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Claims Trading
ALERT

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KEY REVISIONS TO THE LSTA'S TRADING DOCUMENTS

The Loan Syndication and Trading Association has released updated forms of the Par/Near Par Trade Confirmation, Distressed Trade Confirmation, Purchase and Sale Agreement for Distressed Trades, Participation Agreement For Par/Near Par Trades, Participation Agreement for Distressed Trades, Proceeds Letter and Short-Form Proceeds Letter to address certain withholding and reporting requirements under the Foreign Account Tax Compliance Act ("FATCA"). The new versions of the LSTA trading documents will take effect on April 24, 2014.

FATCA (included in sections 1471 through 1474 of the Internal Revenue Code of 1986, as amended, and the rules and regulations promulgated under it) was enacted to improve offshore tax compliance and affects the loan markets. FATCA imposes additional withholding and reporting requirements for foreign financial institutions, including foreign banks, brokers, trust companies and investment funds, including private equity and hedge funds. Foreign financial institutions that do not comply with FATCA are subject to a 30% withholding on all interest and principal payments in respect of a loan to a U.S. borrower. The withholding also applies to the gross sale proceeds of a loan. The revised LSTA trading documents generally make FATCA a payee risk, but the revised agreements provide for payments to be made to parties who are compliant with FATCA without setoff. New versions of the Loan Syndication and Trading Association's (the "LSTA") trading documents will take effect on June 28, 2013. The noteworthy revisions to the trading documents are summarized below.

Key Points - FATCA Revisions to the LSTA Trading Documents:

- A "Remitting Party" is the party that is required to make a payment to another party. The Remitting Party can be the Buyer making a payment to the Seller or the Seller making a payment to the Buyer. The "Receiving Party" the party that is entitled to receive the payment.
- The LSTA trading documents allow a Remitting Party to withhold any amount required by law or pursuant to FATCA. The Receiving Party's withheld amount is deemed to have been paid to the Receiving Party by the Remitting Party.
- The Receiving Party bears the burden of proving to the Remitting Party that the Receiving Party is FATCA compliant and that payments should not be withheld.
- The Remitting Party may request the Receiving Party to send documents evidencing the Receiving Party's exemption from tax withholdings imposed by the U.S. or any other foreign jurisdiction. The Remitting Party is permitted to withhold payments due to the Receiving Party until the Receiving Party provides the Remitting Party with the requested tax withholding documents. If the Receiving Party provides documents to the Remitting Party evidencing the Receiving Party's compliance with FATCA, then the Remitting Party cannot withhold such payments.

- In summary, the Remitting Party may withhold an amount due to the Receiving Party if: (1) the Receiving Party does not provide the Remitting Party with documents evidencing the Receiving Party's FATCA compliance, (2) the Receiving Party does not comply with FATCA, or (3) the Receiving Party would have been subject to the FATCA withholding if the Receiving Party had received the payment directly.

Additional Revisions to the Participation Agreement for Par/Near Par Trades and Participation Agreement for Distressed Trades Agreement:

In addition to FATCA related revisions, the Par Participation Agreement and the Distressed Participation Agreement were revised to reflect updates to the Collateral Annex of the Participation Agreement for Par/Near Par Trades and the Collateral Annex of the Participation Agreement for Distressed Trades and to add "true sale" language to both Participation Agreements, among other changes.

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Members of the LSTA can access the forms on the LSTA Website at www.lsta.org. We are available to discuss any questions you may have with respect to these new trading documents and your individual trades.

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Within Kramer Levin's Corporate Restructuring and Bankruptcy Group is a subset of lawyers that focuses on representing investors in troubled companies. The group represents funds and investors on a national and international scope and concentrates in trading claims in troubled enterprises. The claims trading team is widely regarded as among the finest in representing investment banks, commercial banks and domestic and international hedge funds in their purchases and sales of distressed investments, such as bank claims, trade claims and swap claims in addition to privately traded securities. For more information about this alert, please contact one of the following authors.

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