GLOBAL LEGAL INSIGHTS

Fund Finance 2026

10th Edition

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FUND FINANCE association

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Securing success: key considerations for account security in fund finance transactions

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Even as the scope of fund finance products has expanded over recent years, one key consideration that arises in nearly all transactions is the taking and perfecting of legally enforceable security over the bank accounts through which relevant cashflows are to be directed. This consideration remains a near-universal requirement of lenders, whether parties are engaging in a subscription line facility, asset-backed loan (ABL), GP financing or even a collateral-lite NAV.

It all seems so simple – until it is not. The act of taking security over bank accounts should be straightforward and, consequently, is frequently given little thought until the last moments of a transaction. This often proves to be a fatal mistake: if account security is not managed proactively and early, small details, technical legal points, sticky negotiating points, lack of motivation from the account bank or any combination of the above can lead to account security being the cause of delay to the overarching transaction timeline. In this chapter, we survey both technical considerations and practical "gotchas" – touching on matters ranging from conflicts of law to execution processes – to help guide fund finance practitioners (regardless of role or experience level) through the points to keep in mind when taking or giving account security.

Early considerations – the commercial points

Certain matters relating to bank accounts are commercial in nature and are either negotiated as part of the term sheet or have well-settled practice within certain products or sub-markets. While it is outside the scope of this chapter to explore these in detail, these points are worth noting for the impact they have on other matters considered below. In particular, we highlight the following points:

- *Cashflow requirements* – the cashflows required to be directed through the collateral accounts (and whether these amounts are required to be directly deposited in those accounts by payors or swept within a certain time period) are often broadly settled within a given product or market segment, subject to transaction-specific details still up for negotiation. Settlement of cashflow controls remains an equally important point for both borrowers and lenders. From the borrower perspective, any requirements proposed by the lenders need to be practically achievable and not lead to hair-trigger transaction defaults. Borrowers often will be focused on how the account security will impact their day-to-day treasury needs, which may require structural changes to the account security.

From a lender perspective, the strength of security over bank accounts is of little consequence if the relevant cashflows are not deposited into those accounts in a timely manner. Lenders may also require accounts to be opened solely for use as collateral accounts under the transaction at hand, in order to reduce commingling risk.

- *Identity of the account bank* – in some market segments, it is common for the lead (or sole) lending bank to require that accounts are established with that bank to support the facility. More specifically, a lending bank may require that it holds the bank accounts as this will make it easier to monitor the account and enforce security. Borrowers, on the other hand, may have reasons for wanting to keep the bank account elsewhere, such as ensuring that cash management is consistent across vehicles. If maintaining accounts at a bank selected by the lenders is a requirement, the relevant sponsor should work to understand any technology integrations that may be required. In market segments where control over identity of the account bank is not required by lenders, the identity of the account bank will still be relevant, as the location of the relevant accounts and cooperation (or lack thereof) that may be expected from that account bank will have a practical impact. When identifying the account bank, it is also important to clarify with the account bank whether the account is a pure cash account or whether the account can also hold securities. This can have an impact on the opinions requested by lenders and the actual form the account bank should provide to start negotiations.
- *Pre-enforcement control and verification* – another common commercial focus is whether or not the accounts are blocked or controlled by a third-party pre-enforcement. In the parts of the fund finance industry that are influenced by structured finance, it is common to give a third party, which owes specific duties to the lenders under the transaction, control of the accounts prior to enforcement. Additionally, regardless of who controls the bank accounts, it is frequently the case that third parties will require access to the accounts to verify that payments have been made in accordance with the finance documents or to otherwise report on cashflows. Such controls and access are product and market-segment specific but should be understood early to ensure that they work practically for all parties involved and any third parties have sufficient time to be onboarded and put the relevant access, monitoring or verification processes in place.
- *NAV/hybrid-specific collateral flows and commingling risks* – in NAV and hybrid facilities, collateral cashflows often originate from portfolio-level structures (e.g., special purpose vehicles (SPVs), holdcos, parallel/feeder funds) and may need to take a roundabout route before reaching pledged accounts. Parties should map the full waterfall end to end in order to ensure all material distributions, disposal proceeds and hedge close-outs are routed into controlled accounts. Consider whether separate pledged accounts are required by vehicle or portfolio to reduce commingling risk, preserve borrowing base eligibility and simplify enforcement. Where upstream distributions are constrained by portfolio-level debt, intercreditor restrictions or regulatory limits, reflect such limitations explicitly in the relevant transaction documentation and require rerouting of proceeds into the controlled account set.

Determining the relevant location of the accounts

There will be a variety of commercial, legal and regulatory factors that dictate the location in which collateral accounts will be established. These include jurisdiction of the underlying vehicle, existing banking relationships and/or requirements of the lender.

For bank accounts established domestically in the United States, the state in which a bank account is opened does not have a material impact on the taking and perfection of security, since this is in all material respects harmonised through the application of the Uniform Commercial Code (UCC). Yet, for opinion purposes, it is important for practitioners to designate the governing law of any account control agreement to a jurisdiction in which its firm can render a legal opinion. Further, in multicurrency setups, sponsors may maintain sub-accounts for alternative currencies (e.g., EUR, GBP) under a primary USD account relationship. In practice, those currency sub-accounts may be booked at different branches or even different legal entities of the same bank. That booking location determines where the account "sits" for perfection and enforcement, which in turn drives whether a local pledge is required. This may be in addition to any United States (or other) account control agreement. For both existing and to-be-opened accounts, parties should (i) confirm the actual booking branch or legal entity for each currency sub-account (using the IBAN as noted below, account opening documents and explicit branch confirmations), and (ii) determine early whether any non-domestic currency sub-accounts will be deemed "foreign accounts" necessitating local law security, filings and/or notices.

In Europe and elsewhere, the location of the collateral accounts will determine the form of security and perfection requirements that may need to be satisfied (noting that perfection requirements may also be dictated by jurisdiction of incorporation or establishment of the account holder). It is therefore imperative when dealing with accounts outside the United States to understand the location of accounts from an early stage. This may not be as easy as it sounds – many banks in Europe operate across several jurisdictions through different branches and legal entities, and the location of the relationship manager at that bank may not dictate the branch or legal entity that is used. We therefore recommend, at a minimum, checking the IBANs of accounts that have already been opened (the first two letters in any IBAN are a country code that will indicate the relevant jurisdiction). Where accounts or sub-accounts have not yet been opened, we would suggest discussing this with the account bank directly.

There may be some additional complication in determining the relevant jurisdiction if an account is held through a sub-custodian or similar arrangement. There may be two IBANs each indicating a different jurisdiction relevant to accounts subject to these arrangements. In these circumstances, lenders will generally want to take security over the account that allows direct client instruction (noting that a sub-custodian would not typically accept instructions from the end client or their creditors) as this is practically where enforcement will take place. There are other considerations for lenders dealing with such accounts, such as whether they are comfortable with the creditworthiness and jurisdiction of the sub-custodian (notwithstanding that they will not have a direct relationship, even in enforcement). This will not, however, impact the security that is taken.

The local law security

For international accounts, once the jurisdiction of the accounts has been identified, local counsel should be engaged to advise on and draft the account security. While it may be possible to enforce security governed by a different law over bank accounts, the form and other mandatory requirements of the local jurisdiction will need to be adhered to, meaning that practically lenders will not take such a risk.

Often the difference in account security across jurisdictions is one of form rather than substance. However, there are a number of important considerations that should be addressed in respect of the local jurisdiction: do enforcement proceedings require any formality or court engagement (and, if so, can these be completed quickly and at a low cost); are there any restrictions on who may hold security interests; are third parties able to frustrate or delay the enforcement of security; and is springing account control permitted? If the answers to one or more of these questions are in the negative, the lenders may push for accounts to be opened in a different location. Where foreign pledges are required for alternative currency sub-accounts, parties should engage with the security agent appointed for the broader transaction early on, in order to decide whether that security agent can act in the relevant jurisdiction or whether a local security trustee or agent is needed. In addition, parties should build in time for KYC, notarisation, apostille/legalisation and any stamp duties. In some jurisdictions, "financial collateral" regimes can streamline certain formalities; even so, lenders often still expect local perfection and, where applicable, entity-jurisdiction registrations (e.g., companies registry filings) to protect priority in insolvency.

While local counsel will be responsible for drafting and opining on the enforceability and documentation of a security document governed by their laws, it remains important for lead counsels and the commercial parties to consider these documents, especially in respect of the following:

- *What are the enforcement triggers?* Parties should seek consistent enforcement triggers within the finance documents across applicable jurisdictions, unless specific legal concerns (e.g., insolvency laws providing for moratoriums in certain circumstances) require otherwise.
- *Is the security grant flexible enough to cover future accounts and, if so, what steps need to be taken?* Ensuring that the security grant is as flexible as local law permits will reduce the potential future expense should further or substitute accounts need to be opened. Invariably, further perfection may still be required, but this will be cheaper than a further grant of security.
- *Does the security cover "all monies" and waive defences that may be raised relating to future amendments?* Again, as much flexibility as is possible is desired. If flexibility cannot be built in, the parties should take note that security confirmations (or additional security grants) will be required in the future when certain actions are taken (e.g., accordions, extensions, waivers, etc.). It is often prudent to obtain such confirmations, in any case, but there is a difference between taking such action because it is prudent and cautious and needing to take such action to maintain the enforceability of security.
- *Are the boilerplate terms consistent with (and not overly repetitive of) other security documents?* It is natural that local law security will want to have its own representations, covenants, further assurances and powers of attorney so that enforcement and other actions may be taken without involving conflicts of law concerns in the relevant jurisdiction. However, the drafting should, so far as it is possible, be consistent with other finance documents (that local counsel may not have full visibility of).
- *What are the perfection steps and when are they required by?* This will be considered in more detail below.

Perfection – not solely a legal matter

The Merriam-Webster legal dictionary[1] defines "perfected" as follows:

> *completed in accordance with statutory procedure for giving notice and thereby having a status of priority over security interests that are the subject of such procedure at a later date or that are not the subject of such procedure*

This describes the technical legal meaning of perfection, ensuring that a security granted and perfected is enforceable in priority to any other security, lien or other right that may exist over such property. However, when we speak of perfection over account security, we mean something more: practically ensuring that the account bank is required to take instructions from the security agent acting on behalf of lenders (to the exclusion of the borrower) post-enforcement.

This distinction is important – in many jurisdictions, perfection may be achieved by registration (see, e.g., Canada) or by notice being given to the account bank (see, e.g., Luxembourg, Ireland, and England and Wales) without any acknowledgment or involvement of the account bank. However, even in those jurisdictions, lenders will not be satisfied that their security has been perfected unless an appropriate document acknowledging their enforcement rights has been signed and delivered by the account bank.

Of course, in the United States, a deposit account control agreement (DACA) is required for legal perfection to be achieved – given that is the primary method by which "control" is established in accordance with the UCC. However, almost irrespective of jurisdiction, a similar document will be entered into. Whether it is called a DACA, account bank agreement or notice and acknowledgment (for the remainder of this chapter we will refer to all of these documents collectively as account control agreements), the negotiated points and practical considerations are similar.

Before we consider specific issues relating to account control agreements, it is worth noting that the jurisdiction of incorporation of the account holder may also impose perfection requirements on security grants that will need to be complied with to ensure that such security maintains priority in insolvency. Typically, such perfection will be in the form of registration. Even in circumstances where it is arguable that such registration is not required (for example, the typical registration requirements on English companies may be overridden if the account security constitutes a financial collateral agreement), lenders will take a prudent approach and typically file registrations in any case.

For multicurrency relationships, perfection should be addressed on an account-by-account basis to avoid gaps created by alternative currency sub-accounts booked at foreign branches. Even where a master DACA or notice is used, parties should confirm that it effectively reaches each relevant currency sub-account and, if not, implement local law pledges for those foreign-booked accounts.

Practical considerations dealing with an account bank

When dealing with a third-party account bank, it should be noted that they are not always as incentivised as the parties to the financing to negotiate or to meet tight timescales (this is, in fact, a reason that some banks push for the use of their own accounts in a transaction).

In most jurisdictions, market practice is that the starting form of an account control agreement will be prepared by the account bank. In the United States, many account banks go further and "hold the pen" on the document – in some instances even controlling the execution process. The personnel allocated to managing account control agreements within banks often have little authority to move away from their precedent and can have limited access to their internal legal functions, even if legitimate legal concerns are raised on a transaction with the language in their template. In some instances, such personnel will also require the engagement of separate counsel to negotiate beyond their starting form. This of course adds another level of complexity and another law firm to a transaction.

The above can make it slow and frustrating to deal with issues in account control agreements. As a practical matter, this means that account banks should always be engaged early and (if at all possible) referred to previously negotiated precedents so as not to revisit previously agreed points.

Negotiated points in account control agreements

The following points commonly require negotiation or review in account control agreements:

- *Springing control trigger and timeline* – the account bank should be made to understand whether springing control or blocking control is required and made to provide the appropriate precedent. For reference, a blocked account will not permit payment without lender (or security agent) consent at any time, whereas springing security describes account security where such consent is only required following the occurrence of specified triggers. When there is springing control, a key point for negotiation will be the timelines on which an account bank will commit to cease taking instructions from the borrower following a revocation of control notice, and instead only follow the instructions of the secured creditors. Negotiation of this point should address what constitutes "receipt" of a control notice and cross-border timing certainty, including which time zone governs "receipt" and treatment of local banking days and cut-offs (e.g., Fedwire, CHAPS, TARGET2) for same-day effect.
- *Waiver of liens* – in certain jurisdictions, account banks will have their own liens and security interests over the bank accounts they hold. This will typically be coupled with a right of set-off or deduction that allows an account bank to deduct amounts from the account without instructions to do the same. It is a typical requirement of lenders that these rights are waived except in limited circumstances (e.g., known or standard account operation fees).
- *Termination* – some account banks require the right to terminate the account control arrangement unilaterally (i.e., without the consent of the lenders with security over the relevant account) following a certain specified period of notice. Even if such right were to be legally acceptable (as it would be in jurisdictions that only require notice or registration for technical legal perfection),

accepting this would lead to a situation where, practically, account security may not be capable of enforcement out of court. While the chances of an account bank exercising this right are considered remote, if they cannot be convinced to drop the requirement, a trigger in the loan documentation would likely be required to ensure that the financing does not continue to operate as normal until a properly perfected replacement account is established. It is, accordingly, in both the lenders' and the sponsor's interest to either remove such a right or extend the timeline for such termination to a period that enables replacement arrangements to be put in place.

- *Generality of account references* – if the relevant law and internal policies of the account bank will permit, it is desirable that account control agreements refer to all accounts that may be opened in the future with that account bank by the relevant account holder.
- *FX sweeps and treasury operations* – DACAs and equivalent account control agreements involving alternative currencies should expressly address the treatment of (i) standing FX orders and auto-conversions, (ii) daily sweeps/zero-balancing and notional pooling, (iii) intra-day overdrafts, and (iv) cut-off times. Specify whether such instructions are suspended upon notice, whether the bank will complete conversions that are already in process and how proceeds are credited or controlled post-notice. Require the account bank to maintain sufficient operational flexibility to execute secured creditors' FX instructions during enforcement without impairing control or priority.
- *Permitted investments* – ensure that, where the borrower has negotiated the flexibility to make short-term investments (e.g., in money market funds), the account control arrangements are sufficiently flexible to cater for release of funds for such investments and the finance documents properly contemplate the receipt, reinvestment and/or application of proceeds from those investments.
- *UCC formalities* – depending on the form of DACA that is provided by an account bank, sometimes practitioners will need to either incorporate by reference certain UCC definitions or drop them into the DACA to get comfortable providing an opinion regarding the enforceability for the DACA (e.g., often lender counsel may push to include language stating that the deposit account is a "deposit account" within the meaning of the applicable UCC).
- *Liability for costs/indemnities* – some bank templates for account control agreements seek to make the secured creditors liable for all expenses and indemnification obligations relating to the accounts, even prior to springing control. Even after control is taken over the account, liability matters can be controversial since it will often be an agent signing the DACA on behalf of all lenders and that agent will not want to incur liability (even if they are indemnified by the lenders elsewhere).
- *Governing law and other opinion considerations* – as mentioned earlier, in most transactions an enforceability opinion will be requested over the DACA. While there is often pressure from United States firms to resist opining on a perfection step, if a practitioner loses this point, they should make sure that the governing law of the DACA is the law of a jurisdiction their firm can offer an opinion over, notwithstanding the location of the actual branch of the account bank. As noted above, practitioners should also be clear on the *type* of account that security is being provided over. If the account is a securities account and not just a cash deposit account, there may be a need for a securities account control agreement instead of the usual DACA – and negotiating a securities account control agreement can raise new issues for lenders.

Execution formalities with an account bank

Even after the account control agreement is in agreed form, there may be procedural hurdles that will need to be overcome. Before proceeding with execution, practitioners should confirm with the applicable bank whether there are any specific formalities that will need to be followed or whether there are any timing constraints (noting, as we have previously, that account banks will rarely be as motivated as the principal parties in the fund financing transaction).

As stated above, some account banks have a requirement to run the entire process relating to the account control agreement and this can extend to managing execution. Unusual requirements can appear in these account bank-led signing processes, including specific requirements relating to whether wet ink or electronic signatures will be accepted (and, if they are, which providers are acceptable).

In some instances, the account bank may have a pre-existing incumbency certificate from the account holder of the individuals authorised to sign documents related to the account. Often, as such incumbency document is completed when the collateral account is first opened, the individuals stated are different from those responsible for the financing at the relevant manager. If the depositary bank does have such a pre-existing incumbency, they will often refuse to accept signatures from anyone not already included. This can lead to a last-minute scramble if the stated signatories are not readily available.

As with many of the other matters considered in this chapter, it is worth engaging early with the account bank as to the anticipated signing process and any requirements that they have. Proactive management is key to avoid last-minute issues and delays.

Conclusions

While none of the matters considered in this chapter are particularly complicated, it is the apparent simplicity of taking account security that can cause practitioners to take their eye off the ball and let this universal requirement of fund financing cause delays to anticipated timelines. The simple message is that this can often be avoided by engaging with the requirements of account security and the account bank early. No one remembers when account security is taken smoothly; everyone remembers if it goes wrong.

Acknowledgments

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Endnote

1 "Perfected", Merriam-Webster.com Legal Dictionary, Merriam-Webster, https://www.merriam-webster.com/legal/perfected. Accessed 2 Nov. 2025.

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