

April 24, 2014

LSTA Publishes Revised Documents Effective April 24, 2014

The Loan Syndications and Trading Association (LSTA) has released new forms of its primary trading documents, effective for trades entered into *on or after* April 24, 2014.¹

The LSTA's updated forms are primarily designed to address foreign withholding tax requirements that will become effective July 1, 2014 under the Foreign Account Tax Compliance Act (FATCA). Additionally, the LSTA has significantly revised its Participation Agreements (for both Par and Distressed trades) to include changes consistent with those previously incorporated into its Purchase and Sale Agreement for Distressed Trades (PSA) and to incorporate the LSTA Collateral Annex, which was last updated in June 2013. No significant changes have been made to the Par and Distressed Trade Confirmations or the PSA Transaction Specific Terms.

What is FATCA?²

FATCA was enacted in March 2010 to combat offshore tax evasion by US taxpayers through a new reporting and withholding regime. Under the general premises of FATCA, a foreign financial institution (FFI) must ascertain whether its account holders are US taxpayers, and assuming so, the FFI must disclose information to the Internal Revenue Service (IRS) about such US accounts and act as a withholding agent by imposing a 30 percent withholding tax on any such recalcitrant US accounts that have not properly disclosed information about themselves to the IRS. FFIs that do not comply with FATCA will be subject to a 30 percent withholding tax on any "Withholdable Payments" received by such FFI.

How Does FATCA Affect the Loan Trading Market?

"**FFI**" is broadly defined to include many market participants, such as foreign banks, hedge funds, private equity funds and collateralized loan obligations. "**Withholdable Payments**" are defined as certain US-source payments, including interest payments and—effective January 1, 2017—principal repayments and gross sale proceeds of loans that produce US-source interest payments.

¹ Specifically, the LSTA has revised: (i) the Par/Near Par Trade Confirmation; (ii) the Distressed Trade Confirmation; (iii) the Purchase and Sale Agreement for Distressed Trades; (iv) the Participation Agreement for Par/Near Par Trades ("Par Participation Agreement"); (v) the Participation Agreement for Distressed Trades ("Distressed Participation Agreement," and together with the Par Participation Agreement, the "Participation Agreements"); (vi) the Chapter 11 Plan Proceeds Letter Agreement for Post-Effective Date Settlement of Distressed Trades; and (vii) the Short-Form Proceeds Letter Agreement for Post-Repayment Date Settlement of Distressed Trades.

² This Client Advisory is not intended to be a comprehensive description or analysis of the new FATCA regulations. For more details about FATCA, please review our [Client Advisory dated February 21, 2014](#).

If you would like to discuss these revisions or if you would like to receive copies of the revised documents, please contact your Katten Muchin Rosenman LLP attorney or any of the following members of the **Distressed Debt and Claims Trading** practice.

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Loans that are outstanding as of July 1, 2014, including any standby letters of credit and revolving credit facilities that are drawn upon after July 1, 2014, will be “grandfathered” and therefore *not* subject to FATCA unless such loans are materially modified after such date. A “**material modification**” can include an extension of maturity or a spread change of 25 basis points or more.

How Do the Revised LSTA Documents Address FATCA Tax Withholding Issues?

Similar to the pre-existing tax withholding language, the LSTA makes FATCA a payee risk. With respect to regular payments as between buyer and seller, the remitting party (the “Payor”) has the right to withhold any amount required under law or FATCA. Additionally, the receiving party (the “Payee”) agrees to provide any additional documentation reasonably requested by the Payor as is necessary for the Payor to comply with FATCA, and until such documentation is received by the Payor, the Payor may refrain from making any such payments.

A significant difference from the pre-existing tax withholding language, however, is that under certain circumstances, a Payor is now required to make gross-up payments to the Payee to the extent of any prior FATCA withholdings. Where payments are passed on through the Payor, such as with proceeds or payments under a participation agreement, the new LSTA language provides for full payments to be made to receiving parties that are compliant with FATCA. Thus, where the Payor receives a reduced payment originating from the Borrower or Agent as a result of a FATCA withholding, such Payor is required to gross up the amount forwarded to the Payee *except* where the Payee has not complied with FATCA or would otherwise have been subject to a FATCA withholding had the Payee directly received the payment from the Borrower or Agent.

Additional Revisions to the Participation Agreements

In addition to the FATCA revisions, the LSTA has updated the Participation Agreements so that they conform with the PSA and the Collateral Annexes published last spring. These revisions include, among others, the elimination of the Judgment Currency check-box in the Transaction Specific Terms and resolution of the “inverted trade date” discrepancy as it pertained to future distributions.

Additional noteworthy revisions to the Participation Agreements are highlighted below.

- Removal of Defined Term “Elevation Required Consents” (Par and Distressed): The definition of “Elevation Required Consents” has been removed from the Transaction Specific Terms and replaced with a broad generic definition in the Standard Terms and Conditions, thus eliminating the risk of such definition becoming inaccurate during the period between the Settlement Date and the Elevation Date.
- Addition of True Sale Provisions (Par and Distressed): Section 2 of the Standard Terms now clearly states that the participation shall be treated for all purposes as a true sale (versus a debtor-creditor relationship). Section 8 also includes language that payments or distributions made to one party for the benefit of the other party “shall for all purposes constitute property” of such other party.
- Elevation Upon Seller Bankruptcy (Par and Distressed):
 - The Distressed Participation Agreement Standard Terms and Conditions now include language stating that the consent of the Seller for an Elevation shall be deemed given upon Seller (or its direct or indirect parent) seeking protection under the Bankruptcy Code or similar debtor relief laws (defined as “Debtor Relief Laws”).
 - In the Par Participation Agreement Standard Terms and Conditions, the Buyer may, regardless of the Elevation specification in the Transaction Specific Terms, request an Elevation in the event Seller (or its direct or indirect parent) seeks protection under Debtor Relief Laws.

- Alternative ERISA Representation (Par): The Buyer and Seller ERISA representations have been modified to include a third alternative representation. This third alternative is substantially similar to the language that the LSTA suggests as an “Alternative” ERISA representation for a qualified professional asset manager (QPAM) exemption. Under the new Par Participation Agreement, Parties will no longer need to negotiate the inclusion of such “Alternative” representation. The ERISA representations under the Distressed Participation Agreement were not revised.

Members of the LSTA can access the forms on the [LSTA website](#).

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