

Mezzanine Finance: Overview

Arthur D. Robinson, Igor Fert and Daniel N. Webb,
Simpson Thacher & Bartlett LLP

This Practice Note reviews the typical terms, primary documentation and key issues that arise in mezzanine financings.

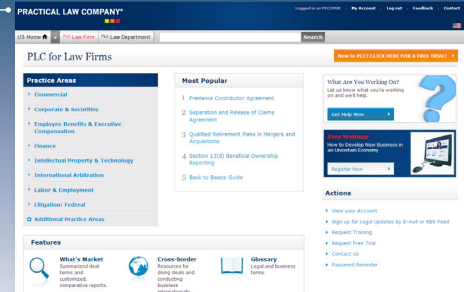
Mezzanine capital typically refers to a tier in a company's capital structure between debt and equity, just as a mezzanine in architecture is an intermediate floor between two different floors of a building (see *Box, What is Mezzanine Capital?*). For many years mezzanine investing was primarily a source of funding in a few select areas, such as real estate (see *Box, Real Estate Mezzanine Capital*) and growth capital transactions (see *Practice Note, Minority Investments: Overview* (www.practicallaw.com/1-422-1158)).

The dislocation in the credit markets and the scarcity of capital in 2008 and early 2009, however, led to the increased prominence of mezzanine investing for a broader array of transactions, including a significant percentage of the few leveraged buyouts that closed during that time (for an overview of a leveraged buyout transaction, see *Practice Note, Buyouts: Overview* (www.practicallaw.com/4-381-1368)). The increased visibility of mezzanine financing during the financial crisis in turn generated additional interest on the fundraising side. A number of financial institutions entered the mezzanine lending space or raised additional capital for existing mezzanine funds.

As the dislocation of the credit markets has receded, non-investment grade issuers have again become able to raise capital by selling both secured and unsecured debt securities in the high-yield market. Nevertheless, even though mezzanine funds compete to a certain degree with the high-yield market as a source of capital for acquisitions and recapitalizations, the outlook for mezzanine finance remains strong, especially during periods of recent market volatility:

- Mezzanine investors continue to invest capital in issuers with growth prospects.

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- Mezzanine investment opportunities are likely to increase in both frequency and transaction size as private equity sponsors, especially in the middle market, raise financing for acquisitions (for an overview of financing an acquisition by debt, see *Practice Note, Acquisition Finance: Overview* (www.practicallaw.com/1-382-8186)). Mezzanine funds can offer terms in a buyout context with an expediency and certainty of execution that is difficult for investment banks to replicate.
- Mezzanine financing can provide leverage beyond that available under a credit facility in middle market leveraged buyouts where the amount of desired incremental debt is not large enough to attract the high-yield market.
- As hundreds of billions of dollars of debt raised before the financial crisis to finance leveraged buyouts begins to mature, companies will have a significant need to refinance it, likely generating greater demand for capital and creating situations where mezzanine funds could play an important role.
- When the credit environment experiences periodic disruptions, mezzanine investors could again find themselves as one of the limited sources of capital available, with an increasing number of attractive deals in which to invest.

Against this background, this note examines the use of US mezzanine financings as a capital raising tool for corporate acquisitions and financings (including recapitalizations). It focuses on:

- Typical terms of mezzanine investments.
- Primary documentation.
- Key issues that arise in mezzanine financing transactions.

For information on mezzanine financings in Europe, see *Box, European Mezzanine Capital*.

TYPICAL MEZZANINE TERMS

Mezzanine financings tend to be highly negotiated transactions, customized for the particular situation. In the current financing environment, the market for mezzanine capital is fluid and evolving, and even less defined by a rigid set of standard terms.

The more heavily negotiated terms are those relating to:

- Type of instrument.
- Maturity.
- Interest rates and fees.
- Ranking in the capital structure.
- Collateral.
- Covenants.
- Redemption and call protection.
- Equity participation.
- Transferability.

Type of Instrument

Mezzanine financings typically consist of unsecured or second lien debt or, less frequently, preferred stock (see *Box, What is Mezzanine Capital?*). An issuer (that is, an issuer of, or borrower under, the applicable mezzanine instrument) may have a preference for one or the other depending on its capital structure or tax and accounting considerations. Investors may also have preferences based on their investment guidelines or their assessment of the potential investment's risk profile.

In practice, most mezzanine financing, particularly for larger financings, takes the form of subordinated, unsecured debt. Initial structuring discussions often focus on whether the debt should be in the form of loans or debt securities, with the investors' view of the likely resale market (bank or bond) driving the result. Mezzanine financings in the form of debt are commonly characterized (and distinguished from similar products such as high-yield debt) by the inclusion of an equity participation, usually in the form of warrants, options and/or conversion features or co-investment rights associated with the primary mezzanine investment (see *Equity Participation*).

Maturity

The maturity of mezzanine debt is typically five years or longer, but the maturity for a particular issue often depends on the scheduled maturities of other debt in an issuer's capital structure. For mezzanine debt that is incurred at the same time as senior bank debt (such as at the time of an acquisition or buyout), senior lenders often insist that the mezzanine debt mature later than the bank facility. However, because mezzanine capital tends to have a higher rate of return relative to other debt in the capital structure, some issuers prefer shorter maturities. Conversely, some issuers agree to longer maturities on their mezzanine debt in exchange for more flexible optional redemption terms.

Interest Rates and Fees

As in other forms of leveraged debt financings, various permutations of interest rates and fees are used within mezzanine transactions to accommodate the needs of the specific issuer and investors. While many mezzanine debt instruments feature a cash coupon with a fixed rate, which can be payable semi-annually or quarterly, others carry a floating rate or give issuers an option to pay at least a portion of accrued interest in-kind (PIK) (by issuing additional mezzanine debt) in certain circumstances. Mezzanine investors usually target a higher internal rate of return (IRR) on their investment than high-yield or bank loan investors, and seek to achieve their target IRR by a combination of the interest rate, fees and the equity component (see *Equity Participation*).

Mezzanine preferred equity investments are typically structured with a high fixed-rate dividend, which may be paid in cash or in-kind, and may feature an optional or mandatory conversion into common equity. In addition, to achieve their target rate of return, mezzanine investors may negotiate for different types of one-time or periodic payments, including structuring, commitment or other fees and they may request that mezzanine debt is issued at a discount to par (original issue discount (OID)), which has the effect of increasing the instrument's yield. It is also not uncommon for mezzanine investors to be reimbursed for their legal and other out-of-pocket fees, as would be the case for a senior credit facility.

Ranking in the Capital Structure

A key consideration in structuring a mezzanine financing is determining the position of the mezzanine debt in the issuer's capital structure. In some situations, mezzanine investors agree to invest in a preferred equity instrument that is junior to all debt in the capital structure. For mezzanine investments structured as debt, senior lenders generally expect that the mezzanine debt is subordinated to the credit facility and possibly other senior lenders, such as high-yield bondholders. Therefore, mezzanine debtholders typically agree to be contractually subordinated to existing and certain future holders of senior debt of the issuer.

Less commonly, this subordination can take the form of structural subordination, where the mezzanine debt is issued by a holding company whose operating subsidiaries do not guarantee the mezzanine debt, while the other debt is issued by an entity that is closer to the assets in the corporate structure and is guaranteed by some or all of the operating subsidiaries of the issuer (subject to certain adverse tax consequences in the event a non-US entity guarantees debt issued by a US issuer). As a result of this structural subordination, in a bankruptcy or other liquidation of the operating company, cash or other assets will only be distributed to the holding company to satisfy its obligations after all other liabilities of the operating company are satisfied. See also *Intercreditor Relationships*.

For more information on the different types of subordination of corporate debt, see *Practice Note, Subordination: Overview* (www.practicallaw.com/4-381-9557).

Collateral

Particularly for larger financings, mezzanine debt is typically unsecured. In those instances where mezzanine debt is issued on a senior basis at the same level with other debt of the issuer, the remaining senior debt is secured, so the mezzanine debt will be effectively subordinated to any secured debt of the issuer to the extent of the value of the collateral securing that senior debt. Where mezzanine debt is secured (which is more common for middle market issuers than larger ones), the lien is typically junior to the lien securing the issuer's senior credit facility.

Covenants

Covenant packages used in mezzanine debt financings are usually based on high-yield style covenants, bank facility covenants or a hybrid of the two. In the former case, the covenants are typically incurrence-based only (though they may include financial maintenance covenants), whereas in the latter, the covenant package often includes some maintenance covenants. If the issuer has an existing senior bank facility, or is entering into a new bank facility in connection with the mezzanine debt investment, the mezzanine debt covenant package may be largely based on the covenants in the credit facility. In that case, the "baskets" and financial maintenance covenants are typically more permissive than the corresponding provisions in the senior credit facility. Senior lenders often join the issuer in pushing for this additional flexibility to ensure that a breach or default under the senior credit facility does not immediately result in a similar breach or default on the mezzanine side requiring the senior lenders to invoke (and rely on) their contractual standstill rights (see *Intercreditor Relationships*). However, because mezzanine investors rely for repayment primarily (or entirely) on the issuer's cash flow, the mezzanine investors may be less willing to adopt the bank facility covenants in cases where the bank lenders are relying for repayment primarily on the value of their collateral (such as in an asset-based lending facility).

Key negative covenants in mezzanine debt may include limitations on:

- Incurrence of debt.
- Restricted payments (including dividends, repurchases of equity and junior debt, and certain types of investments).
- Liens.
- Change of control transactions.
- Asset sales.
- Affiliate transactions.

Affirmative covenants may include those relating to:

- Financial reporting.
- Maintenance of insurance.
- ERISA compliance.

Covenant packages in many recent mezzanine transactions, especially those providing financing for larger acquisitions by financial sponsors, often look fairly similar to incurrence-based covenant packages in marketed high-yield debt instruments. The primary difference is that some mezzanine investors seek to tighten certain covenants and baskets as compared to marketed high-yield covenants, and to receive certain additional information rights. "Jumbo" mezzanine financings that are intended to be syndicated may also include provisions designed to enhance transferability of the debt.

Redemption and Call Protection

Redemption and call protection provisions vary widely in mezzanine financings based on changing market expectations and the specific purpose of each financing. Call protection, where an issuer is not permitted to repay the debt early or must pay a prepayment premium, is more commonly found in high-yield debt than bank debt.

In bank debt, there is generally no prepayment penalty for mandatory prepayments. Most mezzanine debt contains mandatory prepayment/redemption provisions following certain events, such as change of control transactions (with redemption prices ranging from 101% of par to the applicable optional redemption price on that date) or asset sales (at par), both of which are subject to customary exemptions. In addition, some mezzanine instruments include provisions allowing the issuer to redeem some or all of the mezzanine debt in connection with significant acquisitions and other major corporate transactions.

In addition, mezzanine debt that is similar to bank debt may include mandatory prepayments tied to debt or cash sweeps, and optional prepayments at par or at low or declining premiums (for example, notes may be redeemed at 103% of their principal amount in the first year after issuance, 102% in the second year and 101% in the third year).

Mezzanine debt that is more like high-yield debt often features call protection and optional redemption provisions that are similar to marketed high-yield notes (such as no-call periods, with exceptions for "make-whole" redemption provisions or provisions allowing the issuers to redeem a specified percentage of the outstanding debt using the proceeds from certain equity offerings), but these provisions tend to be more varied than marketed high-yield bond issues. For example, mezzanine debt may include a longer no-call period, higher redemption premiums and additional redemption triggers, such as the sale of specified key assets, than are typically found in marketed high-yield notes to achieve the investors' goals of enhanced yield. Where mezzanine debt is issued with OID or PIK elements that could implicate the rules governing "applicable high-yield discount obligations" (AHYDOs) under US federal income tax law, the mezzanine debt will typically provide for periodic redemptions at par after the fifth anniversary of the issue date in the minimum amount necessary to avoid the mezzanine debt being classified as an AHYDO.

Equity Participation

Mezzanine investors regularly seek to enhance their returns by negotiating for equity participation alongside their debt investments (sometimes referred to as an "equity kicker").

Mezzanine equity investments can take various forms, including:

- Warrants or options to purchase a specified percentage of equity (often 1% to 5%) in the issuer. In these cases, the warrants or options are typically "penny" instruments that can be exercised or transferred, subject to compliance with Securities and Exchange Commission (SEC) rules, at any time. For an example of a penny warrant used in this context, see *Standard Document, Warrant (Penny Warrant Form)* (www.practicallaw.com/0-502-5552).
- A right to co-invest in the issuer alongside the controlling stockholder or a private equity sponsor. In these cases the co-investment is typically at the same price as the controlling stockholder's or sponsor's investment and the purchased equity is bound by the terms of any stockholders' agreement or other arrangements among other stockholders (see *Practice Note, Stockholders Agreement Commentary* (www.practicallaw.com/7-381-0517)).
- A conversion feature that allows mezzanine investors to convert all or a portion of their principal investment into common equity of the issuer.

Importantly, mezzanine investors are generally not looking to be long-term stockholders, but rather to achieve a target rate of return. As a result, transactions are structured with fixed rates of return (that is, higher interest rates) without equity kickers.

Transferability

Historically, mezzanine investments have been buy-and-hold products. Unlike high-yield bonds, which are often listed on exchanges in Europe or made eligible for electronic trading between qualified institutional buyers (QIBs) in the US market, mezzanine debt securities are rarely traded. As a result, many mezzanine investments have limited liquidity.

Some recent mezzanine debt transactions, particularly "jumbo" transactions and those undertaken by large mezzanine funds, have sought to enhance the liquidity of mezzanine notes by requiring issuers to qualify the notes for settlement through the book-entry facilities of The Depository Trust Company (see *Practice Note, Clearing and Settlement of Debt Securities: Overview* (www.practicallaw.com/1-502-0059)) and to maintain eligibility for resales of the notes under Rule 144A of the Securities Act of 1933, as amended (see *Practice Note, Resales Under Rule 144A and Section "4(1½)"* (www.practicallaw.com/6-382-8768)). Mezzanine investors often have full transferability of their holdings, subject only to applicable law. However, issuers may push for contractual transfer restrictions, particularly where the issuer is concerned about dealing with potentially numerous holders or holders with whom the issuer does not have a prior

relationship. In addition, other considerations, such as an issuer's interest in prohibiting transfers to competitors, lack of available information or a desire to permit sales of mezzanine debt and corresponding equity only as a unit, may impose practical limitations on transferability.

PRIMARY DOCUMENTATION

The documents used in mezzanine investments tend to be similar to those used in other corporate and financing transactions. The principal instrument governing the terms of the investment is usually an indenture or loan agreement (in the case of mezzanine debt) or the certificate of designations (in the case of preferred stock).

In addition, mezzanine holders often enter into:

- For mezzanine debt that takes the form of notes, a securities purchase agreement under which the mezzanine investors agree to purchase the notes in reliance on certain issuer representations and warranties and the satisfaction of covenants and closing conditions. The securities purchase agreement may also contain the covenant package (in which case, a separate indenture with a third-party indenture trustee is not required).
- If the mezzanine debt is secured, and sometimes even if it is not, a separate intercreditor agreement with the issuer's senior creditors (which may be in addition to the contractual subordination provisions in the indenture, loan agreement or securities purchase agreement governing the mezzanine debt).
- A co-investment, option or warrant agreement, in which the equity participation by mezzanine investors is documented (for an example of a warrant used in this context, see *Standard Document, Warrant (Penny Warrant Form)* (www.practicallaw.com/0-502-5552)).
- *Stockholders*, registration rights and other similar agreements with the issuer's other equity holders (for an example of a registration rights agreement that can be used in this context, see *Standard Document, Registration Rights Agreement (Section 4(2) Private Placement Form)* (www.practicallaw.com/8-500-6936)).

Unlike most underwritten transactions, mezzanine investments tend to involve a small number of highly sophisticated institutional investors who conduct an extensive due diligence review of the issuer. Therefore, the issuer in a mezzanine deal does not typically prepare an offering memorandum or other disclosure document. Instead, investors rely on their due diligence review, financial models, and the representations and warranties provided by the issuer. As a result, legal counsel to the issuer and the mezzanine investors would not be requested (or be in a position) to deliver a negative assurance letter (also known as a 10b-5 letter). For a discussion of due diligence in the context of an underwritten offering of debt securities, see *Practice Note, Due Diligence: Securities Offerings* (www.practicallaw.com/4-380-7917)).



Similarly, because mezzanine deals generally do not involve an initial purchaser or other underwriter which needs to establish a due diligence defense under US federal securities laws (see *Practice Note, Due Diligence: Securities Offerings: What is the Due Diligence Defense?* (www.practicallaw.com/4-380-7917)), the issuer's auditors are not expected to deliver a "comfort letter" covering the issuer's financial information at closing. Mezzanine investors, however, usually receive customary corporate legal opinions (such as due incorporation, due authorization, enforceability of key documents, etc.) and closing certificates upon closing. Most purchase agreements also require mezzanine investors to represent to the issuer that they have received the information they deem necessary and have had the opportunity to ask questions of and receive answers from the issuer.

KEY ISSUES IN MEZZANINE FINANCINGS

Intercreditor Relationships

A key element in any mezzanine transaction is the critical relationship of the mezzanine holders to senior and junior creditors. The type and amount of debt to which mezzanine investors will agree to be subordinated is frequently a highly negotiated point (see *Ranking in the Capital Structure*). Some deals make the mezzanine debt subordinated to all debt of the issuer that is not explicitly subordinated by its terms. Others provide that the mezzanine debt is subordinated only to the credit facility and debt above a specific threshold that is identified on the closing date for the mezzanine financing.

The subordination provisions in the debt instruments, together with the intercreditor agreement, commonly provide that payments on the mezzanine notes will be suspended if a payment default occurs on the designated senior debt. Moreover, if a covenant default under the designated senior debt occurs, holders of such senior debt usually have the right to send a blockage notice to the mezzanine debtholders, which suspends payment on the mezzanine debt for up to 179 days. The mezzanine investors generally limit the senior lenders to one blockage notice per 365-day period and sometimes limit the total number of blockage notices that can be delivered during the term of the mezzanine debt. For more information on subordination provisions, see *Practice Note, Subordination: Overview* (www.practicallaw.com/4-381-9557).

Senior lenders expect the mezzanine holders to be subject to standstill provisions that limit their ability to exercise any remedies, such as bringing suit for payment after a default or acceleration, until action is taken by the senior lenders. Some mezzanine investors negotiate to shorten the standstill period. At the end of the payment blockage period, the issuer must make catch up payments to the mezzanine holders or the mezzanine investors have a right to accelerate their debt.

Some senior lenders negotiate for complete subordination where the mezzanine holders are prohibited from exercising any contractual remedies before maturity absent consent of the senior creditors. In most cases, mezzanine investors resist these requests.

The intercreditor agreement also typically includes a turnover provision where the mezzanine investors (or the trustee or other agent representing them) agrees that if any payment is made to the mezzanine holders during a time when they are otherwise blocked from receiving payment, the payment will be turned over to the senior lenders. Mezzanine investors often negotiate to include an exception to the turnover provision. Referred to as an "X clause," this permits payments in the form of permitted junior securities, typically consisting of subordinated debt or capital stock, to the mezzanine holders in limited circumstances before senior creditors are paid in full.

Some senior lenders resist including X clauses out of concern that they permit mezzanine investors to assert a right to receive a form of payment at a time when the mezzanine holders would otherwise be subject to the standstill provisions. X clauses and subordination provisions have been litigated in many bankruptcies and have generally been held to be enforceable. To reduce potential conflicts between the secured creditors and the mezzanine investors, some intercreditor agreements require the mezzanine investors to vote for any plan of reorganization supported by lenders holding a majority of the issuer's bank facility.

Reporting and Information Rights

Another point that can vary widely is the amount and frequency of information that the issuer must provide to mezzanine investors. Because of the limited liquidity for most mezzanine instruments, mezzanine investors often focus on receiving extensive reporting and information rights. Most deals require the issuer to provide annual audited and quarterly unaudited financial statements.

For mezzanine deals where the parties want the debt securities to be eligible for resale under Rule 144A, issuers commonly covenant to provide holders and potential investors with all financial and corporate information required by Rule 144A (see *Practice Note, Resales Under Rule 144A and Section "4(1½)": Information Requirement* (www.practicallaw.com/6-382-8768)). Many larger deals require issuers, including those not otherwise subject to the SEC's periodic reporting regime, to provide SEC-style reports similar in scope to what they would have to file with the SEC had they been public companies subject to periodic reporting requirements, including the "Management's Discussion and Analysis," "Business" and "Risk Factors" sections (see *Practice Note, Periodic Reporting and Disclosure Obligations: Overview* (www.practicallaw.com/7-381-0961)).

However, even deals with SEC-style reporting usually exempt the issuer from certain requirements applicable to SEC filers, such as providing information that is not material for the mezzanine investors, or having the chief executive officer and chief financial officer certify each quarterly or annual report or certify the issuer's internal controls. Some deals have required issuers to deliver reports to investors upon the occurrence of each event that would trigger a Form 8-K filing for an SEC reporting company (see *Practice Note, Form 8-K: Events that Trigger a Form 8-K Filing* (www.practicallaw.com/9-381-0960)). With the ever increasing number of Form 8-K triggers, however, many issuers have succeeded in eliminating this requirement or limiting it to events that, in the issuer's view, would be material to investors.

WHAT IS MEZZANINE CAPITAL?

In corporate finance, mezzanine capital generally refers to a tier in a company's capital structure between debt and equity.

A mezzanine financing can come in the form of a stand-alone equity investment, typically preferred stock, or a debt investment. Most often, mezzanine financing takes the form of subordinated, unsecured debt. Mezzanine debt can also be secured by a second lien. Because mezzanine capital tends to be subordinated to other creditors of the mezzanine issuer and because mezzanine investments are often not as liquid as more traditional types of debt investments, mezzanine investors receive a higher return than providers of bank loans, high-yield bonds and other, more traditional forms of debt financing.

Mezzanine capital includes a range of products, such as preferred stock, convertible securities and high-yield style debt, and is used for a variety purposes, such as:

- Growth capital for smaller companies (see *Practice Note, Minority Investments: Overview* (www.practicallaw.com/1-422-1158)).
- Leveraged buyouts by private equity sponsors (see *Practice Note, Buyouts: Overview* (www.practicallaw.com/4-381-1368)).
- Real estate "gap" financing (see *Box, Real Estate Mezzanine Capital*).
- Restructurings.

Mezzanine borrowers are often private companies who lack the fluid access to capital available to public companies due to their size, high leverage, market conditions or otherwise, or do not want to or cannot dilute their existing equity holders. Although mezzanine investments are typically unique buy-and-hold products sold to investors in a private placement that are not widely distributed or traded, in recent years a few "jumbo" high-yield style mezzanine offerings have been syndicated to a broader group of qualified investors.

In some mezzanine deals, the reporting covenant originates from the issuer's loan agreement, and requires the issuer to provide an annual budget to the mezzanine investors or even to provide certain key operating information more frequently than on a quarterly basis. Several issuers have argued that given the extensive due diligence and active ongoing involvement of mezzanine investors (including board rights), extensive reporting obligations impose significant compliance costs on the issuer without an appreciable benefit for mezzanine investors and create potential defaults by the issuer. Some sponsor-backed issuers have been able to lessen the reporting burden by obtaining waivers from mezzanine investors that permit the issuer to suspend certain requirements under the reporting covenant unless the waiver is revoked.

REAL ESTATE MEZZANINE CAPITAL

Real estate operators and developers regularly use mezzanine capital to fill a gap between the first mortgage and their equity investment in a particular project. Mezzanine financing can often provide anywhere between 10% and 40% of a real estate project's capital. Unlike mortgage financings, in which a mortgage lender makes a loan to a property owner in exchange for a security interest in the underlying real property, real estate mezzanine deals are generally loans to the parent of the property owner in exchange for a pledge of the equity interest in the property owner.

The parent of the property owner is commonly set up as a single purpose entity intended to be a "bankruptcy remote" entity which owns only the equity interest in the property owner. In larger real estate financing transactions, multiple levels of mezzanine loans may be advanced with multiple levels of mezzanine borrowers (each pledging its equity interest in the borrower under the more senior financing as the collateral for its loan). It is generally believed that a UCC foreclosure on the equity interest by the mezzanine lender is a less cumbersome and faster process than a foreclosure on real property by a mortgage lender.

Because mezzanine lenders are concerned about a potential foreclosure on the project by a mortgage lender and mortgage lenders worry about the creditworthiness of a mezzanine lender who forecloses on the mezzanine borrower's equity pledge, the mezzanine lender and the mortgage lender typically enter into an intercreditor agreement at the time of the initial financing. Among other things, this intercreditor agreement provides for:

- The subordination of the claims of the mezzanine debt to the mortgage.
- Cure rights to the mezzanine lender for mortgage loan defaults.
- Steps that must be taken by a mezzanine lender related to the foreclosure of its collateral (such as providing a new creditworthy entity to act as a replacement guarantor for any guaranteed obligations under the senior loan).

The financial crisis and the deterioration of real estate values in many markets as well as recent high profile bankruptcy cases in the real estate sector have been the source of increased conflict under these loan structures.

For more information on mezzanine loan foreclosures, see *Article, Mezzanine Loan Foreclosures* (www.practicallaw.com/8-385-3969).

In addition to receiving the issuer's information in accordance with the reporting covenant in the applicable debt instrument, mezzanine investors commonly negotiate for the rights to receive all board materials and to appoint a board observer (or in some cases, a director) if they hold a specified percentage of their initial investment, which can be as low as 10% or as high as 50%.



Mezzanine investors structured as investment partnerships may have ERISA compliance responsibilities with respect to their own investments. Therefore, they often require an issuer to provide certain information and consultation rights designed to ensure that the investment partnership may treat the investment as a "venture capital investment" in compliance with the Venture Capital Operating Company (VCOC) exception to the ERISA plan asset regulations. Guidance from the Department of Labor has suggested that even where an investment partnership has not obtained the right to representation on the board or its equivalent, it is possible to fashion sufficient management rights if the investment partnership obtains the right to inspect issuer books and records and receive certain financial information coupled with consultation rights.

The term "management rights" is defined for these purposes as contractual rights, running directly between the investment partnership and the issuer, to substantially participate in, or substantially influence the conduct of, the management of the issuer. The determination of whether VCOC management rights have been obtained is a facts and circumstances exercise and must be examined on a case-by-case basis.

Equity Component of Mezzanine Investment

Because the overall return to the mezzanine investor includes the investor's ability to realize the value of its equity participation, a viable exit strategy is critical to the decision to participate in a mezzanine funding. Potentially viable exit events include:

- The sale of the issuer.
- A recapitalization.
- A refinancing.
- An initial public offering.

Similarly, provisions regarding the transferability and liquidity of the equity participation may be critical to achieving a successful exit.

The terms of the equity investment can be heavily negotiated, especially for privately held issuers whose mezzanine investors and existing equity holders take different views on the valuation of the issuer. While precedents vary, in cases where mezzanine investors will receive only limited equity interests in the issuer, ordinarily they have limited leverage to negotiate for more than standard tag-along rights and registration rights, as well as customary anti-dilution protections. In cases where mezzanine investors are also taking larger equity stakes, however, they may also negotiate for veto rights for specified corporate actions including equity offerings, mergers, affiliate transactions or changes in senior management.

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EUROPEAN MEZZANINE CAPITAL

As in the US, private equity investors in Europe have turned to mezzanine financing as a potential source of capital in financing their acquisitions and recapitalizations. Mezzanine products have a long track record in Europe and the terms of European instruments are often substantially different than those in the US. European mezzanine financing typically looks more like a second lien bank facility, with a form derived from the senior secured facility in the relevant transaction.

In Europe, mezzanine finance has been used to a greater or lesser extent depending on market conditions. However, it is not an uncommon alternative to high-yield bonds in the capital structure of sponsor-backed companies. European transactions in particular involve complex intercreditor arrangements, often requiring consideration of legal and other issues in multiple jurisdictions. In addition, as is common with other types of European debt financings, investors must deal with limitations on the enforceability of guarantee and security claims which apply in many European jurisdictions when structuring mezzanine debt investments.

For the links to the documents referenced in this note, please visit our online version at <http://us.practicallaw.com/2-502-3062>.

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