

REVISIONS TO LMA TRADING DOCUMENTS EFFECTIVE 25 SEPTEMBER 2017

The Loan Market Association ("LMA") published revised versions of its Standard Terms and Conditions for Par and Distressed Trade Transactions (Bank Debt/Claims) (the "Standard Terms and Conditions"), Participation Agreements and the LMA Secondary Trading Documentation User Guide (the "Users Guide")¹. The LMA also published a summary of changes to the rules governing plans and individual retirement accounts under the US Employee Retirement Income Security Act of 1974 ("ERISA") in a document entitled "ERISA Introduction and Explanation of Recent Changes" (the "Explanatory Note"). The revised documents are available on the LMA website (<http://www.lma.eu.com>) and affect trades that are entered into on or after 25 September 2017. This Client Alert summarizes these main changes and discusses why they are important to the secondary market loan trading community.

DELAYED SETTLEMENT AND CLAWBACK

The Standard Terms and Conditions were updated to reflect changes to the Delayed Settlement Compensation calculation in Condition 11.2(c) that enhance a Seller's claw back rights against the Buyer.

The LMA documents protect the Seller in the event the Seller advances Interest or Recurring Fees that the Obligor ultimately does not pay. The LMA updated this condition to reflect that the Seller may retract this payment from the Buyer if *all or any part of* the Interest or Recurring Fees was not paid. Originally, the terms did not specify that the payment may be a partial payment. This is now corrected.

The LMA also clarified that the Seller is able to retract a payment in the event *any* (instead of *either*) of the following two events occur: (1) the scheduled payment for the Interest or Recurring Fees is not made within an applicable grace period in the Credit Agreement, or (2) Interest or Recurring Fees becomes PIK Interest at any time after the Settlement Date and up to the scheduled payment date. The LMA

added that if no such grace period exists, then a grace period of *30 days* from the scheduled payment date shall be applied.

The LMA documents had originally required the Buyer to return the Interest or Recurring Fees after the Seller made a demand on the Buyer. The LMA updated the terms to reflect that the Buyer shall return the Interest or Recurring Fees upon the earlier of the date that the Buyer *becomes aware of such non payment* of Interest or Recurring Fees or the date of the demand by the Seller.

SETTLEMENT AMOUNT CALCULATION

The Standard Terms and Conditions were updated to reflect changes to the Settlement Amount Calculation outlined in Condition 14.2. This provision explains how to calculate the amount payable for the Purchased Assets and Purchased Obligation (the "Amount Payable"). The Amount Payable can be reduced by certain events, such as a Permanent Reduction. If there is a Permanent Reduction, then the Amount Payable is reduced by (100% minus the Purchase Rate) multiplied by the Permanent Reduction of the funded

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or if no funded portion in the relevant currency, the unfunded portion. The LMA added the ability of the Amount Payable to be reduced by the unfunded portion of the Purchased Assets if no funded portion exists.

PARTICIPATION AGREEMENTS

The LMA updated the Standard Terms and Conditions to provide that a Grantor "shall only be obligated to sign a Transfer Certificate" after the Grantor "has satisfied it has complied with all 'know your customer' or other similar checks."

ERISA

The LMA updated the Standard Terms and Conditions' Seller ERISA Representations and Warranties in Condition 22 and the Buyer ERISA Representations and Warranties in Condition 22.5 to reflect the recent changes to ERISA laws. The Explanatory Note also provides further analysis on the reasons for the ERISA revisions. The US Department of Labor (the "DOL") published new rules under ERISA and Section 4975 of the Code that became effective on 9 June 2017.

Before the rule change, only advisors who were charging a fee for their advice on retirement plans were considered to be an "investment advice fiduciary."

The new rules broadened the definition of an "investment advice fiduciary" to include all financial professionals who work with retirement plans or provide retirement planning advice to the level of a fiduciary. This is important because fiduciaries are held to a higher standard and are required to put the interests of their clients ahead of their own.

The new rule does include an important exception that the Standard Terms and Conditions highlight in Condition 22 and Condition 22.5. If the ERISA plan is managed by an independent fiduciary with appropriate financial experience and sophistication, then a person providing advice to the ERISA plan will not be deemed to be a fiduciary.

In addition to these substantive changes, there have been other edits to the suite of LMA trading documents and the Users Guide of which market participants should be aware. Should you have any questions on the revisions to these documents or the impact such changes will have on your transactions, please feel free to contact the authors of this Client Alert or your usual Clifford Chance attorneys.

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ⁱ Terms capitalized but not defined herein shall have the meanings ascribed to them in the Standard Terms and Conditions or Users Guide as the case may be.