily since then. Since inception, Wingspire has closed over $4.5 billion in financing commitments. Wingspire has made its mark as a provider of a range of specialized asset-secured financing solutions, primarily focusing on the needs of middle-market businesses for bank-adjacent credit profiles.

The Secured Lender's editor-in-chief sat down with David Wisen, founder & CEO of Wingspire Capital, to discuss Wingspire's evolution and keys to success as well as his outlook for the future.

Please provide us with an overview of Wingspire including how it got started five years ago, its product offerings, and the highlights of your growth over the last five years.

Wingspire is a diversified commercial finance company focused on providing secured lending solutions to middle-market companies. We operate in two business units: Wingspire Corporate Finance, led by James Garlick, which provides revolving and asset-secured term loans; and Wingspire Equipment Finance, which is led by Eric Freeman and provides financing for the acquisition or refinancing of equipment. In both of the business units, we're primarily focused on privately held middle-market companies here in the U.S.

At Wingspire Corporate Finance, we tend to look at opportunities between $20 million and $200 million, whereas Wingspire Equipment Finance typically offers smaller loans and leases, anywhere from $2 to $100 million. The average size loan at Wingspire Corporate Finance is about $50 million; the average size loan at Wingspire Equipment Finance is around $4 or $5 million. In addition to providing traditional ABL revolvers, Wingspire Corporate Finance differentiates itself in the market by providing senior secured term loans and first-out credit solutions. In both groups we're generalists, but from time to time we invest in certain industry-specific expertise. The most relevant example is our recent investment in healthcare finance. We brought aboard a few healthcare finance experts because we intend to do more healthcare loans.

Community service is an important part of the Wingspire culture. The NYC team is depicted here after a service day at The Bowery Mission.

We're funded with equity from Blue Owl Capital Corp. (NYSE: OBDC) which is fantastic because they provide us with permanent capital. We supplement that with a variety of bank lines and capital markets fundings. Most notably, in 2024 we issued ABS bonds with our inaugural equipment finance asset-based securitization. That'll be an important source of funding for us going forward.

As for our history, Wingspire was created in the fall of 2019. I knew at that point that asset managers were raising a lot more capital from institutional investors for direct lending. I'd spent my entire career in commercial finance, specifically non-bank secured lending, and I felt that we could create a different type of commercial finance company in this new world of asset managers.

The hallmarks of that original strategy were asset diversification and culture; multiple loan products off of a common platform to create a single brand with lower overhead; and the flexibility to do a couple of different things and thereby give us the opportunity to offer multiple products to our customers and grow in a measured way, not diving too deep into any one product. Another key was having a flat organizational structure and high-energy culture that would enable quick decisions and a continuous focus on our customers.

I met the founders of what was then called Owl Rock in the fall of 2018, and they liked the plan. They had similar views on risk and company culture. What was different about them, as compared to the other asset managers, was that they had the vision to think around the corner and the patience to invest in a startup. We were the only de novo startup that was ever created inside of a BDC. There are a few examples of BDCs or asset managers acquiring already established secured lending firms at premium prices, but I believe Wingspire is the only one of our peers that started de novo. That was a testament to Blue Owl's forward thinking and innovative culture, and it turned out to be a tremendous success for them.

Since inception, Wingspire has sourced over $115 billion in loan opportunities, and we've closed over $4.5 billion in commitments. We have intentionally invested in creating a strong origination capability and we believe that is and will always be critical. We're out there doing the hard work to identify proprietary deal flow, and a lot of our success starts with those efforts.

We were profitable after one year, and we've created a lot of enterprise value. Most important for me is the reputation that we've earned. This, of course, is a subjective thing, but based on the feedback that we've gotten, we seem to have created a brand that stands for creativity, responsiveness, and for doing what we say we will do. This reputation is authentic because it reflects our culture.

As an added bit of context, please remember that Wingspire was launched in November of 2019, and COVID started soon thereafter in March 2020. When COVID hit, we had one loan, ten people, and no office. Everything that we've accomplished since

then, growing to about $1.5 billion in assets under management, building a team of over 50 people in three offices, that's all since the start of COVID. Through the pandemic, through wars, through interest rate upheavals, and without one single place where we could all gather. We were able to do that because from day one we were focused on our work culture. That helped us through that early period of building, even though we were virtual.

I believe we are still in the early innings of Wingspire's story. Our strategy of asset diversification and a high-energy culture that focuses on excellence, that delivers a product that the customers want — that's timeless. And although we're proud of what we've done, we are in no way satisfied and we think there's a lot more to do.

How does Wingspire view its value proposition to the market?

Everyone at Wingspire understands that we have two primary stakeholders: our customers and our investors. We built the business from the ground up trying to think of our enterprise through the lens of their goals and experiences. Can we solve for what both our customers and our investors want? Customers want choices when they're looking for financing, and they want capital providers to do what they say they will do. They want choices and reliability. Investors want attractive returns with minimal volatility. So, we built the company trying to keep those first concepts in mind. Looking back over our first five years, we're quite proud and humbled by what we have achieved and we think a key to our success has been the devotion to those first principles.

We've been able to deliver for customers and investors for two reasons: the nature of our capital and the quality of our people. Permanent capital enables us to have a long-term view and to be focused solely on making smart loans, nothing more. We're not managing ourselves for this quarter or this year and we can tailor a lending solution to what makes sense, given the facts, even if the structure is not "plain vanilla."

And we've done a really good job of hiring great people. We think that our people create a culture of excellence that resonates with our customers. This is true not only for our front-end, but also for our portfolio management teams; customers speak highly of their experiences working with us after the loan closings. So, it's this virtuous cycle in which we are able to grow profitably because our customers have a good experience because our people are great, and by doing that we're able to produce very attractive returns for our investors, which in turn enables us to attract the best talent.

With James Garlick's elevation to head of Wingspire Corporate Finance, how do you envision the company's product offerings evolving, particularly in areas like standalone term loans and the new healthcare platform?

We're thrilled to have James at the helm of Wingspire Corporate Finance. Everyone who knows him knows about his passion, his creativity, and his work ethic.

He was appointed to this role not only based on the quality of his work, but also because we know he can lead us into growing these diversified product offerings. We're devoted to the multiple products in Wingspire Corporate Finance. We offer traditional revolving asset-based loans, we offer asset secured term loans, we offer first-out loans. We're doing healthcare. You need a certain type of person who's comfortable in all those products, and James is that person.

The good thing about having permanent capital is we're not trying to achieve a specific number of specific types of loans each year. We're just trying to make as many good loans as we can and, if in a certain year there's more traditional ABL versus traditional secured term loans, then we'll do more of one versus the other. We are committed to all of our products, but the rate of growth for each will depend on market conditions.

As part of Blue Owl Capital, which manages over $200 billion in assets, how has Wingspire leveraged this relationship to enhance your competitive position in the market?

Blue Owl's sponsorship is an important part of who we are. I'll start with the obvious. Blue Owl provides us with ample permanent capital, and that helps us grow, but it also helps maintain this long-term view. In the market that we're in right now, we're not unique in having access to capital, but we do have more access to capital than we could actually use. Blue Owl is really good at raising money, and we've been a great investment for them. So, we have a lot of dry powder.

In addition to that, the Blue Owl brand standing behind us gives us an imprimatur in the market, basically like market validation. Although we've created a brand on our own, it's a big world out there, and certainly there are sponsors or independent companies that haven't heard of us. The Blue Owl name means something, and it gives us that market validation.

And the last thing is they're smart people with great character. From time to time, I'll pick up the phone and get some advice or get some subject matter expertise. They're always there, they're easy to work with, and they offer an important and helpful perspective.

Tell us a bit about Wingspire's 2022 acquisition of Liberty Commercial Finance, now rebranded to Wingspire Equipment Finance, and how it plays into Wingspire's overall strategy.

The Liberty acquisition was a good example of the flexibility we have to implement our strategy. Since inception, I knew we were going to have two business units: corporate finance or ABL, and equipment finance. Equipment finance was part of my background. All of us bring experiences, good and bad, from our past lives. And based on my experience, I felt there was a nice synergy between equipment finance and asset-based lending.

Two years after we launched, we began our de novo equipment finance efforts by hiring our first devoted equipment

finance professional. He and I began to meet with various leaders in the industry to explain the Wingspire strategy. One of the first conversations was with Eric Freeman at Liberty Commercial Finance, and from that first conversation, Eric and I knew there was a perfect match to be made.

He wasn't trying to sell the company at that time. Eric had created an originations powerhouse, but he didn't really have sufficient capital. Wingspire had access to ample capital and great risk management, but we hadn't yet created an originations capability. We brought the two firms together, and it has been hugely successful. Both business units, Wingspire Equipment Finance and Wingspire Corporate Finance, focus on privately held, middle-market companies. And the culture that Eric had built at Liberty meshed perfectly with Wingspire culture, so the integration has been seamless. The business units work really well together.

The combination of Liberty and Wingspire has been very profitable from day one. And it supports our strategy because, right now, under one brand, we're able to offer to the sponsor community and to intermediaries multiple types of financing. They may have a client or portfolio company that needs a revolving line of credit or one that needs equipment financing, and they know that Wingspire can offer both.

You asked how this works with our overall strategy. First of all, it's consistent with the strategy, which was, from day one, to be diversified. But I think it also offers a template for the future because when we talk about the future, you're likely to see a third leg of the stool within Wingspire, and that will either be created de novo or it'll be by an acquisition. And if it's by acquisition, we're going to follow the playbook that we used with Wingspire Equipment Finance: find a firm that complements us, has a similar culture, and where we can work well together.

How do you handle training and maintaining your culture in today's remote/hybrid world?

This is a huge topic for everyone right now, and at Wingspire it is particularly important because we have three offices, and many people who work remotely.

We maintain and nurture the learning, the training, and the culture by being very intentional about it, and we work really hard at it. We work hard at hiring the right people. We work hard at training people and creating a culture that's essentially a learning culture.

During the first week everybody receives the same onboarding orientation, and one of the things we talk about is that we want everyone to ask questions and to have a voice that's heard. We encourage people to speak up and to do the right thing. We talk about that from day one. We collaborate and we teach. We have a mix of generations at our company. We have team members who are cycle-tested and very experienced, and we have team members who are coming up and have newer perspectives. We try to listen to each other. We know that every person sitting at that table may have a point of view that can help lead to the right decision.

And we also hold ourselves accountable on cultural matters. We try to hire the right people and train them the right way, but if we make a mistake, we try to understand why. If somebody's having a bad experience, we try to understand why.

Some personalities are very comfortable speaking up no matter their experience level. Other personalities aren't. But you have to find a way to hear those voices too. And that takes time.

I think it's working. We've had very little employee turnover at Wingspire. And we're blessed to get a lot of reverse inquiries from good people who ask about joining us. I think that's a validation of what we're trying to do.

I also think it creates a positive vibe that, ultimately, delivers a better experience for our customers.

What is your view of today's market and what challenges and opportunities are on your mind as we go into 2025?

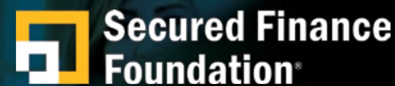
I will share my views, but they're tempered by my belief that we can never be sure of what tomorrow holds. Having said that, I want to talk about '24, but also '25 and '26 as we have a two-year planning cycle. 2024 was a difficult market for all the lending products. Business was slow at the beginning of the year for everyone, not just Wingspire, across the industry. At the same time, a lot of new non-bank entrants have come into the market in both equipment finance and corporate finance. There were a lot of new mouths to feed while deal flow was down.

The key thing in a market like that is to maintain your discipline, to avoid the temptation of convincing yourself that bad loans are good simply because they are available. Because we have this permanent capital and have a long-term view, we were able to maintain our discipline despite the slow first half of the year. I'm happy to say that our pipeline is now quite robust. Sometime in the third quarter things just became a lot busier, and we're going to end up having a good year. And because the pipelines are so full, we have a line of sight to a fantastic '25.

This positive outlook for the next few years is a validation of our strategy. We really do believe we're in the early innings for Wingspire as we are in big markets with many opportunities. Our strategy of asset diversification, our strong originations capabilities, disciplined risk management, and ample capital create the foundation for our high-energy culture of excellence to thrive — to the benefit of our customers, investors, and team members.

Michele Ocejo is SFNet director of communications and editor-in-chief of The Secured Lender.

Secured Finance Foundation: Helping to Shape the Future



WWW.SFFOUND.ORG

The Secured Finance Foundation (SFFound) encourages, facilitates, and supports education, innovation, and charitable works for the betterment of organizations and professionals who deliver and enable secured finance—and for the communities of which they are a part. Below are just a few of SFFound's impactful initiatives:

Guest Lecture Program

- Connects finance industry leaders with students on college campuses
- Provides insights into secured finance careers through lectures from 276 member companies
- Offers access to internships, scholarships, and networking opportunities

Mentoring Program

- Links seasoned professionals with newcomers for learning and growth
- Bi-weekly virtual activities and one-on-one meetings
- Mentees gain skills and network, while mentors give back and shape the industry's future

SFNet Professional Development Courses

- Live-online and in-person courses led by industry experts
- Courses feature practical case studies to help professionals make an impact
- Four free on-demand series in appraisals, factoring, legal issues, and bankruptcies for members

Secured Finance Certified Professional (SFCP) Program

- Prestigious certification in asset-based lending and factoring
- Sets a gold standard for professionals through a comprehensive curriculum and rigorous exam
- Helps organizations attract and retain top talent by focusing on employee development and best practices

To learn more about these initiatives, please contact Denise Castagna at dcastagna@sfnet.com.

TSL
FEATURE

SFNet Members Weigh in on the Possible Elimination of the De Minimis Exemption

The de minimis exemption, which allows low-value international shipments to enter the U.S. duty-free, is under scrutiny in Congress. With proposals to eliminate or reduce this exemption, both Democrats and Republicans seem to agree on the need for change. If implemented, this could lead to higher costs for businesses and consumers alike, particularly impacting the e-commerce sector. SFNet members discuss the potential consequences of this shift on the secured finance industry.

BY MYRA THOMAS

While the political environment can sometimes be polarizing, many Republicans and Democrats in Congress seem to agree on one thing—the reduction or elimination of the de minimis exemption. The tariff exemption allows for zero duties and taxes on international shipments sent directly to U.S. businesses and consumers, when those items are valued under $800 per person or business, per day. Low-value imports are allowed duty-free under Section 321 of the Tariff Act. Documentation requirements are also less strict for de minimis imports. With pending Congressional proposals to eliminate the exemption, the Biden administration's previous support for it, and President Trump's vocal support of additional tariffs, the likelihood of a change to the de minimis exception seems likely.

If instituted, the resulting tariffs could be a boon for U.S. coffers, given the massive number of items coming into the country under the exemption. Over the past ten years, ending in fiscal 2023, the U.S. Department of Commerce estimates that shipments into the U.S. under the de minimis exemption increased from 140 million items to more than 1 billion. They estimate that approximately 4 million in exempted items entered the U.S. each day in 2023 alone. Much of the items appear to be coming from Chinese eCommerce platforms like Temu and Shein. While the true number of goods coming from these two companies is difficult to exactly pinpoint, a 2023 report from the House of Representatives' Select Committee on the Chinese Communist Party suggests that Temu and Shein are "likely responsible for more than 30% of all U.S.-bound daily volume that falls under the provision." Some retail experts also argue that this tariff and duty exemption may be leading Amazon to move to smaller warehouses in parts of Asia or Mexico to benefit from the exemption for international B2C shipments from there. Some small and medium-sized enterprises (SMEs), such as luxury goods manufacturers and made-to-order retailers, are also benefiting from the de minimis exemption.

A Deeper Dive into the Debate

With a significant portion of low-value consumer goods shipped to Americans from warehouses in Canada and Mexico, as well as from air shipments from China, the change could mean increased costs to the consumer and costly and needed changes to some company supply chains to handle inventory management and the related risks. But the trickle-down effect to most retailers and, ultimately, secured lenders, remains a source of debate. Salvatore Stile II, president of Alba Wheels Up International, argues that there is certainly a need for more details on the manifest for low-value goods coming into the US. to reduce drugs and other violations, but this can be mitigated by better processes.

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FGI Finance

LAURA SIEGEL RABINOWITZ
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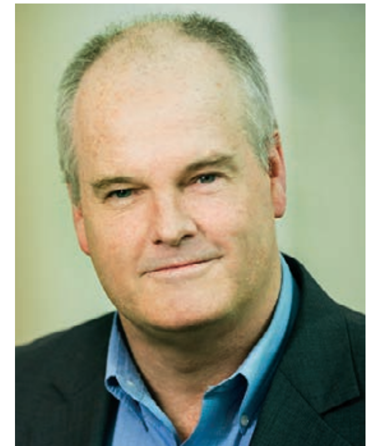
Alba Wheels Up



ALEX SUTTON
Gordon Brothers

According to Laura Siegel Rabinowitz, shareholder at Greenberg Traurig, LLP, this flood of low-value B2C products from abroad make it increasingly difficult for U.S. Customs and Border Protection (CBP) to adequately monitor and track all of it. The elimination of the de minimis exemption could help to stem the tsunami of goods into the U.S. The possible change in the exemption could simply be chalked up to the need to recapture tariffs and duties. But she also notes that "the risk of illicit drugs, as well as violations of trade laws and health and safety requirements, are very real concerns." There's the loss of duty and tariffs, of course, but there's also the potential for shipments of fentanyl, goods that have IP violations, items produced from forced labor, and some products that violate consumer protections. In fiscal year 2023, 85% of the shipments CBP seized for health and safety violations were small packages.

Despite the concerns, Stile notes that a complete elimination may not be a solution. A compromise may be in order, he adds. Smaller importers may not be prepared for the rise in the cost of some raw materials. Plus, future tariffs, especially those related to imports from China, may lead to an increase in the cost of customs bonds to cover increased duties, taxes, and fees. Fluctuations in tariffs could put some secured lenders at risk from importers that will be faced with surety bond stacking and required to post additional collateral to surety companies. With multiple surety bonds in place on the same underlying obligation, ABL and factor claims against a borrower's assets are ultimately diluted.

The elimination of the de minimis exemption could help to stem the tsunami of goods into the U.S. The possible change in the exemption could simply be chalked up to the need to recapture tariffs and duties. But she also notes that "the risk of illicit drugs, as well as violations of trade laws and health and safety requirements, are very real concerns."

The Cost Considerations

The closure of this loophole will also cause the impacted companies to reconsider their supply chain configurations, and secured lenders should be prepared to have critical discussions with those clients. "Think about your borrower's exposure and take steps to assess and mitigate risk now," Stile notes. At the moment, he says that ports and terminals are simply not efficient enough to handle possible changes to inspection, and a delay in shipments translate to a delay in the number of days until that retailer gets paid and a blow to cash flow. Lenders will need to keep a closer connection to the client, possibly increasing stress tests and establishing tighter loan covenants or reporting on collateral.

According to Andrew Barone, director of business development at Rosenthal & Rosenthal, the elimination of Section 321 would be detrimental to some businesses. Many direct-to-consumer brands have made significant strides towards profitability over the last 2 years since their investors focus has shifted from "grow at all costs" to "operating profitability." For companies doing $10MM+ in sales the duty savings are huge and directly contribute to their bottom line. An elimination would mean even more costs for these brands to figure out how to manage. And, at the same time with increasing inventory values, they will lean on their lender to help finance these cost shifts for freight and duty.

The Risk of Security Concerns

If the de minimis exception is removed or modified, there are certainly many companies that will face unexpected costs related to new regulatory and compliance consideration. CBP estimates de minimis shipments account for approximately 92% of all cargo entering the U.S., mostly made up of consumer clothing and smaller consumer goods. John F. Kennedy International Airport (JFK) in New York City, for example, processes about 750,000 de minimis shipments a day—roughly 25% of all de minimis shipments processed, notes Rabinowitz. And, she adds, U.S. government officials know that the items have entered the country, but they simply cannot monitor what is inside all of the packages and track where all of the items eventually end up. Along with four express courier facilities, including DHL, FedEx, and UPS, JFK Airport is home to the country's largest by volume international mail facility where 60% of international mail arrives.

Today, CBP is under significant and growing pressure to check for narcotics and other illicit goods coming into the

country by international mail, as well as precursor chemicals and such things as die molds and pill presses used to make fentanyl and other synthetic drugs. U.S. government officials concede that it's a near-impossible task to adequately review the majority of de minimis exempt packages. In a press release from Andrew Renna, assistant port director for cargo operations at JFK Airport and CBP de minimis task force lead, he noted, "We have limited resources. We only have X number of staff. There is no physical way if I doubled or even tripled my staffing that I could look at a significant percentage of that. So due to the volume, it's a very exploitable mode of entry into the U.S." The flood of smaller packages also presents a growing security risk, especially after anthrax mail-borne attacks.

Mixed Signals for Business

Changes may help mitigate those risks, but for companies shipping B2C goods from abroad, primarily from warehouses in Mexico or Canada, the impact on the supply chain from a de minimis elimination could be significant. According to Chris Fulman, managing director at FGI Finance, U.S. retailers who ship goods directly to consumers from abroad will experience a shift in their financial position. He notes, "B2C businesses shipping low-value items will undoubtedly require time to adapt and diversify their sourcing strategies." Supply chain shifts are expected to result in increased expenses for some U.S.-based companies, as they invest in automation to offset labor costs or compliance systems to manage the increased paperwork, documentation, and reporting requirements. Customers will likely see increased prices on some low-value goods to offset the higher import costs, but this could lead to losing price-sensitive consumers. Fulman points out that some asset-based lenders may face higher risks as collateral values tied to imported goods could become more volatile. If tariffs increase or documentation requirements tighten, the liquidity of inventory may be reduced, prompting lenders to adjust their loan-to-value ratios.

However, for the vast preponderance of U.S. businesses, it appears that secured lenders are not fretting a reduction or elimination of the de minimis exemption. Martin F. Efron, executive vice president and head of factoring for White Oak Commercial Finance, notes, "The spirit of the rule wasn't meant for large online marketplaces." Instead, he notes that it was meant for U.S. travelers bringing goods home and smaller businesses in need of samples from abroad. "Most of my clients that are importers of goods from overseas are not shipping direct to consumer, but to larger retail stores." A reduction or elimination of the de minimis exemption could be good news for many of his ABL and factoring clients. And, for the vast majority of U.S. companies, particularly retailers, the change is good news. Most major U.S.-based retailers are currently finding themselves at a disadvantage when shipping from domestic warehouses. These domestic retailers represent a large proportion of all ABL and factoring customers, say industry experts, and they are looking forward to a more competitive playing field as a result of higher costs on items shipped from abroad and direct to consumer.

A Look Ahead

How it all plays out certainly depends on the way the change is implemented and what countries will be impacted, says Alex Sutton, managing director and head of research, at Gordon Brothers. "It's not decided yet, and it could simply mean a drop in the current $800 exemption set in 2016 from the previous level of $200." If the de minimis exemption is reduced or eliminated, he notes that some smaller industrial products may see increased tariffs, but less expensive consumer products will bear the brunt of the change. Sutton also predicts distribution centers from northern Mexico, the U.S.'s closest neighbor, are likely to see a reduction in incoming shipments.

And, much like others in the secured finance space, Sutton says that only a small number of his clients take advantage of the de minimis exemption. He adds that even for those clients that are impacted, the concern may be a bit overblown. "From an appraisal perspective, we find that this type of event has, normally, a one-time measurable impact on inventory," Sutton adds. "The asset-based lending industry will be affected a little bit by that, but I do think it's a relatively small part of the secured lending business." He agrees that the vast majority of ABL and factoring clients are competing against companies that use the de minimis exception to ship inexpensive consumer goods.

Secured lenders and their clients are more concerned about the possibility of more far-reaching tariffs than the de minimis exemption. For now, the reduction or elimination of the de minimis exemption appears far less controversial and impactful for most U.S. businesses. While President Trump seems likely to move ahead on modifying the de minimis exemption, particularly for goods originating from China or on certain categories of products, it all remains up in the air. However, one new development is getting significant attention. On January 1, Mexico instituted new tariffs on some low-value imported goods coming through the country. The effect on companies such as Shein and Temu, as well as on U.S.-based retailers shipping through Mexico, are not yet fully understood but may change the playing field for these companies. Whatever the outcome may be and its impact, asset-based lenders and factors will always be needed to help navigate any supply chain management disruptions, changes, and risks, if and when, smaller or larger tariffs and duties impact U.S. companies with exposure.

Myra Thomas is an award-winning editor and journalist with 20 years' experience covering the banking and finance sector.

Interview with Otterbourg Attorneys:

Over 100 Years of Providing Legal Expertise to the Secured Finance Industry

BY MICHELE OCEJO

TSL's editor-in-chief sat down with Otterbourg attorneys Allen Cremer, Dan Fiorillo, Pauline McTernan and Lena Surilov, to discuss the firm's secret to success over the past 100 years, what lenders should look out for in 2025 and possible implications of the election. Based in New York City, Otterbourg represents financial institutions (including banks, asset-based lenders, hedge funds, finance companies and insurance companies) and corporations and other business enterprises.

Please tell us a little bit about yourself, how you got started in the industry, your practice area, and any advice you would like to provide for attorneys considering representing secured lenders.

Surilov: I actually started my legal career as a corporate lawyer, but I received a taste of secured financing transactions in my second year through my then mentor, and I really loved the aspect of understanding the retail finance and what companies do from my prior experience as a consumer. I have currently been engaged in documenting a lot of ABL retail financing transactions, basically from cradle to the grave, from the front end to all the way through DIP finance and exit financing, and some of the retail companies have been through multiple bankruptcies and exits.

To anybody starting out, what helped me the most was having a great mentor because I don't think I would've ever started in this type of law if I wasn't given a chance to participate in the transactions and gain that type of exposure early in my career. I don't think I would've had as much exposure to clients and the interesting aspects of secured financing and the more complicated aspects as well, if I didn't have a mentor who involved me in every aspect of the transaction and provided an opportunity to interact with the clients. Having someone pave the path before you to show how your career trajectory can go and what you can do in this industry is invaluable.

McTernan: I'm a litigation partner here at Otterbourg. I've been here for 15 years. How I got involved in representing secured lenders was a little bit different from everyone else here because, like I said, I practice general litigation and now more restructuring and some bankruptcy as well. I first got involved as an associate. I was working on a lender liability litigation and I actually was able, through document review, to learn about asset-based lending as a "fly-on-the-wall" by reviewing the contemporaneous documents and emails at the time with the people involved in the syndicated loan facility.

In that way, I learned about the different aspects of asset-based lending relationships. With that experience I started to branch out into other representations, including in the restructuring context and cash collateral "fights" and the like, and just gained experience along the way. I have a varied and multifaceted view into asset-based lending from that experience.

In terms of advice for younger attorneys or others getting into the field, I would say specifically you should know your codes, the Uniform Commercial Code and the Bankruptcy Code, but more generally I always tell young associates to take ownership, take initiative, and don't be afraid to say yes to new opportunities because they really foster growth, as you never know what you'll fall into.

Fiorillo: I started at Otterbourg in 1996 as a summer associate, and began my first year at the firm in the fall of 1997. I currently chair Otterbourg's Workout and Restructuring Department. I had the distinct honor and pleasure to work under probably one of the best mentors in the asset-based lending community, Jon Helfat, the then

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PAULINE MCTERNAN
Otterbourg P.C.

LENA SURILOV
Otterbourg P.C.

chair of my department. As I think Jon would acknowledge, I wasn't that helpful to him at first, because learning the vernacular of asset-based lending and bankruptcy law as a first-year associate, while working with a leading expert in the field, was challenging for both of us. But Jon did something for me for which I'll always be grateful. Midway through my first year of practice, Jon sent me downstairs to work in the finance department. Jon's view, which I completely share, was that you had to learn how a financing transaction is documented before you can learn how to work out and/or restructure a deal in distress. After spending some time learning how to document the front end of various secured loan transactions, Jon pulled me back up into the workout and restructuring group, where Jon, once again, gave me career-altering advice. He would often tell me that I needed to start telling him what we should be doing on matters we were handling, instead of Jon telling me what to do, which, as a junior associate, was a revolutionary mindset shift in the way I was approaching my job. It forced me to think through all of the issues and considerations that our clients would expect its counsel to

address, which accelerated my understanding and appreciation of the practical and business applications of the legal principles which I was still trying to master. Of course, I always had Jon to consult with, and Jon was excellent at following up with me on all my different projects and assignments.

I would say to any attorney that is starting out in the industry, as Pauline said, that learning the law and understanding the vernacular, navigating personalities, and managing expectations is a daunting task the first year or two of your practice. But once you put the time and effort into it, and are fortunate enough to have one or more good mentors, you will find the learning curve is accelerated.

At Otterbourg, we place a premium on exposing junior associates to taking on larger roles and responsibilities with careful supervision. If you're interested in getting into the field of secured lending, which covers so many different industries at so many levels of the market--from $1 million to $2 billion deals and everything in between--then, as Pauline said, you have to be open to taking on new challenges, diverse assignments, and obviously put the time and effort in, and hopefully you're lucky enough to wind up with a great mentor to teach you the ropes.

Cremer: I'm a partner in the banking and finance department here at Otterbourg. I actually got my start working in-house for a private commercial real estate lender handling commercial mortgage closings. Although I was getting some great transactional experience, after a couple of years I felt the pull to expand my practice into some additional areas, which is when I went down the road of law firm work.

My first two interviews at Otterbourg were with two future SFNet Hall of Famers, David Morse and Jon Helfat, and from there it was off to the races in the secured lending world, representing banks and private lenders in all types of financings with a particular focus on ABL. I was fortunate enough to work with, and learn from, a number of excellent transactional attorneys who helped me navigate the finance practice area.

I would advise younger attorneys to pay attention to the conversations around you and, especially, when you sit in on conference calls with clients and the opposing side. There are so many nuances and substantive issues to be aware of in our field and I learned a great deal from colleagues on these types of calls about how they identified issues and how they advised clients on how to deal with those issues. It's that kind of exposure to knowledge from people who really know their field that helped my development.

I would also add that if you hear something during those conversations or discussions that requires additional context or which you do not quite understand, follow up with the partner for additional feedback. It goes a long way towards your development, and it shows that you're engaged, which partners always like to see from attorneys.

Otterbourg has been practicing law for well over 100 years. What is the makeup of the firm's culture that accounts for this longevity and success?

Fiorillo: I think the secret to Otterbourg's success is its consistency. We've been a midsized law firm for over a hundred years, and for most of its existence, Otterbourg has been very specialized in the field of commercial lending transactions and workouts and restructurings. While there are a number of good law firms in the secured lending industry, I think Otterbourg is recognized as a leading law firm in the market. We've been able to maintain a high level of sophistication and expertise within a midsized law firm model because we attract, train and retain a group of very dedicated, talented attorneys who experience early professional success, and who are able to work with and learn under leading experts in secured lending law practice (as well as a few SFNet Hall of Famers).

We use leanly staffed teams of attorneys, usually comprised of a senior level attorney working with a junior or a mid-level attorney, where both attorneys have direct and constant interaction with the client, so the clients always know the attorneys who are handling their work. We also have developed departments within the firm to provide our secured lending clients with a full-service experience. So, whether the loan needs to be documented, worked out, or litigated over, we provide, as Lena said, cradle-to-grave representation for all matters that come out of our commercial lending practice. We also have excellent communication channels across the departments, so that, for example, a finance department attorney will often send to me an intercreditor agreement with a request to review the insolvency sections of the agreement to ensure that any such provisions requiring a second set of eyes are properly vetted.

While we don't have as many different practice groups as big law firms, we have established excellent relationships with a number of firms that have specialties that Otterbourg does not have. In this regard, we are very efficient in networking with firms that have those specialties that, together with Otterbourg's expertise, really gives our clients the best possible representation, as opposed to being tied to one firm that provides all types of legal services, but not, perhaps, the best in all applicable legal fields.

McTernan: I would second what Dan said, and I would also add, and Dan alluded to this, that while we have remained true to our "bread and butter" areas that we have particular experience and expertise in, we've also been nimble with the times to open ourselves up to other practices or specialties as they've come about.

I would say part of that is because people truly enjoy what they do here, so they're intellectually stimulated and interested in keeping abreast of the new movements and what's new and interesting.

Cremer: Part of what accounts for our success is that it really comes down to the basics. We have attorneys with a real storehouse of practical knowledge and experience in our areas of practice. When you combine that with the collaborative nature of our firm where our younger attorneys are given real responsibility and work closely with and learn from the more experienced attorneys, that provides real consistency and quality in the representation that we provide, and it makes all our attorneys invested in providing good outcomes for our clients.

In addition, we have a broad finance practice and work on deals of all sizes and in many different lending platforms, from middle-market deals to syndicated deals into the billions. So, for instance, when we represent banks and private lenders on traditional ABL deals, term loans, tech deals or various other types of specialty lending platforms, we have a broad knowledge of what the market is, and where it is heading, in these various areas. This market knowledge helps our clients navigate deal points and complex negotiations.

Surilov: I'm the newbie here, so I have the perspective of coming from a different firm. Coming from my prior big law experience, what makes Otterbourg unique is the sophisticated expertise we are able to offer as we typically have a senior partner specialist who is at the highest level in the field on every transaction instead of the deals being staffed with a large number of associates. What really separates Otterbourg, and is the key to its longevity, is the way that they treat people like family, which I think is what creates stickiness for the top talent.

In terms of deal structure and negotiation, I think the interplay between different credit facilities, such as term loans and ABL, will continue to evolve. Borrowers have a continued desire, understandably, to have items such as representations, covenants and default be consistent throughout their various credit facilities, and there has been an even greater push recently to mirror those provisions between the various credit facilities.

From a legal standpoint, what issues should lenders be concerned about in 2025?

Cremer: In terms of deal structure and negotiation, I think the interplay between different credit facilities, such as term loans and ABL, will continue to evolve. Borrowers have a continued desire, understandably, to have items such as representations, covenants and default be consistent throughout their various credit facilities, and there has been an even greater push recently to mirror those provisions between the various credit facilities. So, of course, that can create some push and pull of substantive issues, especially from the ABL perspective.

ABL lenders, along with their counsel, should continue to be mindful of the unique nature of revolving loans and term loans and the different stress points. ABL loans, for instance, generally require more stringent liquidity conditions for money leaving the loan party group, which is typically a bigger concern for the ABL lenders providing new revolving loans while monitoring the financial health and liquidity of its borrowers.

In addition to that, the landscape is still evolving related to liability management transactions and how they are addressed in loan documentation. We will look for continued feedback from the courts on the treatments of things such as dropdown financings and uptiering of transactions, which is still kind of working its ways through.

Fiorillo: From a workout restructuring perspective, maybe you're starting to see the results of certain deal structuring issues, similar to what folks talked about on the front end of loan documentation maybe a year or two ago. For example, there's been a lot of airplay associated with Serta provisions in loan agreements. These provisions are effectively intended to ensure that a subset of lenders within a loan facility cannot do certain things that deprives the other lenders within the facility from receiving the same pro-rata repayment rights under the loan facility. As of this interview, the 5th Circuit has yet to issue its ruling on whether the Serta provisions were complied with in connection with the Serta Simmons Bedding Chapter 11 case, but I suspect that the 5th Circuit decision will have far-reaching legal and practical implications on the secured lending industry.

In one particular case in which Otterbourg is involved, the Chapter 11 case of American Tire Distributors, we saw firsthand one of the Serta provisions being litigated over in connection with DIP financing provided by an ad hoc group of term loan lenders. The excluded term loan lenders, who were not included in the DIP financing provided by the ad hoc term lenders, objected to the extent or the breadth of the exception to the Serta provisions contained in the underlying term loan agreement relating to DIP financing that could be provided by a subset of term lenders. The issue, ultimately, was not adjudicated because a settlement broke out. I think that we will see other skirmishes and posturing between lender groups over the extent and applicability of Serta provisions over the next year, and I think that you'll see a lot of

folks writing about how you can better craft the loan agreement to address the perceived holes in some of these Serta provisions to avoid the litigation that will continue over these issues in 2025.

Another legal development that I'm actually very interested in, although I may not have the best expertise in the underlying business, is the 2022 proposed amendments to the Uniform Commercial Code regarding the incorporation of digital assets. As of July 2024, I think 24 states have approved the incorporation of the digital asset amendments to the UCC. I think it is pretty exciting that a new Section 12 will be added to the UCC, in addition to changing some of the other existing sections of the Uniform Commercial Code to accommodate the proposed changes relating to these digital assets, which include things like cryptocurrencies and the use of control accounts to control and perfect liens on digital assets. I believe New York is still pending the approval of these amendments, but I have to think it will ultimately be approved.

I'd also just want to mention, although it's not a new development per se, but it may continue to evolve from a jurisprudence standpoint, is in the context of "make-whole" provisions. Make-whole provisions are not new, and they have engendered a lot of litigation, and we currently have a circuit split as it relates to whether or not these make-whole provisions are enforceable.

Currently, I believe the Fifth Circuit, which includes Texas, a hotspot for large bankruptcy filings that affect the ABL community, as well as the Third Circuit, another hotspot for bankruptcy filings being Delaware, have adverse case law as it relates to the enforceability of these make-whole provisions. Make-whole provisions are provisions in loan agreements that provide that if the loan agreement is terminated prior to its dated maturity, the lender is entitled to be compensated for, fill in the blank, lost opportunity, interest it didn't get to earn, or fees it didn't get to earn, or a combination of all that. And there are various states, including New York (Otterbourg was actually instrumental in helping form the New York law on this point) that will allow the enforceability of these make-whole provisions or otherwise known as early-termination provisions that give the lender the ability to make up for the lost opportunity associated with a prematurely terminated loan.

The recent bankruptcy court decisions in the Fifth Circuit, Third Circuit, and other courts, are basically saying, notwithstanding the state law allowing for the enforceability of these fees, these provisions that allow for these fees to be recouped as part of the loan, are not enforceable because under the Bankruptcy Code, you cannot collect unmatured interest. And some courts, including the Fifth and Third Circuits, have effectively concluded that any make-whole provision, no matter how you draft it, is deemed unmatured interest and, therefore, not enforceable in bankruptcy.

We're waiting to see if other circuits adopt this particular view of the section. It also could go up to the U.S. Supreme Court. The Supreme Court is, I would say, leaning towards a more conservative view of business transaction type legal issues. So, some creditor may want to take it up to the Supreme Court and have the highest court decide the issue in 2025.

McTernan: As Dan mentioned, the Fifth Circuit has really become a hotspot that has sort of dethroned Delaware for a little while as the main place to seek Chapter 11 relief. And with that comes ramifications for all creditors and not just secured creditors because of different perceptions of debtor friendliness in particular jurisdictions. We have also seen a rise in bankruptcies in the District of New Jersey.

I've even had a big bankruptcy in Indiana of all places. We may see this trend continue where it's not just Delaware focused and these other circuits continue to come into play, particularly since we can expect that the law at the circuit level will catch up now to be more defined in each of these areas. It will be interesting to see if that trend continues as well.

Surilov: I am expecting to see a continuing trend from 2024, which is an increase in defaults. Based on the current trends, the defaults will continue in 2025 and there will be some accommodations in this connection. A lot of borrowers were very successful in pushing out maturity in 2024, so there will not be as much concern there. That might diminish some of the defaults and some of the flexibility that the borrowers have been looking for.

With the markets being stronger, a lot of the private equity firms are going to start to look for financial flexibility in the documents and loosening up some of the covenants that were tightened up during and after COVID. We will see a lot of the older provisions and covenant-light provisions coming back that created some of the litigation Dan and Pauline were talking about.

The direct lenders in the middle market are going to stay very strong because they can focus on some of the borrowers that are not doing as well, while the banks are still going to look at the stronger borrowers who can actually dictate more terms than they've been able to in the past. I don't see as many bankruptcies as Dan sees, but I do see a lot of things that might cause bankruptcies in the future because the borrowers are going to be asking, especially sponsors, for those things that we know can be detrimental to the lenders and the precedent down the road.

There still will be some borrowers looking for repricing and refinancings, but it most likely will not create as much activity as it did this year. Some of the sectors, such as healthcare and some of the energy sectors that have been struggling in the past, are going to be able to get some better provisions in their documents. We'll see a lot of renegotiation bringing back some of the older, more borrower-friendly provisions that we haven't seen in the past three to four years.

Do you see the recent election results having any influence on your clients and/or practice?

Fiorillo: I think the short answer is I think there's going to be a lot of uncertainty initially regarding what President-elect Trump's agenda will actually be relative to what people are expecting the administration to implement that might impact the landscape in which the commercial lending clients that we represent will have to navigate.

Specifically, I know that tariffs have become a hot-button issue. I read that Trump said that he would increase tariffs against certain Chinese companies up to 60 percent or something along those lines, and it would be more or less a game-changing type of move that will have broad implications directly and indirectly against a number of industries that rely on those imports to run their businesses, and the impact that will have on prices for goods and services. You have a U.S. consumer base that's been basically beaten up over the last several years with the inflation spikes that we've all experienced. Supply chain issues have contributed to that. And now, going into 2025, we expect the interest rate environment to settle down a little bit, which should hopefully give people a break on having the ability to spend more money, but will that be enough if there are certain actions taken that could create pricing issues, and to what extent that impacts the ability of our clients' borrowers to maneuver around that challenging landscape or whether that's going to cause more bankruptcies and insolvencies, remains to be seen.

There is definitely an expectation, at least among the clients that I've spoken to, that the new administration is more business friendly, to use that overused term, and less regulation driven. I think that there's at least an expectation that under the next administration the banks will have more flexibility to operate.

I also think that there are certain things that won't change. I don't have a crystal ball, but at the end of the day the market drives a lot of political decisions and, ultimately 'it's the economy, stupid', to use that quote, and I think that if things start going south as a result of whatever the new administration wants to implement, I don't expect it to continue in a bad direction. I would expect things will normalize, hopefully within the second or third quarter of 2025 after people realize what the new landscape will be.

We represent a whole host of clients from the largest banks down to some very small specialty lending shops and folks in between, and so what might impact a large bank may not have the same impact or may have a much bigger impact on a number of our specialty finance clients.

McTernan: Following up on something Dan mentioned, I think it's likely we will see a push toward deregulation, especially of the regulatory agencies that regulate the banks. Recently, the Wall Street Journal came out with an article that said that the Trump administration is already looking to consolidate or altogether eliminate a lot of the bank regulators. I think that'll have a big impact.

Obviously, another potential impact, although the results won't be seen immediately, is the jurisprudence of Trump-appointed judges. There is likely to be a movement towards being more willing to leave matters up to the states and limit agency power.

Cremer: I think the short answer to your question is "most certainly." No matter where you fall on the political spectrum, it's hard not to notice the optimism in the business world for some of the anticipated policy changes regarding, say, corporate taxes and reduction in regulations. The potential to again prioritize traditional sources of energy production will probably have a big impact on the market as well.

These policies could translate in significant ways to the lending world. A reduction in the regulatory environment will probably lead to more credit being available, especially in connection with possible changes to capital reserve requirements and liquidity rules for banks and other financial institutions. Those changes, in turn, can have an effect on the risk tolerance for banks in providing loans. The potential is there for a loosening of credit.

The election results may also affect the continued implementation of ESG requirements and incentives, for which there has been a big push with banks and borrowers over the past few years relating to, among other things, its effect on interest rates and other loan terms. So, there is certainly potential for a decreased emphasis there due to expected regulatory rollback and court challenges.

Surilov: There will be a lot of changes in the second quarter of 2025 because the beginning will resemble the end of 2024. I think tax is obviously going to be a big issue. The Tax Cuts and Jobs Act (TCJA) and the related tax provisions are expiring at the end of 2025, so I think those will be revisited and possibly continued, and I think a lot of the things we've been seeing in the credit agreements, such as getting 100% of equity of foreign companies, which has become more common, that is going to continue because now there's certainty that the favorable tax provisions will be extended.

I think there's going to be a lot of losers and winners in some industries. Healthcare will be impacted by some of the Medicare reform that's coming down the pipeline. There are also federal staffing changes that will impact the healthcare industry. Energy is going to be another one that will be interesting to watch. I think there'll be some things that are loosened up for fossil regulations that the companies in this suffering sector have been looking for in the past year. But I think the ESG initiatives that have been in a lot of the legal documentation and have become a hot topic are going to take a back seat.

Currently, everyone is kind of hoping for the ease of inflation and a cut in the rates. Based on the current projections, the rates will not come down as much as expected, which is not what the market or certain companies have been hoping for in the coming year. I think that's going to squeeze some of those spreads that everybody's hoping to change, and it's going to push the borrowers towards the middle market and some of the direct lenders, and Otterbourg is well positioned for 2025 and beyond as we are diverse as a firm and well positioned for all types of borrowers and lenders.

Michele Ocejo is SFNet director of communications and editor-in-chief of The Secured Lender.

TSL FEATURE

Is Your ABL Collateral Covered?

Why Action and Close Monitoring Are More Critical Now Than Ever Before

BY IAN FREDERICKS, MICHAEL MCGRAIL, RICK EDWARDS, AND SCOTT CARPENTER

As the market grapples with increased restructurings and rising bankruptcy costs, asset-based lenders face significant risks if they fail to understand the true position of their collateral within a timely manner. Across industries, asset values are declining rapidly. This necessitates more active and frequent collateral and borrowing-base monitoring.

This article explores the challenges and evolving trends across asset classes and the implications for asset-based lenders.

Asset Challenges

The volatile nature of asset values in the current market presents a substantial risk to lenders. Appraised values are trending down, reflecting not just increased capital costs and broader economic challenges, but also rapid value erosion resulting from the very decisions lenders make as their borrowers begin to struggle. This instability demands a more proactive approach from lenders, from forbearances to milestones and everything in between.

Valuation Considerations

Trends in Consumer Goods and Retail: With stubborn inflation and increased interest rates, the consumer is getting squeezed, especially consumers with lower to middle incomes. These consumers are looking for value, causing retailers to discount aggressively to drive sales and sacrificing margin. This promotional activity has a negative impact on gross orderly liquidation values (GOLVs), which has a direct correlation to lower net orderly liquidation values (NOLVs).

During the pandemic, supply chain issues caused a spike in the value of consumer goods, particularly durable assets such as home goods, furniture, exercise equipment, and outdoor goods. While this had a positive short-term effect on firms' revenue and profits, and brand value, it ultimately decreased future sales as the long-lasting nature of these products suppressed future demand.

More recently, we've experienced a downturn in the real estate market due to increased interest rates. Consequently, we've observed materially increased inventory levels across the home goods, furniture, and mattress sectors. These "big ticket" goods are recovering well below historical levels as consumers simply lack the disposable income to purchase these goods, even in going out of business or store closing sales. Consumers are also carrying record credit card debt with high interest rates, further softening demand across these and other inventory categories.

Direct-to-consumer (DTC) companies, which for years leveraged low-cost capital to market to consumers—some without ever becoming profitable, are now facing materially higher costs and limited capital availability. This financial strain is weighing heavily on DTC businesses, forcing more widespread restructuring and bankruptcy.

The food and grocery sectors, however, continue to perform generally well despite some downward pressure on higher-end brands as consumers trade down to private labels to navigate inflationary pressures.

Consumer Intellectual Property (IP): Prior to and early in the pandemic, we saw new, smaller entrants in the brand acquisition space. Poor financial performance post-acquisition and rising capital costs caused some entrants to liquidate while others saw liquidity dry up. Additionally, the largest brand aggregators in the space have been focused on larger and larger acquisitions to drive growth. Consequently,

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there are fewer and fewer potential buyers, driving down IP recoveries.

With the continued rise of social media, many new, digitally native "brands" surfaced. Many of these brands were linked to one or more celebrities or social media influencers and on growth without profitability. These brands have recovered poorly, especially in distressed circumstances.

As noted above, the mismatched home goods, furniture, exercise equipment, and outdoor goods supply issues led to increased on-hand inventories and substantial discounts to push products through retail doors. Unexpectedly, this resulted in rapidly decreasing brand value as potential acquirors question when the demand will return.

Despite some headwinds, luxury brands in the consumer goods space with a long history and strong public awareness continued to perform well despite reductions in revenue and profits. Lenders should consider more frequent valuations of luxury IP.

Real Estate Sectors: The office sector is experiencing a

significant shift due to work-from-home trends leading to oversupply and low demand, which is expected to continue throughout 2025. Filling vacant spaces and retaining tenants remain challenging with negative rental growth and high overall cap rates persisting. However, the transition to recovery is expected in 2026 or 2027, with limited supply additions and conversions to alternative uses.

The industrial sector is seeing rising vacancy rates and flattening rental rates due to supply additions and a slowdown in leasing activity. This has led to stable to moderately declining market fundamentals, which is expected to continue in 2025.

The multi-family sector varies significantly across regions with expansion anticipated to dominate by the end of 2025, including strong demand, low vacancy rates, rental growth, and decreasing overall cap rates.

The retail sector was showing signs of recovery with improving fundamentals, increased occupancy, and rents expected to strengthen. However, recent distress in the retail sector – with thousands of stores closing and retailers looking to restructure their leases – has softened the near-term outlook for retail real estate, especially in B and C centers. Transaction activity is relatively low, but is expected to increase if interest rates decline in the coming quarters.

Machinery & Equipment: Beginning in mid-2020, the machinery and equipment market experienced a price bubble that lasted through the summer of 2022 due to increased raw material and wage costs, labor shortages, and supply chain issues. This led to high prices for used equipment as original equipment manufacturers (OEM) struggled with backlogs and extended lead times. As the pandemic waned asset classes stabilized, and 2023 saw a downward correction in used market values. The availability of used equipment increased as end-users replaced older assets with new ones, driving prices lower.

- Although labor challenges persist today, wages and availability have stabilized, and raw material prices and logistics have normalized. While the metalworking and manufacturing sector faced demand declines due to disruptions in the construction and automotive markets, it has rebounded driven by increased demand for metal products and technological advancements. Stronger business conditions and better access to credit are encouraging investment in new metalworking tools, despite challenges in key downstream sectors.
- The construction equipment industry continues to correct from peak pandemic values impacted by OEMs catching up with demand and high interest rates. Most used equipment entering the market is aged and overutilized. However, a positive outlook for 2025 is expected with government construction investment and a talent shortage increasing receptiveness to new technologies.
- The trucking industry is expected to see a more favorable rate environment in 2025, gradually ending the freight recession. The upcoming 2027 EPA emissions regulations are expected to benefit sale pricing and volume for new vehicles exempt from the new standards. The van trailer market in 2025 is anticipated to be subdued due to cooling demand and oversupply with a market rebound likely not improving until 2026.

Factors Impacting Appraisal Accuracy

More and more, liquidation outcomes vary materially from appraised values, many of which are outside the control of liquidation firms because of the time between appraisal and liquidation, reduced demand, inventory mix erosion, increased promotional activity, and, critically, store and distribution center (DC) employee challenges. While some of these are within lenders' control, others are less so.

For example, lenders do not – and should not – determine a retailer's sales and promotional strategy. But increasingly, lenders have given their borrowers more time and flexibility leading to a potential insolvency. During these periods, retailers desperate to drive sales to avoid a potential filing begin promoting their best-selling inventory at the same time vendors begin to slow ship or stop shipping inventory. So, the highest recovering inventory is partially or completely gone by the time a liquidation begins, significantly suppressing GOLVs and NOLVs.

In all retail and consumer winddowns and business liquidations with minimal or no DTC, employees are the key to success in both sale performance and avoiding shrink or inventory loss. Prior to the pandemic, liquidation firms implemented standard incentive and retention bonus programs for these employees, which typically required a pool of about 10% of base payroll. Since the pandemic, this pool was increased to 15% of base payroll, which is proving inadequate to retain employees as mass walkouts and callouts frequently disrupt liquidations. Moreover, the entire pool, or nearly the entire pool, is allocated to retention. So, if employees stay, they receive their bonus regardless of performance.

Many appraisals are written on a "guaranteed" or "equity" basis pursuant to which liquidation firms will advance capital to pay off or down lenders in exchange for the right to liquidate the collateral and control many aspects of the liquidation such as term, expenses, marketing, promotions or discounts. In fee-for-service transactions, liquidation firms only make recommendations on these and other aspects, relying on management to make the final decisions. But more and more, management teams disagree with the recommendations. In many instances, they may have objectives unrelated to maximizing the asset recovery, which are driving decisions contrary to recommendations. Thus, the explicit assumptions underlying the appraisal do not exist. Yet, lenders and professionals expect the NOLVs in the appraisal to hold, which is not happening.

Lastly, not following a liquidation expert's guidance on timelines can result in the slower movement of goods and/or poor allocations from DCs to stores and from shuttered facilities or holding points to other locations. This leads to (i) lower in-stock levels in stores and imbalances among the stores that cause poor sales and force inventory discounts more than intended and (ii) inefficient order fulfillment and increased labor and occupancy costs. Similarly, post-sale removal and shipment of inventory and delayed equipment sales can impact seller liquidity as well as buyer production output, leading to the delayed delivery of goods, violation of a buyer's contractual obligations, and missed seasonal or other critical selling periods.

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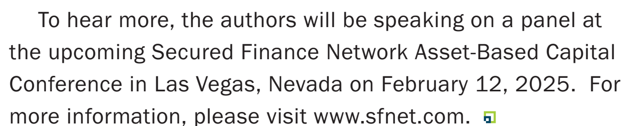
Conclusion

The rapidly evolving market conditions – coupled with evolving dynamics between borrowers, lenders, professionals, and liquidation firms – underscore the importance of remaining diligent and active in monitoring borrower performance, borrowing bases, and collateral value. As requests come from borrowers and their professionals, lenders would be well-served to remember that they did not take equity risk; they only have downside and not upside potential. While lenders do not have control of outcomes, they do have more tools at their disposal to mitigate risk and influence outcomes than they currently employ.

To hear more, the authors will be speaking on a panel at the upcoming Secured Finance Network Asset-Based Capital Conference in Las Vegas, Nevada on February 12, 2025. For more information, please visit www.sfnet.com.



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TSL FEATURE

Refinancings Dominate 2024 ABL Loan Market: Well-Capitalized Bank Lenders Look to Grow New Assets in 2025

BY MARIA C. DIKEOS

Maria Dikeos of LSEG LPC provides readers with the highlights of 2024 and explores the trends, insights, and what's ahead for the leveraged lending market in 2025.

After a difficult 2023 marked by fears around bank lender stability, adequate bank capitalization and regulatory pressures, the U.S. syndicated loan market rebounded in 2024 to place over US$1.6Tr of leveraged issuance by mid-December, a new record which outpaces historical, annual totals (Fig. 1).

Lenders noted a renewed sense of orderliness in the market, driven largely by qualified reassurances in the context of looming regulatory concerns around risk-weighted assets (RWA) and Basel III, as well as monetary easing via two rate cuts by the Federal Reserve.

The improved market tone was reinforced by burgeoning optimism around the state of the U.S. economy and opportunities for growth. For much of the year, transactors were guardedly hopeful about the Federal Reserve's ability to balance bringing down inflation without drifting into a recession – a soft landing. Post Labor Day and then again, following the U.S. election and the dissipation of any lingering concerns around possible election uncertainty, a bullish market outlook for the rest of the year and into 2025 gained momentum.

Repricings and Refinancings Dominate

Despite improving market sentiment, however, borrowers were in no hurry to undertake large event-driven transactions for much of the year. Roughly US$330bn or just under 21% of total 2024 leveraged loan volume represented new money transactions – largely in the form of upsizings and a smattering of M&A deals (Fig. 2), down from 33% in 2023 and a far cry from the 50% pro rata share of the leveraged loan market logged in 2022.

At roughly US$70bn (as of the beginning of December), buyout volume was running at a pace over two times year-ago levels (the latter of which represented a 20-year low). "New issue is getting done," explained one arranger at the end of 1H24. "And it is pricing well. The market is in a good spot, but it is lacking adequate supply. We are churning dollars that are already in the system rather than bringing in new opportunities."

By the end of 3Q24, the leveraged market did see an increase in M&A activity via the broadly syndicated loan market as the Fed rate cuts and public market valuations supported both opportunistic deal flow and retail executions with favorable spread dynamics, but it was ultimately repricings that defined the leveraged loan market in 2024.

"Unfortunately, the boring, but big story for 2024, was the market catch up on refinancings," according to one arranger of leveraged debt. "The niche story that wasn't is that we did not have the M&A that we wanted."

Over US$430bn of leveraged institutional issuance, alone, was repriced as of early December (Fig. 3). "It has been a flurry of refinancing activity," added another arranger. "Given where the average index spread is, we may see it carry into the new year. Demand for loans remains robust and over 75% of loans are trading over par, which is a near record."

MARIA C. DIKEOS
LSEG LPC

Despite the Highest Total on Record, ABL Lending Felt Thin

Against this backdrop, the U.S. asset-based lending (ABL) market pushed over US$111bn of issuance through retail syndication by early December to make up 7% of total 2024 leveraged loan volume (Fig. 4), the smallest share of overall leveraged lending since 2017.

Fig. 1: Leveraged volume

US leveraged loan issuance nears US$1.6Tr, a record high

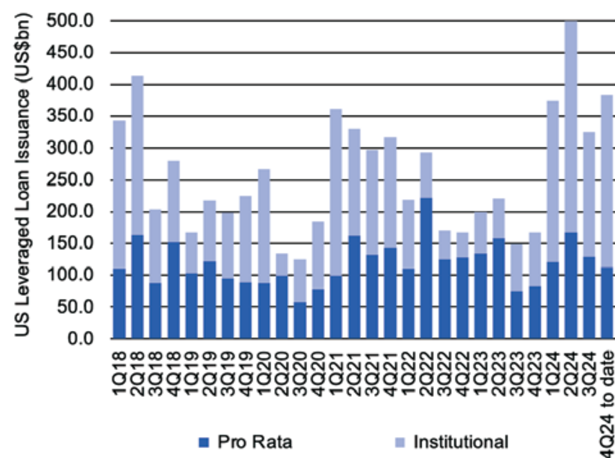
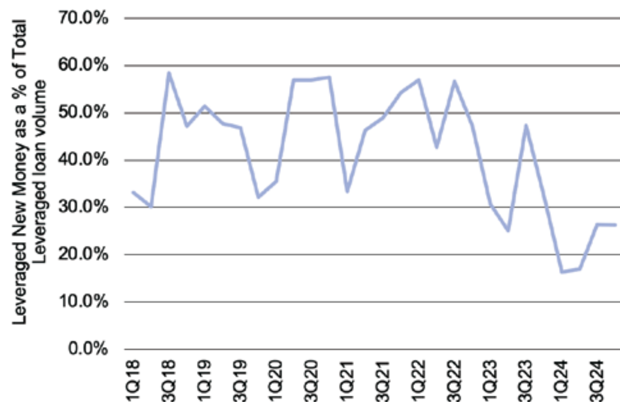


Fig. 2: New Money

New leveraged loan assets make a slow return to market



Source: LSEG LPC

Fig. 3: Repricings

Record 2024 US institutional repricing volume hovers north of US$430bn *(numbers through December 10)*

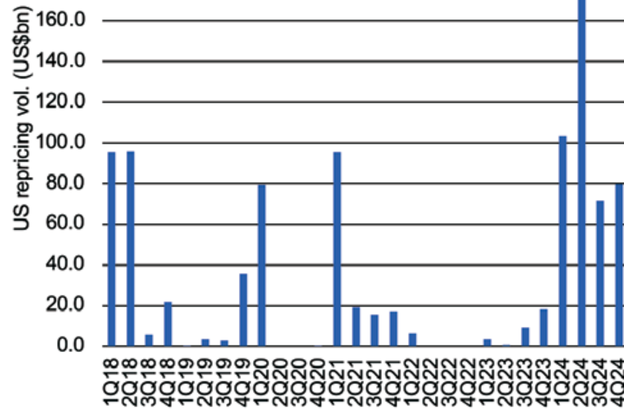


Fig. 4: New Money

New leveraged loan assets make a slow return to market

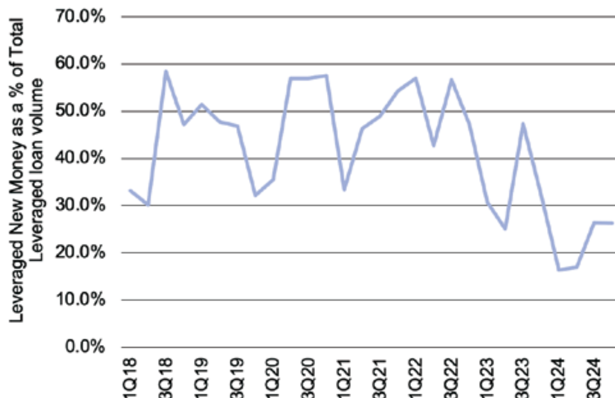
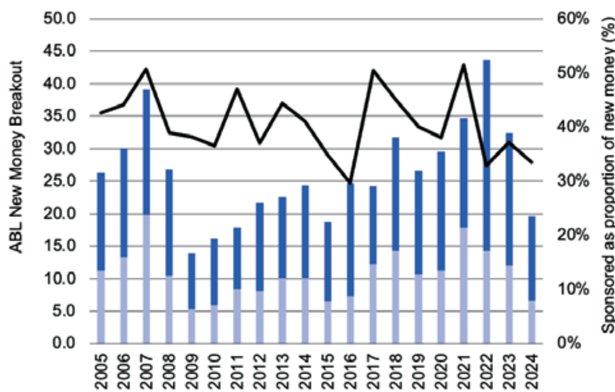


Fig. 5: Sponsored activity makes up roughly 33% of new ABL assets in 2024

New leveraged loan assets make a slow return to market



Source: LSEG LPC

The results represented the fourth highest annual totals on record. Similar to the broader leveraged cash flow market, the mix of deals skewed heavily toward refinancings, and supplemented with emerging signs of a nascent new money pipeline.

"2023 was a big capital 'No' year. Credit got tighter. There were renewals, but not for every name and this kept several issuers out of the market – they knew they would not be able to raise the funds they had. The market is more robust now," pointed out one ABL lender.

"The 2021-2022 bank market was a 10 out of 10," added a second lender. "But in 2023, it deteriorated to a 4 out of 10 and now we are at an 8 out of 10. Banks have plenty of capital and structure, deal terms are good for issuers."

By early December, corporate borrowers had raised just over US$13bn in new loan volume, while sponsored issuers had placed roughly US$7bn (Fig. 4) of issuance. Less than US$6bn of combined corporate and sponsored new issuance for the year backed acquisitions.

Fig. 6: ABL New Money vs Refi Vol

Refinancings make up over 82% of 2024 ABL calendar

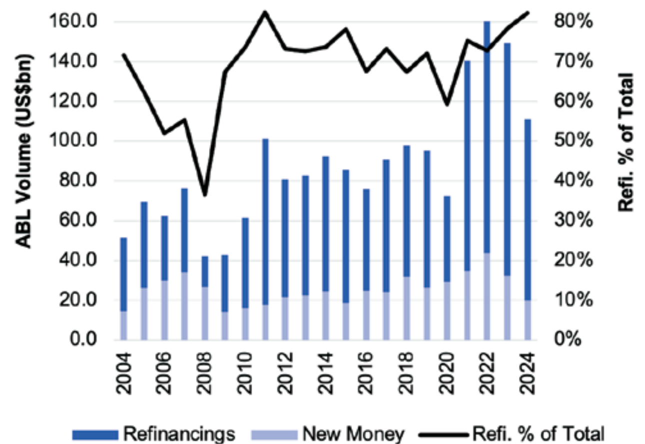
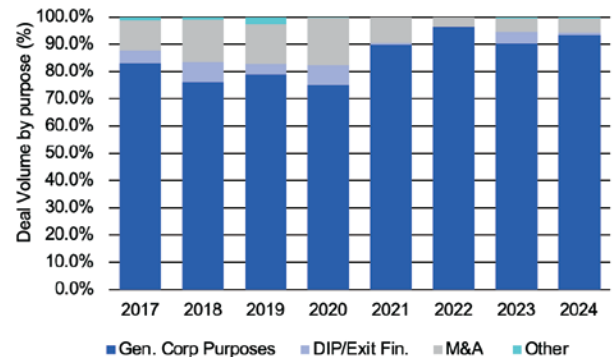


Fig. 7: ABL Vol by purpose

M&A lendng represents roughly 5% of 2024 ABL issuance



Source: LSEG LPC

Refinancings Drive Activity

At over US$91bn, refinanced ABL credits represented over 82% of total ABL issuance for the year (Fig. 6). Over 93% of 2024

ABL volume supported general corporate purpose needs, up slightly from full year 2023 totals but lower than the 96% share garnered in in 2022. Event driven activity in the form of DIP/exit financings were down at less than 1% but M&A activity did edge up to 5% year over year but remained well below historical M&A norms well north of 10% (Fig. 7).

Issuers pulled deal flow forward in 2Q24 and 3Q24 ahead of the election, but lenders note that there are several deals set to mature in the coming years which will return to market in 2025, including a smattering of 2021 vintage deals.

At the start of 2024, outstanding ABL commitments totaled US$354bn (Fig. 8). Of this total US$117bn comes due in the next 24 months (Fig. 9).

"I look at the cliff and it is not a five-alarm fire," said one arranger, "but an opportunity for all banks to look at their portfolio

Fig. 8: ABL Loan Commitment

Outstanding ABL holdings over US$345bn, down modestly compared to 2023

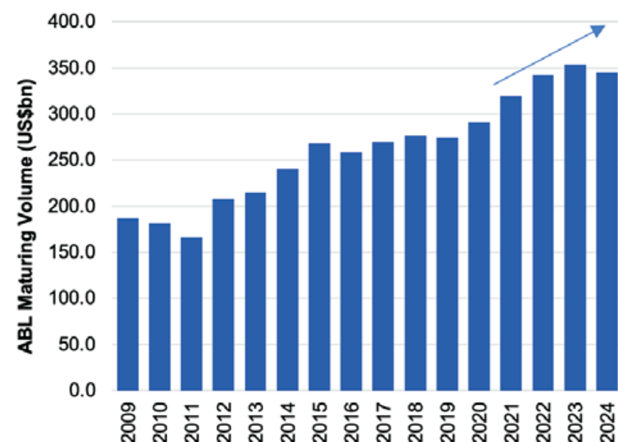
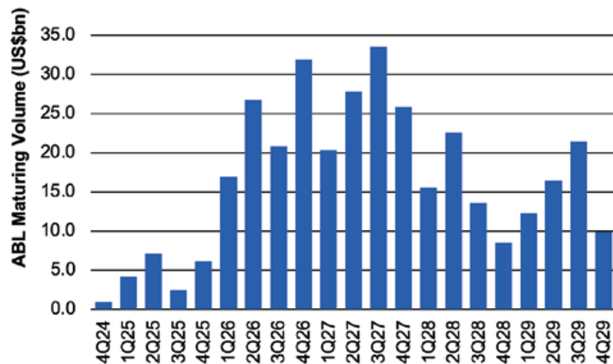


Fig. 9: ABL Refi Cliff Historical Comp

US$224 bn or 65% of current ABL outstanding commitments mature between 2025 and 2027



Source: LSEG LPC

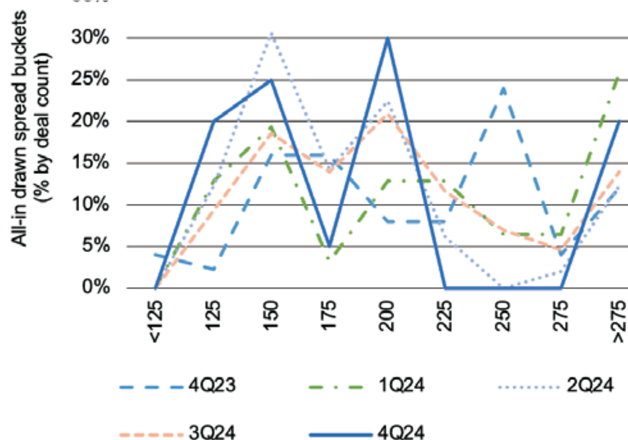
names. We will look at returns. Some banks may opt to lighten up on some names and do new deals. That will be an important feature over the next 18 months. Banks will pull where they don't think there is long term return and others will come in."

Erosion of Traditional ABL Cushions?

At the same time, a number of lenders say that the market is arguably grappling with the erosion of some core ABL tenets. Unsurprisingly, spreads have come in amid robust bank capitalization to hover at historical lows of roughly 125-150bps over SOFR for strong, well-known names. This is down from 175-250bps over SOFR at the end of last year (Fig. 10). Of greater concern is what several lenders say has been the degradation of ABL cushions, which have long protected syndicates. "The

Fig. 10: ABL pricing by bucket

By year end 2024, average pricing edged down, hovering in the range of 125-150bps



Source: LSEG LPC

underpinning of asset-based lending is 'credit be damned, we lend against assets and we are good at lending to good assets.' But in 2024, there have been some close calls on ABL losses." Watered down appraisal values and arguably looser valuation methods amid deteriorating credit conditions on select names have been flagged as key markers for the lender community to keep an eye on in 2025.

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GEO-POLITICAL INSIGHTS

ELECTION TRENDS

Reflections on the Year of Elections – Part Two

BY DAVID CHMIEL

As 2024 ended, Donald Trump's re-election reshaped the global political landscape, with significant implications for U.S. trade and foreign policy. This article delves into the potential impacts of his presidency on economic regulation, international relations, and the evolving dynamics of conflicts in Ukraine and the Middle East, making it a crucial read for understanding future geopolitical shifts.

As 2024 drew to a close, so too did the "Year of Elections," in which almost half of the world's population lived in countries undertaking some form of national election. It reached its crescendo on November 5 when Donald Trump – defying some expectations – won a second term as president of the United States, while the Republicans took back control of the U.S. Senate and retained their majority in the House of Representatives. This was a year of drama in the global political landscape, leaving it much different and, arguably, less certain than when the year began. Many of these elections occurred against a backdrop of pessimism – including throughout the G7 – with economic issues such as inflation, job security, and social inequality at the forefront of voters' concerns. Governments elected or re-elected in 2024 will almost certainly prioritize economic policy and, thereby, the regulation of business activity, as they seek to build on and secure the mandates given to them by worried voters.

In the November 2024 issue of *The Secured Lender*, I considered some of the political changes that came about earlier in the year from elections in Europe and beyond. This article focuses on the U.S. and looks at some of the implications of Donald Trump's return to the White House – primarily in terms of cross-border trade and investment, but also in relation to the place of the U.S. in the world, economically and politically. I also offer a few comments on evolving dynamics elsewhere and preview some electoral contests worth watching in 2025.

The Second Trump Administration: An Overview

One of the most striking things about the weeks immediately following Donald Trump's election victory was the speed with which foreign governments engaged with his nascent administration. Optically, power seemed to ebb away from the Biden White House faster than in previous presidential transitions. In November, Canadian Prime Minister Justin Trudeau flew to Mar-a-Lago to meet with the president-elect only days after Trump announced on social media that one of his first acts upon taking office would be to impose 25% tariffs on imports from Canada and Mexico unless their governments secured their borders with the U.S. Then, in December, French President Emmanuel Macron invited the president-elect to Paris for the rededication of Notre Dame Cathedral, according him the pomp and ceremony usually reserved for visiting heads of state.

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In some ways, this reflects the transactional nature of Trump's approach to politics. It rejects traditional ways of doing things, it is sometimes ideologically conflicting, and it creates a compelling need for foreign leaders to make their cases on issues early and personally – as they learned during his first term. That transactional approach to governing also begets unpredictability. Depending on one's political perspective, this can be seen as good or bad, but its net effect is a world in which institutions, including the business community, must develop greater agility to deal with domestic and foreign policy agendas that can change dramatically and rapidly, with consequences for regulatory frameworks and broader economic conditions.

Trade Policy: As in his previous presidential campaigns, Donald Trump made trade a central policy focus, including promising to introduce a universal baseline tariff of 10 or even 20% on all goods imported into the U.S. While this raises concerns that the global economy will undergo shocks from renewed trade wars, it remains to be seen whether the Trump administration implements and maintains these measures or whether they are simply a pretext for negotiation with foreign governments. Several components of this renewed focus on trade are worth considering.

First, it should be noted that, while Donald Trump made tariffs a central focus of his successful 2024 election campaign, Americans remain largely supportive of free trade in its broadest sense. Polling by Gallup in April of 2024 showed that 65% of Americans generally believed free trade agreements to be good – a figure almost 15% higher than the number expressing positive views of free trade in 2016, when Donald Trump was first elected. Moreover, many economists argue that sustained tariffs could drive up consumer prices, weaken economic wellbeing and make the economy less innovative and competitive in the longer-term. All these consequences could serve to reinforce support for free trade principles and yield a political backlash against protectionism, starting with the 2026 midterm elections. But the debate is, at present, simply not settled and some sectors – including the U.S. steel industry – are already lobbying the Trump administration for early tariffs on competing imports.

Second, the Trump administration is very likely to tie tariff

negotiations to issues beyond trade policy. In effect, tariffs are not just for trade wars any more. The president-elect's threats to impose tariffs on imports from Canada and Mexico were linked not to trade, but to border security. It is easy to envisage circumstances in which President Trump threatens tariffs on imports from fellow NATO members who fail to increase defense spending to meet NATO-wide targets. This source of friction is already exacerbated by the significant budgetary constraints in which many NATO members find themselves. It will only increase further now that the new NATO Secretary-General, Mark Rutte, has called for the NATO-wide spending target to rise from 2% of GDP to 3%. This co-linking of trade policy to other issues also highlights how the U.S.-China trade relationship – and the prospects of a renewed trade war between those two countries – cannot be decoupled from the rapidly increasing geopolitical and national security tensions that exist between them. To be fair, an aggressive approach to U.S.-China trade policy is one of the few issues commanding bipartisan support in the increasingly fractious world of U.S. politics. While President Biden rescinded many of the first Trump administration's tariffs directed at U.S. allies such as the EU, Japan and South Korea, China-focused tariffs were maintained and even augmented. China is prepared to respond in kind – as evidenced in December's announcement that it will ban exports to the U.S. of key minerals such as antimony, gallium, and germanium – all critical to high-tech manufacturing.

The Trump administration is very likely to tie tariff negotiations to issues beyond trade policy. In effect, tariffs are not just for trade wars any more. The president-elect's threats to impose tariffs on imports from Canada and Mexico were linked not to trade, but to border security.

Finally, it is always worth remembering that it takes two to have a trade war. If the Trump administration imposes tariffs on foreign countries, their governments are not obligated to respond in kind. They do so because it is, in fact, politically expedient for them to act in that fashion. While bodies such as the EU retaliated against tariffs imposed in the first Trump administration, other governments – most notably that of Japan's former prime minister, the late Shinzo Abe – opted to negotiate with the U.S. to reduce trade tensions and avoid a full-blown trade war. In fact, governments around the world are showing a propensity towards protectionism and economic nationalism outside of their trading relationships with the U.S. Nigeria, Ghana, and Indonesia have all recently imposed bans on exports of unprocessed minerals. In the summer of 2024, Canada imposed tariffs on Chinese electric vehicles, steel, and aluminum. Goods and services still flow across international borders at record levels and the risk of a return to a fully protectionist, autarkic global trading economy remains comparatively low. But businesses should be mindful of the political dynamics at play around the world – and not just in the U.S. – meaning that the ever-ongoing pursuit of freer trade that many took for granted a decade or two ago is not a given in this world of greater nationalism and volatility.

Antitrust, ESG and Regulatory Enforcement: Under the Biden administration, there was a significant increase in government oversight and enforcement of regulatory activity in areas such as antitrust, securities regulation and the introduction of environmental, social and governance (ESG) metrics into corporate decision making. In some circumstances – particularly the trend towards greater regulation of business in the ESG space – those activities came under sustained criticism and scrutiny from Republican lawmakers and from conservative-leaning courts. However, others such as the application of antitrust laws commanded bipartisan support. How President Trump deals with these executive powers is another key area for businesses to watch post-inauguration.

The overwhelming consensus is that the Trump Administration will adopt a considerably lighter touch to government regulation and oversight. Much attention will be paid to the work of the proposed Department of Government Efficiency – actually, a presidential advisory council rather than an executive department – under the leadership of Elon Musk and Vivek Ramaswamy. They have been tasked with identifying areas of potential cost savings in public expenditure, which could well include funds directed to the enforcement arms of executive departments. President Trump has also nominated Paul Atkins to succeed Gary Gensler as chair of the Securities and Exchange Commission (SEC). Atkins has previously criticized the efforts of the SEC to introduce ESG metrics into its regulatory oversight powers and is widely expected to adopt a much less interventionist approach to regulation than his predecessor, as will Senator Tim Scott (R-SC) who is seeking to take over as chair of the Senate Banking Committee from

Senator Elizabeth Warren (D-MA).

In early December, President-elect Trump nominated Andrew Ferguson, a current commissioner on the Federal Trade Commission (FTC), to succeed Lina Khan as that body's chair. Under Khan's leadership, the FTC became much more activist in its approach to the investigation and enforcement of federal antitrust laws. This anti-monopoly position commanded support within some circles of the Republican Party as well, with Senator Josh Hawley (R-MO) a particularly strong proponent of aggressive antitrust enforcement. In fact, there was media speculation over the summer that Khan might be asked to carry on as FTC chair in a future Trump administration. If the FTC does now pursue a less-interventionist approach to antitrust enforcement, it could spark a flurry of large-scale mergers, particularly in sectors that might have faced greater scrutiny under a more interventionist FTC, including technology and financial services. Nevertheless, congressional advocates for a more activist approach to merger control appear prepared to pursue this through legislative initiatives as well with Senators Hawley and Warren recently co-sponsoring a bill that would ban co-ownership of pharmacies and pharmacy benefits companies.

One area which may, in contrast, see an increase in investigative and enforcement activity is where regulatory oversight overlaps with national security. During the first Trump administration, bodies like the Committee on Foreign Investment in the United States (CFIUS), which assesses proposed inbound foreign direct investment for national security concerns, expanded its remit. President-elect Trump is clearly willing to tie trade policy to national security concerns in their myriad forms based on decisions taken in his first term and pronouncements made since his re-election. Further similar interventions are highly likely. An early test will come with the completion of CFIUS's review of the proposed acquisition of U.S. Steel by Nippon Steel – a deal to which President-elect Trump, President Biden, and Vice President Harris all expressed opposition. While CFIUS' review was scheduled to be completed while President Biden was still in office – and prior to this article's date of publication – President-elect Trump's reaction to it will offer insights into how his administration will treat the growing pool of issues in which trade and investment, government oversight and national security intersect.

As has already been noted, a second Trump administration is likely to remain skeptical about the value of the U.S. security alliance network, particularly if President Trump believes that allied countries are either not contributing sufficiently to the costs of these alliances or if the countries in question also fall foul of his trade agenda.

Foreign Policy: A strong case can be made that Donald Trump begins his second term of office in a much more volatile geopolitical environment than that which existed during his first term. The world confronts two major regional wars in Ukraine and the Middle East and other long-standing flashpoints in places like Taiwan, North Korea and the South China Sea are no less volatile. There is also little to no indication that President-elect Trump is any less skeptical about the value and relative burden-sharing of certain U.S. security alliances. In some ways, foreign policy was one of the areas in which President Trump was least predictable in his first term and there is every reason to believe that approach to international affairs will continue in his second.

Much has already been written about how a second Trump administration could spur negotiations to end the war in Ukraine, which will enter its fourth year a few weeks after Donald Trump takes office. Trump has questioned the value of U.S. long-term military support for Ukraine and it was no coincidence that, not long after the November election, Ukrainian President Volodymyr Zelenskyy indicated for the first time that Ukraine was prepared to make territorial concessions to Russia in return for NATO security guarantees. However, Donald Trump's return to the White House was not necessarily the sole catalyst for this change in tone. Ukrainians, not surprisingly, are becoming war weary. Polling by Gallup taken just prior to November's U.S. election found only 38% of Ukrainians now support the belief that their country should continue fighting until the war is won, down from 63% in 2023. Moreover, while citizens of numerous EU member states remain largely approving of both military support for Ukraine and maintaining sanctions on Russia, a survey for the European Council on Foreign Relations earlier in 2024 showed limited support in those EU countries for increasing assistance to Ukraine if a new U.S. president withdrew American support. To be fair, the opening of negotiations does not guarantee a rapid resolution, particularly if Putin demands a lifting of sanctions as part of the final settlement or if NATO members cannot reach

a consensus on security guarantees to Ukraine. But Trump's return to office certainly introduces new variables to a conflict that remains the most serious source of security instability in Europe in generations.

The geopolitical situation in the Middle East also changes at a rapid pace – as most recently evidenced by the unexpected collapse of the Assad regime in Syria. At the time of writing, little is known about the direction in which Syria's new interim government will take the country, but this is only one element to consider. Will Israel's ceasefire agreement with Hezbollah hold? Will a hostage deal be agreed upon with Hamas next? What are the risks of further escalations in the conflict across the wider region? There is every likelihood, based on past history, that President Trump will maintain or even increase pressure on Iran, perhaps through more aggressive targeting of its energy exports or even pre-emptive military strikes to weaken its nuclear capabilities. Such efforts would have consequences for shipping in the region and on global energy supplies and the global economy. Any energy price or supply volatility potentially gives the Trump administration impetus to encourage further U.S. domestic energy production, with the U.S. already becoming the world's largest oil exporter during the Biden administration.

As has already been noted, a second Trump administration is likely to remain skeptical about the value of the U.S. security alliance network, particularly if President Trump believes that allied countries are either not contributing sufficiently to the costs of these alliances or if the countries in question also fall foul of his trade agenda. Some argue that this reflects a broader U.S. trend towards isolationism and there have been calls from some European politicians for the EU to prepare to function in a world in which the U.S. disengages from international security commitments. Nevertheless, a survey for the Chicago Council on Global Affairs earlier in 2024 found that a majority of Americans – 56% – still support the idea of the U.S. playing an active role in international affairs. What remains striking is that Democrats are now more supportive of this view (at 68%) than Republicans (at 54%) or independents (at 47%). This represents a complete reversal of the historic position that existed for decades in which Republicans were more likely to support U.S. engagement in international affairs. The perennial question is whether President Trump is ahead of public opinion on this issue or whether the majority view of the U.S. public will limit how his administration deals with these various alliances and foreign policy engagements.

The Rest of the World: An Update and a Look Ahead to 2025

Of course, even as U.S. voters went to the polls in November, politics did not stop around the rest of the world. In the United Kingdom, the new Labour Government under Prime Minister Sir Keir Starmer has had one of the shortest political honeymoons in British political history after its landslide victory in July. Some polls now put Labour in third place behind the Conservative Party and the insurgent, populist Reform Party. This is attributable to a host of factors, not least of which is a seeming erosion in business confidence in the UK linked to employer tax increases, new worker-friendly labor laws, and constrained government spending. Starmer recently launched a "reset" of his government to try and regain momentum and they next year will test whether this has resonated with investors and the general public. Across the English Channel, a non-confidence vote in the French National Assembly ousted the government of Prime Minister Michel Barnier only three months after he was appointed by President Macron and France seems to be entering a period of political stagnation as voters increasingly support populist parties on both the left and right. Meanwhile, South Korea plunged into political chaos in early December when President Yoon Sook Yeol briefly declared martial law and was subsequently impeached by the South Korean parliament. This casts a significant degree of uncertainty over the future political direction of a country that continues to be an important lynchpin in U.S. alliance structures in East Asia and in the geopolitics of that region.

Looking forward to 2025, two further G7 countries will go to the polls at times when their incumbent governments appear increasingly unpopular. Germany will have early elections in February following the collapse of the coalition of incumbent Chancellor Olaf Scholz. As with France, the Netherlands, and a host of other countries in the EU, German voters are showing an increasing propensity to support more radical, populist parties – reflected in 2024 by the surge in support for the right-wing AfD in regional elections. This is partially due to increasing uncertainty about the future direction of the German economy linked to structural weaknesses in its once-mighty manufacturing sector. Canadians will also go to the polls before the end of 2025 as Prime Minister Justin Trudeau's current mandate expires. The governing Liberal Party trails significantly behind the opposition Conservative Party of Canada – including among younger voters who are concerned about their longer-term economic security in a country that has struggled with inflation, housing shortages and an unpopular carbon tax.

In many ways, the end of the "Year of Elections" simply marks the beginning of a new chapter in history. Now comes the hard part for those who succeeded at the ballot box: putting into practice the promises they made on the campaign trail. The example of the Labour government in the UK shows how political euphoria can evaporate quickly. Around the world, volatility and unpredictability is the "new normal" – and has been for some time. In a world in which voters appear increasingly less forgiving of incumbent leaders who fail to address their fundamental worries and concerns, there may yet be more change to contemplate when the next wave of elections rolls around in just a few short years.

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LENDING TRENDS

Cannabis Lending: Are You Ready to Fire It Up?

BY LON M. SINGER AND LYLE P. STEIN

When Federal and State laws collide, doing business is complicated and fraught. In this article, Riemer and Braunstein LLP commercial finance attorneys Lon M. Singer and Lyle P. Stein explore the background, evolution, and emerging landscape applicable to financing the cannabis[1] industry – with practical guidance for both the lending and legal communities.

Background – Legal Conflict

In 1976, Peter Tosh sang "legalize it, and don't criticize it."[2] As of this writing, the vast majority of states allows medical and/or recreational marijuana usage. Indeed, only three states – Idaho, Kansas, and Nebraska – currently do not allow use of cannabis in any manner. At the same time, under federal law marijuana remains classified as a Schedule 1 substance under the Controlled Substance Act – the same classification applicable to heroin and LSD.[3] Not surprisingly, federally-regulated banks and financial institutions, and to a lesser extent even private debt funds, struggle to understand whether and how they can or should play a role in funding the activities of this multi-billion dollar domestic industry.[4]

Compounding the challenge, banking institutions have been loath even to accept deposits and provide customary cash management services to a business whose revenue stream flows from legally murky, brackish waters -- where state and federal regulation and jurisdiction do not smoothly blend. This has been true despite the general eagerness of banks to augment depositary holdings in the wake of post-Covid bank failures and the contemporaneous runs on several institutions other than the "too big to fail" money center banks (which benefitted from a perceived flight to safety).

Consequently, banks have been sitting on the cannabis sidelines for several years. Private debt, subject to less regulatory oversight and perhaps less fixated on reputational risk, sometimes found high-yield opportunities too good to resist. But even where private debt stepped up, the cannabis industry routinely paid more for debt capital than the application of traditional underwriting principles would have required for a different industry vertical.

This dynamic did not, however, apply uniformly throughout the often-integrated North American finance market. In Canada, marijuana use (both medical and recreational) was legalized in October of 2018[5], although laws around the lawful manufacture, distribution, and use of cannabis products vary among the several Canadian provinces. Accordingly, for several years both banks and private debt lenders have dabbled to varying degrees in the Canadian loan market in favor of licensed cannabis growers, processors, distributors, and retailers.

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Experimenting, but Not Inhaling[6]

Lenders, including smaller and regional banks, have begun selectively to provide specific financing products to U.S. cannabis industry participants. Most notably, these initial forays have taken the form of real property financing, where mortgages or other security interests apply only to non cannabis related products.

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As mortgage/equipment financings, these facilities are less going-concern oriented than working capital facilities and inherently are not the sort of loans that generally or even frequently include providing a range of ancillary banking products to the borrower or its affiliates. This means that, even where it obtains a mortgage or equipment financing credit extension, a domestic cannabis company often will be unable to enter into a revolving credit line with a U.S. bank or use a U.S. bank to arrange letters of credit, factor receivables from sales of cannabis products, or hedge currency or commodity risks, much less arrange for credit card usage and processing.

Moreover, Lenders need to understand that various categories of collateral, including even equipment primarily or exclusively useful in cannabis processing, may be difficult to foreclose upon and impossible to liquidate, in the absence of state licenses. In the face of these obstacles, family offices and private debt funds remain the primary participants in this delicate financing space.

While there are some pro-cannabis advocacy groups alleging that state marijuana regulation is not preempted by federal law,[7] the legal uncertainty is only likely to be fully resolved

when two things happen (i) Cannabis is reclassified under the Controlled Substances Act, and (ii) federal legislation to legalize marijuana is signed into law. In this regard, on May 1, 2024, Senators Chuck Schumer (D-NY) and Cory Booker (D-NJ), together with Finance Committee Chairperson Ron Wyden (R-OR), reintroduced the Cannabis Administration and Opportunity Act (S.4226), which would both decriminalize and reschedule cannabis. The bill is currently viewed as unlikely to become law,[8] but even if it did, the full harmonization of federal and state laws would still necessitate a protracted process of rulemaking that some commentators suggest could require a period of years, during which the regulatory landscape would continue to evolve.

An interim step that has also been floated is the Secure and Fair Enforcement Banking Act of 2023 (or the SAFE Banking Act) (H.R. 2891), which would provide cover for banks to engage with state-sanctioned cannabis businesses without fear of (i) penalties from federal banking regulators, or (ii) anti-money laundering implications of handling proceeds of unlawful activities. For the major credit card processors, it is unclear whether passage of the SAFE Banking Act would convince institutions to open their menu of financial product offerings to the marijuana industry, or if that step would still demand federal legalization or rescheduling, as mentioned above.[9]

A prospective lender also wishes to be confident that all aspects of a cannabis business are operated exclusively within a single jurisdiction that authorizes and licenses all aspects of its conduct. Accordingly, in multi-borrower facilities, each borrower will grow, process, and/or retail its product within a single state (usually the state in which it is also incorporated or organized).

For now, operators and prospective lenders alike are relying in substantial part upon the fact that as a bi-partisan matter, and for about a decade, "the federal response to states' legalizing marijuana largely has been to allow states to implement their own laws."[10] As for banking practices, "[f]ederal banking regulators have yet to issue any formal guidance in response to state and local marijuana legalization efforts; however, in February 2014 the Treasury Department's Financial Crimes Enforcement Network issued guidance on financial institutions' suspicious activity report requirements when serving marijuana businesses." [11]

This approach is reflected in specific provisions of applicable loan documents that as a global or contextual matter, as well as with respect to specific contractual provisions, embody a sophisticated understanding of the legal and commercial landscape in this specialized lending space.

Today's Leading Edge

The lenders, both private debt funds, and banks, that are funding most freely into the cannabis space, have conducted important legal and business diligence that informs the structures we are seeing in practice today.

First, the loans in each case we have encountered take the form of single or delayed draw term loans, i.e., they are not revolving facilities. Structurally, too, the corporate or limited liability organizational structure is carefully scrutinized and informs the determination as to which entities in the organizational structure can and should be loan parties, with potential covenants restricting the activities of non-loan party subsidiaries. Lenders will also need to weigh the implications of equity pledges in any subsidiaries that own state marijuana licenses, since such pledges may trigger reporting requirements (for beneficial owners of state-licensed entities) and be subject to restrictions on the transfer of state-issued marijuana licenses.[12]

A prospective lender also wishes to be confident that all aspects of a cannabis business are operated exclusively within a single jurisdiction that authorizes and licenses all aspects of its conduct. Accordingly, in multi-borrower facilities, each borrower will grow, process, and/or retail its product within a single state (usually the state in which it is also incorporated or organized). In this way, its interstate commerce activities are minimized and, instead, its business is vertically integrated within a single state that is legally favorable to its operations.

Additionally, obligors' secured structures limit the collateral

to non-cannabis related products and assets, primarily machinery and equipment, intellectual property such as federally registered trademarks, packaging materials, hemp[13] products, and CBD products (Cannabidiol, which is derived from hemp or manufactured in a laboratory and is not considered a controlled substance). Moreover, there have developed a litany of particular representations and covenants designed narrowly to: (i) define the scope of the business and assets being financed, (ii) help ensure compliance by the obligors with applicable laws to the greatest possible extent, and (iii) empower lenders to exercise rights and remedies against obligors and/or collateral when appropriate.[14]

Specifically, loan documentation will initially need to address the fact that a state-sanctioned marijuana business is, by definition, violating federal cannabis laws, including the Controlled Substances Act, (21 U.S.C. § 801 et seq.); that dilemma supports lenders requiring strict compliance with all applicable state cannabis laws. Setting aside the typical negotiations on materiality qualifiers, the ubiquitous "compliance with laws" representations and covenants will need to exempt federal cannabis laws from their scope, while avoiding overly-broad exemptions of laws and activities that may overlap with such cannabis laws.[15] For example, a recent credit agreement we prepared and negotiated for a financing transaction consummated in favor of a North American (U.S. and Canada) industry participant provides, in pertinent part, that:

The cannabis industry poses unique challenges for the banking and lending sectors. It also represents a massive opportunity, with projected growth (no pun intended) in North America alone from a $43 billion industry in 2022 to over $400 billion by 2032.[16]

"Agent and the Loan Parties acknowledge that although Canadian Cannabis Laws and certain State Cannabis Laws have legalized the cultivation, distribution, sale, transfer and possession of cannabis and related products, (a) the nature and scope of Federal Cannabis Laws may result in circumstances where activities permitted under Canadian Cannabis Laws and State Cannabis Laws may contravene Federal Cannabis Laws and (b) engagement in Restricted Cannabis Activities may contravene Federal Cannabis Laws. Accordingly, for the purposes of this Agreement and any other Loan Document, each representation, covenant and other provision hereof relating to compliance with Applicable Law will be subject to the following: (i) engagement in any activity that is permitted by Canadian Cannabis Laws or State Cannabis Laws but contravenes Federal Cannabis Laws, and in respect of which the general practice of the applicable Governmental Authority is, or the applicable Governmental Authority has agreed (or is bound by Applicable Law (e.g., the proposed Secure and Fair Enforcement (SAFE) Banking Act (H.R. 1595) and the proposed Clarifying Law Around Insurance of Marijuana (CLAIM) Act (H.R. 4074 and Senate Bill 2201))) to forego or have otherwise suspended prosecution and enforcement of such Federal Cannabis Laws will not, in and of itself, be deemed to be non-compliance with Applicable Law or engagement in any Restricted Cannabis Activity; (ii) engagement in any Restricted Cannabis Activity will be deemed to be non-compliance with Applicable Law; and (iii) if any Change in Cannabis Law results in the business activities of Borrowers, any other Loan Party or any of their Subsidiaries becoming Restricted Cannabis Activities, such Change in Cannabis Law will be deemed to have had a Material Adverse Effect. Nothing contained in this Agreement or in any other Loan Document shall require any Borrower, or any of the other Loan Parties or their Subsidiaries to violate any provision of the Canadian Cannabis Law or State Cannabis Law or its attendant regulations, as applicable."

As for compliance with state cannabis laws, it is imperative that borrowers remain in strict compliance with state cannabis laws and

licensing regulations, to minimize risks of forfeiture of assets or of licenses to state authorities–and also to deny federal regulators any incentive to begin enforcing federal cannabis laws. Lenders may want access to their suite of remedies (including acceleration of loans) if there are even minor (and certainly less than MAE-triggering) violations of state cannabis laws. In furtherance of that approach, the "Events of Default" under the Credit Agreement quoted above expressly include any Loan Party engaging in any "Restricted Cannabis Activity" and any "Change in Cannabis Law" (as each such term is specifically defined). Inevitably, however, as lenders lend more regularly to the cannabis industry, increased competition may empower borrowers to insist upon relaxation of such strict covenant and default provisions.

Navigating Through the Haze

The cannabis industry poses unique challenges for the banking and lending sectors. It also represents a massive opportunity, with projected growth (no pun intended) in North America alone from a $43 billion industry in 2022 to over $400 billion by 2032.[16] Lenders, particularly federally regulated banks, undoubtedly will continue to balance in their underwriting and structuring processes, the commercial and legal risks inherent in the conflicts between federal and state laws, against the expanding economic opportunities to carve out a niche in an important commercial space—all while keeping a watchful eye on the rapidly changing regulatory landscape.

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1 The word "cannabis" refers to all products derived from the plant Cannabis sativa. The cannabis plant contains about 540 chemical substances. The word "marijuana" refers to parts of or products from the plant Cannabis sativa that contain substantial amounts of tetrahydrocannabinol (THC).

2 Tosh, Peter. "Legalize It" ©1976.

3 21 U.S.C. 13, §§ et seq.

4 MJ Biz Factbook for FY2023 (2024).

5 The Cannabis Act, Bill C-45 (October 17, 2018).

6 Presidential candidate Bill Clinton, asked in 1992 if he had ever violated international law, famously replied "I experimented with marijuana a time or two . . . I didn't inhale . . . "

7 Marijuana Policy Project, MPP.org (2024).

8 "Senate moves to legalize pot at federal level. What are the Chances?", *The Los Angeles Times* (Sasha Hupka, July 29, 2021).

9 "From Cash-Only to Cashless: How the SAFER Banking Act Will Reshape the Cannabis Payments Industry", Business of Cannabis North America (John Yang, October 19, 2023).

10 "The Federal Status of Marijuana and the Policy Gap with States," Congressional Research Service (May 2, 2024).

11 Id.

12 For example, Colo. Rev. Stat. §44-10-312 (Transfer of Ownership).

13 Cannabis containing no more than a 0.3% concentration of the psychoactive compound delta-9-tetrahydrocannabinol [delta-9-THC].

14 One remedial point that merits underwriting attention is the potential unavailability of access to the federal bankruptcy courts. Where marijuana products are involved, bankruptcy jurisdiction has not been exercised, primarily because U.S. Trustees have highlighted their own inability to liquidate such products. It remains to be seen whether bankruptcy courts may administer cases where the debtor entity does not deal with marijuana, particularly if there is no need jointly to administer the case to include affiliates of the debtor that may do so.

15 For example, consider that manufacturing facilities of a borrower should still comply with regulations prescribed by the Occupational Safety and Health Administration (OSHA).

16 "Cannabis Market Size, Share & COVID-19 Impact Analysis, By Type (Flowers/Buds and Concentrates), By Application (Medical, Recreational (Edibles and Topicals), and Industrial Hemp) By Component (THC-Dominant, Balanced THC & CBD, and CBD Dominant), and Regional Forecast, 2023-2030" (October 7, 2024) (Source: https://www.fortunebusinessinsights.com/industry-reports/cannabis-marijuana-market-100219).

CROSS-BORDER ESSAY

CROSS-BORDER FINANCE ESSAY

Cross-border Finance: Navigate Through Challenges

BY LYNN LI

Earlier this year, SFNet announced its third Cross-Border Finance Essay Contest, sponsored by Goldberg Kohn Ltd. Members of SFNet's International Finance and Development Committee judged the essay submissions on content, originality, clarity, structure and overall contribution to furthering and expanding understanding and discourse within the field of cross-border finance. This essay won second place.

When poached egg on avocado toast becomes a popular choice on the breakfast menu, people don't necessarily associate it with topics like globalization and international trade, which have made it all possible and easy. Human civilization and modern economy have come thus far that exotic ingredients, foreign art, and advanced technology can be reached in local premises. Of course, import and export is fundamental to this, with the support from enablers such as government policy, logistic infrastructure and entrepreneurial business ideas. Another crucial player here is banks, or funders in a more generalized term, who have assisted to bridge the supplier and buyer in different continents through financing the underlying trade in a number of traditional and bespoke ways. Factoring, Letters of Credit, Supply Chain Finance, Multi-local facilities, these all sound much more complex than a cup of Starbucks coffee which is made of coffee beans imported from Latin America or Africa. However, it is those cross-border financing products and tools that helped a local café to extend payment terms or achieve a better discount rate with the bean suppliers. So a business, regardless of scale or size, is able to access international supply chains and has options to support its trading activities with the appropriate financing.

It sounds rosy and straightforward in simple terms, but in reality is cross-border finance really as easy and accessible as walking into a store and buying a new iPhone which was manufactured in another country that is thousands of miles away? The answer to that is probably not, as challenges often emerge when trades start to flow from one country to another. Here are the common challenges which companies, shareholders, sponsors and funders are still navigating through despite international trade becoming business as usual.

Maturity of local financial markets differs massively across the global: Multi-million cross-border deal flashes are often reported and seen in Europe and America, but not elsewhere. Why? Firstly, the number of counterparties in those countries including companies with international business operations, debt and equity funders, financial advisors, brokers, insurers and transaction lawyers is substantially higher than the rest of the world. When it comes to a time that a less-developed financial market is in the finance territory, it is difficult to find similar and equivalent counterparties in that region who understand the underlying assets or proposed structure. As such, the deal starts to rely on a funder who has local branches with local product offerings and team presence. But even the biggest bank in the world couldn't cover every country, whether it is from a cost or an operational perspective. Therefore, it is likely to see a European bank who can support a cross-border finance should it happen to have the same geographic footprint as the financing company. On the other hand, it is less likely to see a diversified or exciting cross-border finance deal which involves Mongolia or Peru. Secondly, various financial products and systems have been well-developed and tested in Europe and the United States, governed by mature and industry-standard loan documents. Simply, there aren't such finance tools or products available in the less developed places. When a group of international banks are participating in a receivable purchase programme, the financial institutions in developing countries are still focusing on vanilla products and trying to establish operational and financial capability to support complex transactions. Over the years, emerging markets have taken over more manufacturing responsibilities in the global economy. But the question is, can they also obtain a relatively good access to finance? Is cross-border finance available for them? Do they have to become international first?

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Fear of the unknown jurisdictions, local regulations and laws: When it comes to the complexity of financial regulations and laws, you don't need to go from the far East to the far West. Enforcement rights on an asset in an insolvency situation differ massively in Germany and France, although both of them are in the single market under the EU using the same currency, and geographically next to each other. The fear of tapping into a foreign market, where a clause in a foreign legal document, often written in a less familiar language, might mean a funder will not recover in a collect-out, could change the underlying credit story completely, hence leading to a non-financeable

situation. Similarly, the fear of losing the grip on assets when they left the port for a foreign land or handled by a third party who might refuse to release the security has stopped the majority of lenders considering finance in a less- familiar market. The common proposal is to get a professional legal opinion on the local law, or get a local team that will have the relevant knowledge, but many cases also demonstrated that when things go wrong and funders need to recover from their lending, it can get really difficult, especially when the assets are overseas, despite reporting and covenants that have been put in place trying to make sure lenders are in control. The reality is never straight-forward. We have all seen cases where lenders found out that other secured or preferential creditors are ranking ahead of them. When this happens in an administration situation, losses are often inevitable for a lender. Therefore, cross-border finance becomes restricted to "home countries" which share similar law practice or at least where funders feel confident about their security position and exit route. As a result, unknown markets remain untapped and little progress has been seen in terms of really expanding cross-border finance to a true global scale.

Lack of ability to treat assets across countries holistically: Banks do see natural cross-border funding opportunities, especially from multi-international businesses where there are numerous subsidiaries with various assets like local receivables and stocks, different plants and machineries and properties in different countries across the world. However, another challenge is can banks treat all of the assets in a company holistically? In practice, it is most likely that those assets will have to be treated separately, due to different asset valuation requirements and different realization routes in different local markets. In a very recent example, a private equity company was looking to acquire a business with a significant value of assets on balance sheet: $70m of receivables, $100m of plant and machinery, $90m of stocks and $200m of land and buildings. Whilst the sponsor was aware those assets were spread across countries where the company had operational activities, she didn't expect how low the funding availability this asset-rich company could offer was until she brought the transactions to various lenders. Even the international banks didn't have the capability to fund all those assets in each one of the countries. Plant and machinery had to be valued ex-situ, value in stock diminished after a couple of countries were not eligible for inventory funding, and debtors, which are often the most straightforward, couldn't be advanced against much due to different reserve requirements under different laws. As a result, the asset pool, which had high book value in the first instance when it was treated at a consolidated basis, quickly shrunk in value in this deal. The funding availability suddenly dropped to a very low level and made the transaction meaningless from a debt funding perspective.

When you are a multi-international business, with subsidiaries in different countries and a wide customer base, it is relatively easier, if not much easier, to talk to a bank asking for financing. There are many more options, whether multi-local facilities or a single-group facility.

Smaller businesses have much less options: When you are a multi-international business, with subsidiaries in different countries and a wide customer base, it is relatively easier, if not much easier, to talk to a bank asking for financing. There are many more options, whether multi-local facilities or a single-group facility. If you are an investment-grade credit quality, it opens up more doors and stronger bargaining powers to achieve better terms whether it is lower pricing, higher quantum, or lighter covenants. For certain, cross-border financing only makes commercial sense if the borrower and financing objectives meet certain criteria (often big scale and good profitability), because the cost to set up the cross-border facilities is not immaterial. Hence, what is left for smaller businesses is limited. Sometimes they have to go to different banks for different requests or stick to more traditional finance rather than cross-border initiatives. Sometimes, this is also related to a bank's scale. The financing request from smaller companies are often smaller in facility size or expected funds in use. To set up such small cross-border facilities would either mean low return for the bank or be too costly for the company if the bank passes on all operational and monitoring costs to its client. In the end, multiple facilities in an individual local country makes more sense from a cost point of view.

Funders' product and service offering differs across countries: Similar to the business size mentioned above, a bank's size, scale, growth strategy etc. could also determine whether and where it can offer cross-border finance. A U.S. bank with European presence is likely to have the knowledge and capability (from operational and personnel perspectives) to meet clients' financing needs in different locations. However, it is not uncommon for one bank to have different product and service offerings in different markets. The U.S. bank is probably able to fund all assets (e.g. account receivables, inventory, P&M and properties) in the U.S., but only selective assets in certain European countries. This can be a result of different regulatory and licence requirements, or different credit policy locally. Therefore, when a bank's offering doesn't match the business' requirements, the company either has to look for another funding partner or break the funding objectives down and look for banks that can partner with each other. It can be very time-consuming and difficult because banks might not be able to reach agreement in the end, due to differences in lending appetite, pricing model, return target or any other mismatches. Sometimes, we even see simple reasons: one bank doesn't know what the other bank can or can't do, so they simply decline the client's request once they conclude that it doesn't fit their own lending criteria, instead of seeking third parties to share the financing.

Newly emerged issues around geopolitical uncertainty, sanction and cybersecurity: Recent geopolitical events have not only caused significant market volatility and economic uncertainty they have also adversely impacted international trade and supply chains. It is apparent that sanctioned countries are outside of cross-border finance considerations. Companies that have any relationship with the sanction list or politically sensitive destinations, whether it is operationally or structurally, have also been facing difficulties in getting banks comfortable. People are also hearing more and more about fraud, cyber-attack and data security. Payment obligations, especially when they come from another country, have become increasingly challenging to assess and control, even after all the KYC and compliance banks put together. Insurance can help to a certain extent, but it adds extra layers of operational processes and costs. When it comes to claims, insurers often ask whether the banks have done the initial screening properly and sufficiently to ensure everything is appropriate, such as verifying that underlying invoices are genuine, and that trade reporting and records are as required.

Whilst cross-border finance faces undeniable challenges, it has navigated through difficulties over the years. In fact, it is encouraging to see banks continue to explore new products and creative structures around it. Industry and professional institutions also have established networks and partnerships for banks in different countries to come together and team up for complex transactions. People are more willing and open to test foreign markets, then share knowledge and practice. Undoubtedly, there will be times when success is celebrated and there will be other times when lessons are learned. What is certain is that cross-border finance will evolve, adapt and improve within a global economy. And there will be more and more theorical research and practical case studies to be seen on this exciting topic.

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BUSINESS TRENDS

The Value of a Fractional CFO: Strategic Financial Leadership on Demand

BY BRIAN RESUTEK

In today's rapidly evolving business landscape, small to mid-sized companies are increasingly turning to fractional CFOs to provide high-level financial expertise without the commitment of a full-time hire. This flexible solution allows businesses to access strategic financial leadership on demand, driving smarter decision-making and fostering long-term growth. In this article, Brian Resutek of Republic Business Credit explores how fractional CFOs are reshaping the role of finance in SMEs, offering critical support for lenders and business owners alike.

For decades, a company's C-suite organization chart looked similar across large publicly traded companies and growing SMEs. Typically, a CEO was at the top, with extensions to CFO and COO positions leading to various division heads. Over the past decade, however, the "traditional" C-level responsibilities have expanded to include technology, risk management, cyber risk, and other key areas. In SMEs, where a CFO was traditionally second in command, today's immediate needs might prioritize a CMO, CIO, or CTO over or alongside a CFO as these functions often require specialized expertise.

Enter the fractional CFO, a fast-growing solution for many small to mid-sized businesses. These professionals have become familiar figures to lenders, ownership groups, and other stakeholders that traditionally interacted with a CFO. This article will take a deeper look into this growing space, examining how fractional CFOs enhance financial sophistication and augment business strategies from a lender's perspective.

On the definition level, a fractional CFO is a highly skilled financial expert hired by a company on a part-time or project basis in lieu of full-time CFO. Cost savings and expertise are often the initial reasons for engagement; however, many companies also find that the fractional CFO opens new ideas to make strategic decisions going forward and improve long-term decision making.

According to CFO.com, the average CFO global tenure reached a five-year low of 5.7 years in the first half of 2024. A chief reason was an increase in retirements, with 54% of outgoing finance chiefs exiting or moving to board roles exclusively. Coupled with increasing responsibilities either directly or tangentially related to hiring, risk management, technology implementation and the core CFO functions of yesterday have taken on a new job description. As a result, an often immediate and consistent need for financial expertise at a company level is warranted, particularly in the SME segment. As NOW CFO, Scott Christensen stated, "To find an experienced controller or CFO can take upwards of 3-4 months many times, and then it's hard to maintain their employment over a number of years." NOW CFO, formed a little over 20 years ago, specializes in the outsourced CFO, accounting and financial needs among other areas to fill these voids and keep a company's vison moving forward. Christensen uses the term that companies can efficiently, "rent the knowledge" of their services without the full price of a CFO along with access to various specialists as a company's needs change. In working with lenders of credit facilities, Christenson highlights that his team can effectively move deals into a lender's funnel complete with the materials a banker needs to see from a cash flow, accounting perspective and background to ensure accurate representation. Post-closing, their engagement ensures continuity of information, a benefit well-received by lenders.

BRIAN RESUTEK
Republic Business Credit

Not all companies engage fractional CFOs to fill a CFO void. Evan Toporek, partner at Heritage Growth Partners, saw the benefit of these firms firsthand from the CEO level when his growing company, Alternative Apparel, experienced inventory challenges. "We had an extremely competent and experienced controller at the time, but with our growth in new channels, we had an inventory problem that required outside expertise. Rather than attempt a full search, our board was able to recommend a firm that not only could tackle our inventory problems at the time, but also make the appropriate link to our working capital facility and banking partners," stated Toporek. In Alternative's case, the engagement level was not a turnaround or workout situation as the company was performing on the bottom line, but the ability to have experienced, outside expertise operating inside the company. "We had built a strong culture since inception, which was of equal importance to maintain at the company, myself included. While I had helped build the company from the beginning, I had limited knowledge on which systems and processes to utilize as we expanded into new areas or the best ways to prepare

our company when we ultimately sold," Toporek recalls on his experiences with their fractional CFO firm. Alternative engaged the same firm that managed their initial inventory issue to help facilitate their growing credit facility and other financial reporting needs over a four-year period. "These individuals had run businesses of their own in the past and helped us use a more analyzed approach to decision making; quite likely helping us avoid potential mistakes along the way because of their past experience," commented Toporek when asked about the additional benefits of a fractional CFO engagement.

Experience Matters. Unsurprisingly, the SME segment is the largest growth area for fractional CFOs. A Wilke CPA report highlighted that in 2023, there was a 103% increase in the interim CFO world, with growing recognition among business owners that fractional CFOs are meeting this need, however, while experience matters, so does cost.

This is the approach taken by Joe Jessup, partner at Tech CXO. As a seasoned Citibank lender in a variety of industries and founder of his own entrepreneurial company, Tech CXO's approach is finding a way to match structure with the services a fractional CFO company can provide. "We can do a variety of functions and certainly have expertise in multiple areas, but largely, we are there to support management teams from the financial side. For many of these companies, there is not a full-time need for a CFO, however, there must be expertise for reporting, due diligence and even HR management functions," Jessup stated when asked about a typical client. Jessup typically has 4-6 active engagements at any one time, but also is "on-demand" with other companies which is quite valuable. "In those cases, I might have collaborated with a company several months ago, but now they have a potential M&A need or assistance with debt financing. Already being previously engaged allows the company to quickly move forward with an effective team in place as their trusted advisor," Jessup added regarding additional project work.

Lenders should be prepared to work more with fractional CFOs in the future, especially in the SME world. Sara Daw, CEO of the CFO Centre and The Liberti Group, noted that just two years ago, LinkedIn accounts had about 2,000 accounts promoting C-Suite fractional services.

Lenders should be prepared to work more with fractional CFOs in the future, especially in the SME world. Sara Daw, CEO of the CFO Centre and The Liberti Group, noted that just two years ago, LinkedIn accounts had about 2,000 accounts promoting C-Suite fractional services. Today that figure is approximately 114,000. Phil Bonelli, a principal at Roundtree Advisors, is one of those newly added, as he shifted out of a career in middle and corporate banking at regional and large commercial banks into the fractional CFO world. "I always enjoyed being a banker, but my value was acting as consultant to my clients even if there was not a direct banking need. I saw the biggest gap between the middle market and corporate segments for this development and the chief reason I set out in this space," Bonelli commented regarding his transition. Bonelli helps incorporate highly competent ex-CFOs into businesses to improve upon a variety of issues. "A lot of companies want to maintain entrepreneurial growth, but struggle with the necessary tools in terms of cash-flow projections, HR practices and an overall playbook on how to ensure their businesses ensure success. We can engage an experienced CFO oftentimes for as little as one day a week and make a sizable impact for a company," noted Bonelli when asked about the cost/benefit aspect of the services requested.

Fractional CFO services may not always be an immediate necessity, but their value warrants attention from lenders and companies alike. These services drive growth and improve outcomes, creating mutually beneficial results for all parties.

Brian Resutek (Atlanta, GA) is the Southeast Regional Manager and SVP at Republic Business Credit, a nationally recognized commercial finance company supporting working capital requirements. Brian leads business development for the Southeast and has been active in portfolio management and corporate banking roles for nearly two decades. He can be reached at bresutek@republicbc.com.

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TAX CREDITS TRENDS

Transferable Inflation Reduction Act (IRA) Tax Credits: Considerations for Tax Credit Bridge Lenders

BY ANNE LOOMIS, VAUGHN MORRISON, RICHARD POLLAK, OLIVIA MAO, AND AMINATA SABALLY

Enacted in 2022, the Inflation Reduction Act (IRA) allows the transfer of certain tax credits, enabling unrelated parties to purchase them for cash. Lenders who want to use tax credits to secure loans should consider tax credit insurance and consult legal, tax, and insurance professionals to navigate new financing structures.

Enacted in 2022, the Inflation Reduction Act (IRA) allows the transfer of certain tax credits outside of traditional tax equity partnership structures. This enables unrelated parties to purchase tax credits for cash, without the need for complex equity arrangements. It also changes the manner in which lenders may secure tax credit bridge loans. This article sets forth certain factors potential lenders should consider when contemplating tax credit secured financing in the IRA era.

Impact of the Transferability on Tax Credit Bridge Loans

Traditional tax credit financing involves tax equity facilities in the form of (i) partnership flips, (ii) inverted leases, or (iii) sale-leasebacks. It generally requires investors with substantial tax liabilities who are willing to assume the certain obligations associated with ownership in the underlying project in exchange for the tax credits. Under this construct a lender providing a loan that is sized to consider the value of the tax credits (known as a "tax equity bridge loan" or "tax credit bridge loan") generally necessitated a firm tax equity commitment that could be enforced directly by the lenders following a foreclosure. Without that, the lenders could not have confidence there would be a means to monetize the tax credits, and the loan could effectively be undercollateralized.

The IRA introduced new Section 6418 of the Internal Revenue Code, which allows taxpayers owning eligible projects the right to sell certain investment tax credits (ITCs), production tax credits (PTCs), or several other credits which may be available to them on the open market to unrelated entities. In doing so, it provides an alternative platform to tax equity financing which enables lenders to extend tax credit bridge loans without the need for a tax equity commitment. Instead, lenders can underwrite to a forward purchase commitment from a creditworthy buyer of the tax credits. Further, some lenders have grown comfortable underwriting to no tax credit monetization commitment at all, relying instead on the fact that transferability has opened the market up to a sufficiently broad pool of potential taxpayers that there will always be someone willing to purchase the credits. Note, however, that a higher coverage ratio is typically associated with these so-called "merchant" tax credit bridge financings.

Tax credit transfers, however, are subject to strict procedural limitations. First, any purchases of tax credits are required to be made entirely in cash. Second, while ITCs can be claimed in full at the completion of a project, they are subject to recapture for a disposition, change in ownership, change in use, or withdrawal of all or part of the project from service (including in the event of a casualty) within the first five years after a project is placed in service, with the potential recapture amount decreasing by 20% of the credit each year of the recapture period. Third, potential buyers are

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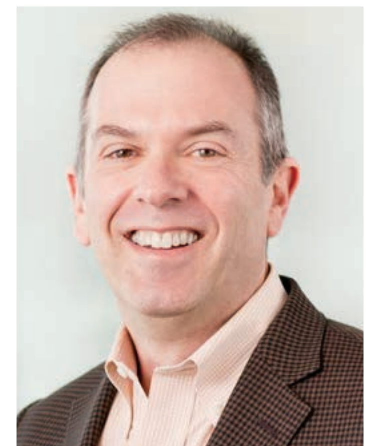

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prohibited from paying for tax credits earlier than the first day of the taxable year in which the tax credits accrue. Finally, tax credits can only be transferred once.

The strict procedural and timing requirements limit project companies' ability to sell tax credits for cash needed to fund for project costs. Practically speaking, the recapture rules for ITC and the single-transfer rule applicable to all IRA credits limit a lender's ability to directly secure loans with a pledge or collateral assignment of the tax credits themselves. However, tax credit transfers may create bridge financing opportunities for interested lenders who can secure loans with a pledge or collateral assignment of a PTC-generating project, an interest in an entity that owns (directly or indirectly) a tax credit-generating project, or a bank account into which the buyer of a tax credit is directed to deposit proceeds from a negotiated tax credit transfer. Nevertheless, due to the novelty of such financing structures, there are potential risks and uncertainties that lenders should carefully consider, as further discussed below.

Risk Factors

New tax credit monetization strategies require an updated approach to collateral packages. Lenders must evaluate the creditworthiness of both the project and the buyer. For ITCs, the possibility of recapture must be managed, which means that the lender typically cannot foreclose on the project itself or on the membership interests of the project company, though could in some circumstances have a security interest in the stock of a corporation or certain interests in a partnership that owns a project. In some cases, blockers may be strategically interposed in the organizational structure to facilitate a foreclosure on a controlling interest in an ITC asset without

The calculation of a tax credit is dependent on many factors, including the date a project began construction and the date it was placed in service, whether it is located in certain favored "energy communities", the origin of the equipment used in the project, the project's qualifying costs (for the ITC), and the electricity produced by the facility (for the PTC).

causing recapture.

Some have expressed a theoretical concern that the loan itself might be characterized as a payment for a tax credit, which would negatively implicate the single-transfer rule. The IRS has specifically declined to provide guidance with respect to third-party lenders providing funds to a tax credit seller, and specifically noted in regulations on tax credit transfers that whether such an upfront loan is a payment for a tax credit (which would prevent the subsequent transfer of the tax credit to a buyer) is subject to a "facts and circumstances" analysis. However, the application of the facts and circumstances test to properly structured tax credit bridge loans generally have not deterred transactions in the market. The single-transfer rule likewise limits a lender's ability to take possession of an accrued tax credit itself, as no further transfer would be possible.

The calculation of a tax credit is dependent on many factors, including the date a project began construction and the date it was placed in service, whether it is located in certain favored "energy communities", the origin of the equipment used in the project, the project's qualifying costs (for the ITC), and the electricity produced by the facility (for the PTC). The IRS can disallow tax credits that have been improperly claimed or miscalculated. The IRS can also impose monetary fines on the

buyer of the tax credits for excessive or improper transfer or improper valuation of the tax credits. To the extent these risks would be inherited by a lender following foreclosure, diligence of the tax credit qualification is crucial.

There is also a risk that Congress could repeal tax credit transferability prior to the closing of a particular sale.

Recommendations for Lenders

First and foremost, lenders need careful due diligence to ensure that the amount of tax credits has been properly determined and all procedural and registration requirements have been met by the project owner to properly claim the tax credits, including proper pre-registrations and initial tax return elections. It is important for lenders to fully appreciate the ongoing compliance and reporting requirements associated with the specific project.

In addition, lenders should consider additional risk-mitigation measures such as tax credit insurance to cover recapture, penalties, disallowance, and borrower defaults.

Conclusion

While the IRA offers new opportunities to monetize tax credits, lenders providing financing in the context of tax credit transfers are entering relatively uncharted waters. As market players seek to maximize the benefits of the IRA, lenders can expect increasingly fluid project financing structures. Lenders should proceed with trusted legal, tax and insurance professionals to navigate this market evolution.

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DETECTION TRENDS

Fraud: Capital F or small F? You Decide

BY MARK FAGNANI

"Small f" fraud occurs when desperate business owners take risky financial shortcuts, believing they're temporarily solving problems. These actions, while not maliciously intended, violate loan agreements and can ultimately put loans at risk by masking underlying financial issues.

A few years ago, I published an article in *The Secured Lender* detailing a case of fraud called Allou (see June 2021 and September 2021 issues). This was a pre-meditated fraud with duplicate sets of books, a deliberate fire, an involuntary bankruptcy filing, dozens of lawsuits and the eventual imprisonment of eight perpetrators. When the fraud was finally discovered it had been going on for more than five years and had fooled the lenders, the public shareholders and not one, but two, accounting firms. While there was a sizable recovery, ultimately the banks involved suffered a large loss. Allou had it all and was by any definition a Capital F fraud.

But not all frauds are so complex and all-encompassing, and yet, in their own way can be damaging and, if left unchecked, can easily lead to loan losses. Unlike Allou, many "small f" frauds are perpetrated by normally honest individuals who believe the business has only suffered a temporary setback or has a temporary need for additional cash and they further believe that they are doing this to save the company or save the employees' jobs and can be set to rights sometime in the future. Let's examine some examples of what I call "small f" frauds:

- A borrower, already tight on liquidity, knows their ineligible A/R has increased and so they fail to submit the monthly aging when due. Several reminders are delivered by e-mail and/or by phone and a number of excuses are provided. You're probably not calling a default or sending out a reservation of rights letter or taking any draconian actions and yet, when the aging is finally delivered, 30 days late, you find yourself in an overadvance. If the borrower is lucky and there is no real fundamental problem, maybe the ineligibles have gone back down in the last month. In that case, the next month's aging is delivered post haste and the overadvance cleared. Was that fraud? We will get to that. On the other hand, if there is an underlying problem causing A/R to not be collected and submission of the following month aging is also delayed, what then? Time to react?
- Dilution averages 5% and the advance rate is 85%. This month dilution jumps to 15%, but you don't know that because the borrower has failed to issue the credits or record them on the BBC. If the company does $2.5 million in sales per month, that's an extra $250,000 (10%) in unreported credits. If they do $10 million a month, that's an extra $1 million. You get the idea. This represents some exposure and could potentially result in an overadvance and, in fact, likely will, because if the borrower had enough liquidity (availability) to absorb the hit, they would probably just issue the credits, right? Well, maybe, but what if there is, again, an underlying systemic issue that would cause dilution to remain at elevated levels? The borrower knows you might lower the advance rate and/or establish a reserve and that's the last thing they want. Now, this could be a one-off event, and just like in the first example, even if you notice that you haven't gotten credits reported, would you declare a default or reserve rights based on one month's activity? Probably not. And yet, failure to issue credits overstates A/R, may be masking a product quality or delivery issue or may be masking a phony billing issue. Is this fraud?

MARK FAGNANI
PKF Clear Thinking

- Your borrower is tight on availability and faces increasing pressure from vendors and needs an advance in an amount larger than that which you are willing to provide. They assign invoices today for goods not yet shipped. They have real orders, and the goods are scheduled to be delivered over the next two weeks. The borrower is "pre-billing" and may believe this is just a one-time temporary "fix" and when the goods actually do get shipped all will be well. Is this fraud?
- Assume the same scenario as above, but instead of pre-billing (or perhaps in addition to), the borrower decides to divert some collections (this example assumes the lender has cash dominion) to cover the needed advance. Of course, since these A/R have now already paid, but you don't know it, eventually they will become ineligible (example 1) or they will need to be credited out (bringing us right back to example 2). Is this fraud?
- Let's try one more. All of the above are generally predicated on a borrower's lack of adequate liquidity which, in turn, is usually a result of losses or other events that have eaten

cash reserves. The borrower is required to submit financial statements on some regular basis (monthly, quarterly, etc.), but they have failed to do so. In fact, you are two or three reporting periods behind in receiving financials. The borrower has again offered some excuses: we have a new controller, we have a new CFO, we converted systems, it's the summer and people are on vacation, etc. Now, in theory, an astute lender doesn't need financials to know what's going on. If you closed a deal with $X in availability and today it is $X minus Y, generally that indicates negative cash flow and is suggestive of a problem. But there may be other reasons why liquidity is declining, and an examination and analyses of financial statements will help solve this riddle. The failure to deliver financials as required, along with declining availability, is putting you at risk. Is this fraud?

My answer to all of the above is yes, these are all examples of fraud. Perhaps not on the magnitude of an Allou or Capital F, and in fact, as noted earlier, very often not pre-meditated. Rather, the borrower is reacting to what they hope is a short-term problem, but they have failed to adequately communicate with their lender and financial partner. They are dealing in bad faith, they are violating the terms of the loan agreement and, ultimately, they put your loan at risk. What your borrower should do (and to be fair, most do) is call you and identify their problems in clear and candid terms. You may elect to support them with an overadvance or other form of loan accommodation, but if you do so, you understand your risk and control the magnitude of exposure and the repayment terms. You may suggest (or insist) that they retain a management consulting firm to help identify the issues and formulate strategies designed to right the ship. You may even determine that they should find another source of financing, but will likely give them sufficient time to do so without causing a crisis. When they don't do this and instead take matters into their own hands, you have a problem.

Okay, you say, but we can't go around declaring defaults left and right, or worse, alleging fraud every time a borrower strays from the letter of the loan documents, can we? Well, that depends on a lot of things, which I will not get into here (like who owns the company, is there a sponsor, what other business do we have with these entities, etc.) but in a general sense my answer is yes. Your job as lenders is to remain vigilant and never stop asking questions and then to never stop verifying the answers. If you have called times to ask about the aging, or the credits or the ineligibles and you are not satisfied with the answers, then perhaps it is time to call counsel, review the loan documents, make sure you understand your rights and then escalate. Where there is smoke there is generally fire and only a proactive approach can help protect your loans. Increasing turnover (or DSO) of A/R may point to phony billing or pre-billing or re-aging or failure to issue credits. It's why ABL lenders track turnover. Increasing dilution may suggest phony billings, quality or delivery problems or liberal return policies, all of which compromise your ability to collect A/R and, ultimately, your loan. That is why ABL lenders track dilution. Aging spreads that start to show material spreading into older categories similarly suggest problems within the A/R. If your borrower has simply and innocently just given customers extended terms, then let them tell you that so you can verify the same and then decide to be more lenient with eligibility. Otherwise, it is not unreasonable to assume there is a problem and this is precisely why ABL lenders track ageing spreads and over 90-day A/R, etc. Little f frauds when undetected or pooh-poohed away very often may grow into Capital F frauds once the borrower realizes how easy it was to deceive you, and with no consequences. Additionally, frequent occurrences of this nature without any resulting paper trail (i.e. - notices from your organization to the borrower) make it all the more difficult to justify your actions when you finally do take them.

So, if you are hankering for a nice big fraud that you can tell the grandkids about, ignore everything you just read and hang on for the ride. If, on the other hand, you would prefer to avoid such an issue, pay attention to the details, know what your loan docs say, ask the borrower lots of questions, verify the answers and be proactive if things don't feel quite right.

Mark Fagnani is senior managing director, PKF Clear Thinking. He has more than 30 years of hands-on experience working with large bank groups, private equity sponsors, turnarounds, workouts and insolvencies. Fagnani was formerly a managing director and the chief credit officer of Wachovia Capital Finance, a unit of Wachovia Bank. After leaving Wachovia he helped form HVB Capital, a subsidiary of Hudson Valley Bank, and subsequently spearheaded their sale to EverBank resulting in EverBank Business Credit. More recently, Fagnani was recruited to help establish an asset-based lending business for Bank Leumi USA; serving as first senior vice president and group head of Leumi Business Credit.

■ SFNET COMMITTEE SPOTLIGHT

SFNet's Chapters Committee

BY EILEEN WUBBE

This column highlights the hard work and dedication of SFNet's Committee volunteers. Here we speak with Jason Hoefler, managing director, Asset Based Lending, at BMO Commercial Bank and chair of SFNet's Chapters Committee.

JASON HOEFLER
BMO Commercial Bank

Please provide our readers with some background about your career.

I am a proud Fighting Illini, graduating from the University of Illinois with an accounting degree and a CPA. I spent three years at KPMG in the Audit group before beginning my ABL career at Fleet Capital as a field examiner, ultimately working at what became Bank of America for eight years where I was an underwriter and then a portfolio manager. I have now been at BMO for almost 14 years and have the pleasure to work with an amazing group of people in an industry I enjoy. Presently I manage one of three teams in ABL, overseeing business development, underwriting and portfolio management with my team's responsibility being primarily in the Midwest.

SFNet's Chapters Committee is a little different than other Committees in that it consists of Chapter Presidents only. For someone reading this interview and interested in becoming more engaged with SFNet, such as playing an active role in a local Chapter how would you recommend doing so?

I know how important the success of the chapters are to SFNet and how important the Midwest Chapter has been in my career. I was always fortunate enough to be encouraged by my managers to become engaged with SFNet. It started by attending SFNet's Field Exam School class and continued through becoming Chapter president. I was encouraged to attend events, particularly the educational ones, and eventually joined a Chapter Committee. I would encourage

everyone in our industry to become more engaged with their local Chapter and joining a committee is a great way to do so.

How much time would you say is dedicated to being an active member of a Chapter Committee?

I hate to put a number of hours a month on it because it will vary by person and Chapter, however, everyone is a volunteer and has day jobs. That said, the time spent on the committees will be with other members of the industry and is great for developing relationships outside of attending events. I do believe that each Chapter should have more, not less, committees and that happens with more volunteers! Depending on your individual goals and interests, joining the Golf Outing Committee or Education Committee of my local Chapter were the first two that I joined locally.

What are your goals for the Chapters Committee for the coming year?

The Chapters Committee that I am overseeing will focus on the facilitating of best practices across all of the chapter leaders, such as membership outreach, sponsorships and events. Generally, there will be a monthly meeting with all of the chapter leaders, but the meeting will be targeted. There will be specific topic meetings that will all serve to drive our value proposition, which includes providing outstanding networking opportunities and value-added educational events. At least one meeting per quarter will be dedicated to the chapters based on size and market. The idea is to focus on the unique needs of the chapters vs a one-size-fits-all approach. As an example, a large-market chapter, such as Chicago, New York or Southern California that has membership of several hundred members in a concentrated area, is able to host different kinds of events than a chapter covering multiple states with a smaller membership base, so sharing of best practices and chapter-specific objectives will be different depending on size and market, albeit with the same ultimate objective. One type of event that has been very successful in the Midwest Chapter has been "Dine-Around with Lenders", where 6-7 very senior lenders, such as a head of asset-based lending, will rotate between multiple tables of 6-8 people during the lunch. These events typically draw 45-60 members across 2-3 restaurants both downtown and in the suburbs. Such an event is easily replicated in a large city, however, might have to be re-imagined in a chapter covering multiple states. At the end of the day, increasing membership and engagement amongst the lenders is key to the growth of each individual chapter.

When you are not busy at SFNet or BMO, what can you be found doing?

I really try to take advantage of free time with family and friends. We have two children in college that we enjoy visiting, but this has also allowed me a little more time playing golf and a little more time falling asleep on the couch watching golf!

Eileen Wubbe is senior editor of The Secured Lender.

SFNet 2025 Chapters Committee

Jason Hoefler, BMO Commercial Bank ABL,
Midwest Chapter President, SFNet Chapter Chairperson

Heidi A. Ames, SLR Business Credit,
New York Chapter President

Eric Bookbinder, PKF O'Connor Davies,
Former New England Chapter President

Anna Chandler, Charlotte Chapter Administrator

Chuck Doyle, BizCap,
Northern California Chapter President

Carrie Jenkins, Mission Valley Bank,
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SFNET MEMBER PROFILE

KORE Capital: Fueling Growth for Government Contractors

BY EILEEN WUBBE

KORE Capital Corporation began its operations in January 2020 and offers factoring and asset-based lending financing solutions designed to fit business needs to scale, meet payroll and create liquidity.

KWESI ROGERS
KORE Capital Corporation

Founded by Kwesi Rogers, formerly president and CEO of Federal National Commercial Credit and White Oak Business Capital, KORE Capital Corporation primarily provides government contract financing to companies rendering services or delivering goods to the U.S. federal government. Headquartered in Bethesda, MD, KORE Capital offers factoring and asset-based lending.

Once a borrower wins a large new government contract, their working capital needs grow in lock step with their revenue. KORE will provide advances against earned, but unbilled and billed, accounts receivable to provide borrowers with the liquidity required to execute on current contracts and confidently onboard new contracts. KORE will advance between 80% to 90% against those invoices to provide the company with the working capital required to scale.

Rogers' experience in the industry spans more than 30 years. He began his career at Federal National Commercial Credit (a trade name of Federal National Payables, Inc.) and was promoted to president in January 2006. Eventually, Federal National was sold to White Oak Business Capital, where Kwesi was president and CEO.

"While I helped grow Federal National, prior to its sale to White Oak, I was not the founder," Rogers explained. "I really had a burning desire to start, run and grow an entrepreneurial venture from the ground up. Additionally, I learned a lot from the plethora of missteps I made earlier in my career, and I was anxious to take those lessons learned and build a company that lifts other entrepreneurs as we grow."

The first two years after KORE Capital was founded it was forced to operate in the COVID market, which was flooded with capital, eliminating the need for KORE Capital's products for 18-24 months. The

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7/22/2024	**Wingspire Capital**, Agent	Non-bank	$110.0M	Phillips Pet Food & Supplies, which carries one of the nation's largest selections of pet food and treat brands including labels such as Nestle Purina, Diamond, Fromm, Tuffy's, Mars, Wellness, Canidae and Natural Balance, Easton, PA	Other	Senior Secured Revolving Credit Facility
7/22/2024	**Stonebriar Commercial Finance**, Lender	Non-bank	$25.0M	Major regional lumber company	Other	Secured Term Loan
7/22/2024	**Great Rock Capital**, Lender	Non-bank	$25.0M	Phillips Pet Food & Supplies	Other	Liquidity Through a Senior Secured Credit Facility
7/18/2024	**First Citizens Bank**, Lender	Bank	$24.0M	To finance the acquisition of a post-acute medical rehabilitation hospital in Tulsa, OK	Healthcare	Financing
7/18/2024	**CoVenture**, Lender	Non-bank	$50.0M	TruckSmarter, a digital platform designed to assist owner-operators and trucking companies in optimizing their operations	Trucking	Debt Facility
7/17/2024	**Flatbay Capital**, Lender	Non-bank	$1.0M	Midstream manufacturing and service company	Manufacturing	CRE Loan
7/17/2024	**SLR Healthcare ABL**, Lender	Non-bank	$7.5M	A chronic care physician services and technology company	Technology	Asset-Based Revolving Credit Facility

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company began growing in 2021 mostly via referrals. The market continued to improve, and KORE saw modest growth in 2022.

"We had a successful year in 2023, and we realized robust growth in 2024," Rogers said. "Most of our growth has come from our trusted referral network. We are fortunate to have professionals who place their confidence and trust in KORE to deliver financing solutions to their clients. KORE has grown from three employees at the start of 2024 to seven employees by the end of 2024."

KORE prides itself on being responsive, reliable, and having the required resources to meet its borrowers' needs. "Our borrowers know the entire company and have a relationship with the company and our decision makers," Rogers added.

As the industry settles into 2025, Rogers has reported seeing more priorities and agendas beginning to take form, coinciding with business owners making predictions about where the priorities will show up in the federal government budget this upcoming year.

"I believe there will be an uptick in federal government spending on contracts awarded to companies rendering services to the federal government," Rogers said. "We are seeing government contractors who are providing language and linguistics services, logistics, war simulation training, cyber security, IT services, guard services, facilities management, aviation services, staff augmentation, management consulting, grant and program management, healthcare services, healthcare IT, cabling and transportation services. The federal government purchases a wide variety of goods and services."

KORE often provides financing to entrepreneurs who excel in their specific discipline, but often have weaknesses that they fail to address by adding members of their teams who are equipped to prop up the owners' weaknesses.

KORE often provides financing to entrepreneurs who excel in their specific discipline, but often have weaknesses that they fail to address by adding members of their teams who are equipped to prop up the owners' weaknesses. These weaknesses or blind spots often manifest into challenges that Rogers said KORE must tackle in a collaborative manner with the client. Common issues that arise range from accounting challenges to the inability to price out large jobs.

"Upon winning a large job that was not priced properly, a client had a hard time concluding that the job they thought was going to push their profitability to new heights was actually causing them to lose money," Rogers explained, as an example.

"Generally speaking, when owners are receptive to listening to our observations and genuinely work to solve problems things turn out well. However, when owners think they know it all and refuse to listen with an open mind, that is typically the beginning of a bad ending."

A few of the key areas that asset-based lenders need to keep at the forefront when engaged with government contracts include IRS issues, The McNamara-O'Hara Service Contract Act, Department of Labor and properly tracking funding under contracts to ensure the invoices purchased have value, Rogers noted. Looking ahead, KORE will soon launch its new website offering innovative financial solutions, valuable resources, and expert insights.

Eileen Wubbe is senior editor of The Secured Lender.

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