LSTA
THE LOAN SYNDICATIONS AND TRADING ASSOCIATION

Mandated: Risk Retention Reversal Takes Next Step

April 3, 2018 - As we noted last week, the opportunity for the government to file an appeal to the United States Circuit Court for the DC Circuit (DC Circuit) in its risk retention litigation with the LSTA expired at midnight on March 26th with the agencies choosing not to pursue further action in this venue. On Tuesday. April 3rd, the critical next – but not final – step happened: The DC Circuit issued a "mandate" to the DC District Court.

What does this mean? The mandate simply transfers the case back to the District Court and requires the District Court to implement the Order quoted below that was issued in conjunction with the DC Circuit's opinion to vacate the risk retention rule as it applies to open market CLO managers.

"This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is ORDERED and ADJUDGED that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded with instructions to grant summary judgment to LSTA on whether application of the rule to CLO managers is valid under § 941, to vacate summary judgment on the issue of how to calculate the 5 percent risk retention, and to vacate the rule insofar as it applies to open-market CLO managers, in accordance with the opinion of the court filed herein this date."

It is important to note that the issuance of the mandate is not the last step in the judicial process and that the risk retention rule has not been vacated yet and will not be vacated until the District Court issues its order.

There is no set timeframe for the District Court to issue the order vacating the risk retention rule. It is likely that the court will issue the order in due course but we cannot say for sure whether that will be in a matter of days or weeks. That said, the issuance of the order is ministerial; i.e., the District Court cannot ignore the mandate or issue an order that is not consistent with the DC Circuit's order.

As we also noted last week, until May 10th, the government agencies can still ask the United States Supreme Court to review the DC Circuit's decision. We believe it is unlikely that the agencies will seek Supreme Court review and that, if they did, it is unlikely that the Court would grant their petition.

So, what's the bottom line?

The deadline for filing an appeal to the Circuit Court passed and the government agencies chose not to exercise their right to appeal. The Circuit Court has now issued its mandate instructing the District Court to vacate the risk retention rule for open market CLO managers and the District Court will likely issue that order within the coming weeks. The government agencies can, but are unlikely to, appeal to the Supreme Court and if they don't do so by May 10th, the long judicial process for the risk retention rules will come to an end.