

**ALERTS**

## **LMA Updates its Standard Terms and Conditions to Incorporate FATCA Provisions**

**31 May 2016**

On 20 April 2016, the Loan Market Association (“LMA”) updated its Standard Terms and Conditions for Par and Distressed Trade Transactions (Bank Debt/Claims) (“Standard Terms”) to include language that covers FATCA (as defined below) tax withholding on certain payments of US source FDAP income and, potentially, sale proceeds (as described below).

### **What is FATCA?**

The Foreign Account Tax Compliance Act (“FATCA”), enacted by the United States, obliges US and foreign payors to generally withhold a 30 per cent tax on specified US-source payments made to foreign entities (such as foreign banks, investment funds (including private equity and hedge funds), non-publically traded foreign entities and securities dealers) and certain other non-financial foreign entities. However, the withholding will not apply if the foreign entity complies (or is deemed to comply) with the information reporting rules imposed under FATCA, or falls within a category of exempt foreign entities.

Withholdable payments include:

- US-source interest, dividends, rents, royalties and certain investment advisory-related compensation (US FDAP); and

- Gross proceeds from the sale, redemption, repurchase or other disposition of any property of a type that produces US-source interest or dividends (US gross proceeds).

FATCA withholding on US FDAP generally began on 1 July 2014. However, FATCA withholding on gross proceeds does not take effect until 2019.

FATCA is a complicated tax regime and it is outside the scope of this *Alert* to set out all of the circumstances where an entity might be subject to a FATCA withholding tax or information reporting requirement. Investors who are uncertain if FATCA might be an issue should speak to their SRZ attorney or one of the authors listed below.

## LMA Documentation Updates

Historically, in the secondary trading market, counterparties relied on the inclusion of the July 2013 LMA FATCA riders (namely rider 3 for Trade Confirmations), as another term of trade to cover any FATCA compliance requirements. If the rider was not specifically included as another term of trade, then the terms of the trade lacked any mechanism to address the FATCA requirements pertaining to such trade and could result in the inequitable allocation of the cost of any such FATCA withholding. The addition of sections 29.4 (*FATCA Withholding*) and 29.5 (*FATCA Information*) in the Standard Terms means that reference to the riders is no longer required.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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