New LSTA Trade Confirmations

By Paul B. Haskel and James J. Ohlig

On September 25, 2009, The Loan Syndications and Trading Association, Inc. (the "LSTA") officially released its revised forms of (i) Par/Near Par Trade Confirmation (together with the applicable Standard Terms and Conditions, the "Par Confirmation") and (ii) Distressed Trade Confirmation (together with the applicable Standard Terms and Conditions, the "Distressed Confirmation")[1], each effective for LSTA trades entered into on or after that date (collectively, the "September 2009 Confirmations").

The recent revisions are relatively technical; we briefly summarize herein those changes relating to the calculation of Delayed Compensation that will have an economic impact on trade settlement.[2] We have previously described the February 2009 revisions to the LSTA trade confirmations[3] -- those revisions were somewhat more conceptual and focused on the new par buy-in/sell-out procedures as well as changes to the provisions of the Standard Terms dealing with non-recurring fees, expense reimbursement and compensation for delayed settlement. While the current changes are probably less significant overall, they directly affect pricing calculations and are therefore significant to the day-to-day trade settlement process.

I. Changes to the Par Confirmation; Delayed Compensation

LIBOR Floor

The Par Confirmation now addresses the calculation of Compensation for Delayed Settlement ("Delayed Compensation") with respect to "Performing Loans"[4] that are subject to a LIBOR Floor.[5]

The revision addresses the concern that under the existing Delayed Compensation regime, sellers had been overcompensated in cases where the LIBOR rate received by lenders under the relevant credit agreement was in excess of market LIBOR because the relevant credit agreement contained a LIBOR floor.

The Delayed Compensation provisions were intended to provide sellers with a reasonable cost-of-carry (deemed to be market LIBOR), and no more. However, under the original Delayed Compensation mechanism, rather than receiving actual LIBOR for the Delay Period, buyers paid sellers the higher rate of LIBOR subject to the LIBOR Floor.

The revised language alters the methodology used for calculation of Delayed Compensation to the extent that a LIBOR-based Performing Loan is subject to a LIBOR Floor. Delayed compensation for such loans will now be calculated as if the loans were Non-LIBOR Based Loans in that seller will be paid actual LIBOR on the loan and buyer will receive a credit to the purchase price for "interest and

[1] The LSTA also published, on September 25, 2009, a revised form Purchase and Sale Agreement for Distressed Trades in order to clean up some minor errors contained in the prior February 6, 2009 form agreement.

[2] This update has been prepared as a service to clients and friends of Richards Kibbe & Orbe LLP to report on recent developments in the US secondary loan market that may be of interest to participants in that market. The information is therefore general and does not (i) constitute legal advice, or (ii) focus on issues relevant to specific facts and circumstances.

[3] *See* "New LSTA Trade Confirmations" dated May 7, 2009 by Paul B. Haskel and James J. Ohlig. http://www.rkollp.com/New%20LSTA%20Trade%20Confirmations.pdf

[4] "Performing Loan" means debt with respect to which either "interest and accruing fees" or, if applicable, "adequate protection payments", are being paid as of T+7 and through the "delay period" to the settlement date on the terms specified in the applicable credit agreement or adequate protection order.

[5] "LIBOR Floor" as defined in the Par Standard Terms, means a minimum reference rate of interest established by the Credit Agreement that governs the calculation of interest (or Adequate Protection Order that governs the calculation of Adequate Protection Payments) for "LIBOR Based Loans", to which the "spread" or "applicable margin" is added.

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Memorandum

November 20, 2009

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accruing fees" on the loan allocable to the Delay Period.[6]

Seller "Clawback" for Interest and Accruing Fees

The "clawback language" from the Distressed Trade Confirm has been added to the Par Confirmation as well. As discussed above, under the rules for par Delayed Compensation, upon settlement, the buyer receives a credit to the purchase price equal to the margin on the loan accruing during the Delay Period. This credit is given regardless of whether the payment has yet been made as of the settlement date. Under the original Delayed Compensation rules, a buyer had no obligation to return the credit should the borrower eventually default on such payment. Under the new rules, if the borrower defaults, buyer must return such amount upon seller's demand.

II. Change to the Distressed Confirmation; Delayed Compensation

For the purpose of calculating the LIBOR payment to be made by buyer to seller under distressed Delayed Compensation, "Average LIBOR" will now be calculated by taking the sum of all individual LIBOR rates for each day in the delay period from T + 18 (rather than T + 20) through the date two business days prior the settlement date and dividing by the total number of days in such period. Although less precise in determining seller's actual cost-of-carry, this change should give transacting parties more time to prepare Delayed Compensation calculations and related documentation.

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We anticipate that the LSTA will continually update and revise their suite of secondary loan trading documents. We will endeavor to continue to provide updates on these developments.

If you would like more information on the revised LSTA forms of Par/Near Par and Distressed Trade Confirmations or have any questions on the foregoing, please feel free to call us at 212-530-1800.

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If you have any questions regarding the matters discussed in this memorandum, please call your usual contact at Richards Kibbe & Orbe LLP or one of the persons listed below.

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[6] Section 6(b) of the Par Standard Terms and Conditions provides that, if the loan is a "Performing Loan" that is a Non-LIBOR Based Loan, the buyer pays to the seller its "cost of carry" on the purchase price for the period from T+7 until the settlement date and receives a credit to the purchase price for "interest and accruing fees" on the loan allocable to the "delay period."