THE LOAN SYNDICATIONS AND TRADING ASSOCIATION

New LSTA ERISA Advisory

August 13, 2018 - On August 10th, the LSTA advisory published its new “New ERISA Representations for LSTA MCAPs” market advisory. This advisory replaces the guidance contained in the LSTA’s September 2017 advisory on ERISA representations required under the Department of Labor (DOL)’s 2016 Fiduciary Rule. As previously advised, the DOL’s 2016 Fiduciary Rule has been vacated and no longer applies in the US, and therefore the scope of the ERISA representations required from lenders is significantly narrowed. While the representations and covenants in the original advisory were largely added as a direct result of the DOL Fiduciary Rule, the process of drafting those representations led many in the market to recognize the utility of including lender representations with respect to prohibited transactions and, now that the 2016 Rule was vacated, with respect to the previous fiduciary rule under ERISA which is now applicable. The August 10th advisory generally retains the lender’s representations with respect to the Administrative Agent to confirm that the acquisition, holding and activities under the loans by a lender would not give rise to prohibited transactions. A lender represents either that it is not subject to ERISA or Section 4795 of the Code or, if it is, that the relevant transactions are not prohibited under Section 406 of ERISA or Section 4975 of the Code. Further, if the Lender is subject to ERISA, the language includes an additional representation that the Administrative Agent is not a fiduciary under ERISA with respect to the assets of the Lender involved in the relevant transactions. The language in the advisory is generally modeled on the ERISA language in the LSTA trade confirmation. The LSTA will also be publishing revised ERISA language in its suite of trading documents in due course in light of the 2016 Fiduciary Rule having been vacated.