



CLO Risk Retention: The Window To Appeal Has Closed

May 11, 2018 - At midnight last night, the last opportunity for the government to file a petition for certiorari to the United States Supreme Court in its risk retention litigation with the LSTA expired, with the agencies choosing not to pursue further action. Thus ends a judicial process initiated by the LSTA on November 10, 2014, exactly three and a half years ago. This constitutes an important victory for the CLO market and we are delighted that this long journey has ended successfully.

To recap briefly, on February 9, 2018, the United States Court of Appeals for the District of Columbia Circuit (the Circuit Court) ruled in favor of the LSTA in its lawsuit against the SEC and Federal Reserve Board. The ruling held that the risk retention rules promulgated under section 941 of the Dodd-Frank Act cannot be applied to open market CLO managers. On April 5th, the DC District Court ordered that i) summary judgment is granted in favor of the LSTA regarding the application of risk retention to open-market CLO managers, ii) summary judgement is vacated on the issue of how to calculate the five percent risk retention under the Credit Risk Retention Rule, and iii) the Credit Risk Retention Rule is vacated insofar as it applies to investment managers of open-market collateralized loan obligations. With the passing of the deadline for appeal to the Supreme Court, the judicial process is over and the order cannot be reversed.

We are grateful to our board and our members who supported our efforts and to our former Executive Director, Bram Smith, who had the tenacity to see this case through despite some bumps along the road. Thanks also to our legal team, Richard Klingler, Peter Keisler, Jennie Clark and Daniel Feith of Sidley who did a fantastic job of navigating us through the entire process.

Please see the op-ed from Lee Shaiman, Executive Director of the LSTA, published yesterday in the American Banker, with some reflections on the CLO Risk Retention saga and lessons that can be learned. The op-ed is available [here](#).

While the issue of risk retention for open market CLOs has been finally resolved, other related issues continue to exist and the LSTA looks forward to working with our members to address them.