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New LSTA Form Distressed Participation Agreement

On October 24, 2007, The Loan Syndications and Trading Association (the “LSTA”) officially released its form of Participation Agreement for Distressed Trades (the “DPA”), which became immediately effective on that date. This is a significant development in the market. Prior to the release of the DPA, many loan market participants used their own forms of distressed participation agreement. On a going forward basis, unless otherwise agreed, parties that enter into a distressed loan trade on LSTA terms to be settled by participation are required to use the DPA.

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It should be noted that even if a market participant intends to settle an LSTA loan transaction by assignment, there may be instances in which an assignment is not possible. In that case, as per the LSTA standard terms, a participation via the new DPA form will be required.

The DPA applies to transactions in distressed loans only; the LSTA has not published a form participation agreement for par/near par loans. It is safe to say, however, that the form of the DPA will influence the terms of participation agreements in the par market as well as the non-LSTA distressed market.

The DPA is based on the LSTA Purchase and Sale Agreement for Distressed Trades (the “PSA”) and many of the core provisions are quite similar, including the representations and warranties,

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and the indemnification provisions. As participation agreements also include provisions detailing the ongoing administrative obligations of the parties, the DPA also contains many provisions not contained in the PSA. It is the intent of the LSTA that these provisions capture current market practice for participation agreements of this kind.

We note also that the Syndicated Secured Loan Credit Default Swap Physical Settlement Rider (the "LCDS Physical Settlement Rider"), published by the LSTA on June 18, 2007, provides that parties to LCDS trades that are subject to physical settlement will, from and after publication of the DPA by the LSTA, be required to use the DPA in order to effect physical settlement by participation. However, the LCDS Physical Settlement Rider provides that the DPA will be modified to provide that (i) no voting rights will be transferred to the participant, and (ii) the participant will be required to post cash collateral in the amount of 100% of any unfunded commitment, unless the participant is a commercial bank or financial institution that is rated at least investment grade from Standard & Poor's or Moody's Investors Service.

In this brief memorandum, we discuss some of the more significant features and provisions of the DPA with a focus on those provisions that are specific to participation agreements. As with virtually all LSTA form documents, the terms of the DPA may be separately negotiated by the parties. Absent such negotiation, however, the default provisions will automatically apply. For your convenience, we attach copies of the DPA and the LSTA Market Advisory accompanying the release of the DPA.

Structure of the DPA

The DPA is structured much like the PSA. The document is broken into two parts: (i) the "Standard Terms and Conditions" (the "Standard Terms"), where all of the operative "default" provisions of the contract between the parties are found; and (ii) the "Transaction Specific Terms" (the "Transaction Terms"), where the particular details of each individual transaction are specified. In the Transaction Terms, by using various "check-the-box" options and/or adding new or modified language, the parties may tailor the Standard Terms to conform to or deviate from its default provisions in accordance with the specific terms of trade that were agreed by the parties in the trade confirmation or otherwise.

Credit Support for Future Funding Obligations

When the loan participation being sold includes revolving commitments or delayed-draw term loans, the participant typically assumes any and all future funding obligations. If the participant fails to fund the grantor of the participation in a timely fashion, under the Standard Terms, the grantor may, in its sole discretion, either: (i) setoff against participant's right to receive payments under the DPA, but only to the extent elected by the parties in the Transaction Terms; (ii) charge participant interest at the "Federal Funds Rate" on the amount of the funding advance for the delay period; or (iii) take such other actions as specified and agreed by the parties in the Transaction Terms.

In addition, the parties may also elect in the Transaction Terms to apply and incorporate the terms of the LSTA form of Collateral Annex to the Participation Agreement, which became effective on February 6, 2008. We attach a copy for your convenience. The optional form Collateral Annex requires that the participant deposit into a collateral account, cash or government securities in an amount equal to an agreed-upon upfront percentage of the then unfunded commitments, which amount is subject to additional infusions of collateral by the participant or reductions and redemptions by the grantor through the life of the participation as unfunded commitment amounts

and relevant market valuations change. In addition, to secure its future funding obligations, the participant grants to the grantor a security interest in the participation itself, the collateral account, and any and all proceeds of those assets.

Information Delivery

Pursuant to the Standard Terms, the grantor agrees, subject to applicable law, regulation and the terms of the credit documents, to use commercially reasonable efforts to furnish the participant with all written information and documents received by the grantor in respect of the credit documents and the “Transferred Rights”.

Those participants that do not wish to receive confidential information regarding the participant or borrower may need to take steps to alter this default provision or to ensure that the information is delivered to a third party.

Voting

Section 11.1 of the Standard Terms and Section H of the Transaction Terms work in tandem to frame the participant’s voting rights under the DPA. In Section H.1 of the Transaction Terms, the parties may elect whether or not the grantor will actually grant to the participant voting rights. If voting rights are granted to the participant, the parties must then agree on whether or not those rights will be traditional “majority” voting rights, or limited voting rights, restricted to the specific parameters and/or items provided by the parties in Section H.1. Finally, if the parties choose to apply the “majority rules” provisions to the DPA voting scheme, then the grantor additionally must indicate whether or not it will include its own loan interests and/or claims, as well as those of its affiliates, for purposes of determining the make-up of the “majority participants” or “majority holders”, as applicable.

Standard of Care

Under Section 12.1 of the Standard Terms, the grantor covenants that it will use the same standard of care in the administration and enforcement of the participation as it would if it had continued to hold the participation interest for its own beneficial account. Otherwise, the grantor has very few affirmative obligations or duties under the DPA; more specifically, it will have no liability for errors in judgment or actions taken or omitted to be taken by it, unless the participant suffers a loss due to the grantor’s bad faith, gross negligence or willful misconduct or the grantor’s breach of the express terms of the DPA. Furthermore, Section 12.2(viii) of the Standard Terms provides that the grantor will have no obligation to take any action (including the exercise of voting rights on behalf of the participant and regardless of the parties’ agreed-upon voting scheme as set forth in the Transaction Terms) which it determines in good faith could: (i) violate applicable law, rule, regulation, order or the credit documentation or predecessor documentation; (ii) prejudice the grantor’s continuing relationship with any regulatory authority or damage its reputation (in each case subject to the grantor’s reasonable judgment); or (iii) expose the grantor to any material obligation, liability or expense for which it has not been provided adequate indemnity by the participant.

Resale of the Participation by the Participant

Section 10.1(a) of the Standard Terms outlines the parameters under which the participant, prior to the occurrence of an “Elevation” (which is discussed further in paragraph 7 below) may sell, assign or otherwise transfer the participation and its rights under the DPA to a third party. The participant may not make a “Pre-Elevation Transfer” without the prior consent of the grantor, which consent

may not be unreasonably withheld or delayed. In addition, any “Pre-Elevation Transfer” by the participant will not be effective unless: (i) it does not violate applicable laws or regulations or cause the grantor to violate or be in breach of the credit documents, the predecessor documents or the operative transfer documents; (ii) the prospective transferee makes to the participant, for the benefit of the grantor, certain representations, warranties and covenants (i.e., sophistication of the transferee, no ERISA money, no withholding tax issues and a confidentiality undertaking) made by the participant to the grantor in the DPA; (iii) the participant has paid to the grantor a participation transfer fee, if required by the Transaction Terms; and (iv) the transferee is either a US entity or not otherwise subject to withholding tax in the US or any other applicable jurisdiction.

Notwithstanding the foregoing, the participant may sell subparticipation interests in the participation and its rights under the DPA without the consent of the grantor, so long as the parties have specifically agreed to and elected such “non-consent” provision in the Transaction Terms.

Following an elevation of the participation, the participant may sell, assign, participate or otherwise transfer all or any portion of the “Transferred Rights”, the DPA, its rights under the DPA and any predecessor agreements without the consent of or notice to the grantor.

Elevation from Participation to Assignment

Under the default terms of the DPA, upon the request of either the grantor or the participant, the parties agree to take commercially reasonable steps to elevate the participation and the participant (or its permitted assignee), respectively, to an assignment interest in the “Transferred Rights” and lender of record status under the credit agreement. The participant may not request an elevation, however, if any amounts (including in respect of a funding advance) or other obligations are owed to the grantor under the DPA.