

**CONFIDENTIAL INFORMATION SUPPLEMENT**

**Loan Syndications and Trading Association, Inc.**

**[October 1, 2008]**



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**CONFIDENTIAL INFORMATION SUPPLEMENT  
to the Loan Syndications and Trading Association's  
CODE OF CONDUCT**

**As of [October 1, 2008]**

**I. Introduction**

This Confidential Information Supplement sets forth guidelines relating to the use and disclosure of confidential information in connection with transactions in the loan market. Unless otherwise specified, these guidelines apply to all loan market participants ("LMPs") in the context of trades entered or proposed to be entered into by them pursuant to the LSTA's Par/Near Par Trade Confirmation and Distressed Trade Confirmation. This Confidential Information Supplement is intended to be consistent with the general standards of professional integrity and fair dealing set forth in the LSTA's Code of Conduct and to promote confidence in the fairness of the loan market. It is not a statement of the legal principles applicable to disclosure of information in the loan market. Each LMP should assess the applicable legal requirements and adopt procedures to assure compliance with them. We recommend that market participants also review the LSTA's "Statement of Principles for the Communication and Use of Confidential Information by Loan Market Participants" (the "MNPI Principles"). The MNPI Principles outline broad guidelines for the receipt, use and distribution by and to, LMPs of different types of confidential information that is generally available in the loan market and that may at times include material non-public information ("MNPI") and address the issues that arise by virtue of the fact that many LMPs also participate in the securities markets that generally transact solely on the basis of Public Information (as defined below).

**II. Types of Information in the Loan Market**

A. **Syndicate Information.** Syndicate Information is confidential information that a borrower provides (typically through an administrative agent or arranger) to lenders or prospective lenders. Syndicate Information is provided subject to specific confidentiality undertakings contained in credit agreements, evaluation materials and stand-alone confidentiality agreements. Syndicate Information can be more extensive than that which is publicly available and in certain circumstances may constitute MNPI. Syndicate Information may be provided orally or in writing. It typically consists of: (i) information made available by a borrower in connection with the origination of a loan<sup>1</sup>; (ii) information made available periodically by or on behalf of the borrower to the entire syndicate of lenders in accordance with the terms of the applicable credit agreement; and (iii) information periodically made available by the borrower to the entire syndicate of lenders regarding developments or other special circumstances, and may include requests for amendments and waivers.

Confidentiality provisions in credit agreements also contemplate and permit disclosure of Syndicate Information by a lender to prospective assignees or participants in connection with a proposed assignment of an interest in a loan subject to prospective assignees or participants themselves agreeing to appropriate confidentiality undertakings.<sup>2</sup>

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<sup>1</sup> In some circumstances Syndicate Information may include the credit documentation.

<sup>2</sup> In May 2005, the LSTA published Model Credit Agreement Provisions, including a model confidentiality provision.

- B. Borrower Restricted Information. Borrower Restricted Information is confidential information, including MNPI, that is made available by or on behalf of a borrower that is not Syndicate Information because the borrower has not made such information available to all members or potential members of the syndicate. Borrower Restricted Information might include, for example, MNPI provided privately by a borrower to an agent or to a limited number of syndicate members (often referred to as “agent-only information”) or information made available to a steering committee or certain creditors during the course of a restructuring. Borrower Restricted Information often becomes Syndicate Information upon its later communication to the entire syndicate.
- C. Bank Loan Non-Restricting Information. Bank Loan Non-Restricting Information is information that does not include MNPI and is provided confidentially by or on behalf of a borrower to members and potential members of a lending syndicate. Bank Loan Non-Restricting Information is subject to standard confidentiality undertakings. The most common example of Bank Loan Non-Restricting Information is information contained in a Confidential Information Memorandum, or “Bank Book”, that is provided to members and potential members of a lending syndicate and developed specifically for LMP personnel who do not wish to receive MNPI because such personnel wish to be able to both extend loans and trade securities of the borrower. Although this type of Confidential Information Memorandum does not contain MNPI, it may contain sensitive business information and is, therefore, subject to a confidentiality undertaking.
- D. Public Information. Public Information is information that has been generally disseminated to the public and, accordingly, is not MNPI.
- E. Material Non Public Information. Syndicate Information and Borrower Restricted Information may contain MNPI. Information has been defined as “material” under the U.S. federal securities laws in circumstances where (i) there is a “substantial likelihood” that a “reasonable investor” would consider the information important in making an investment decision; (ii) the disclosure of the information would be “viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available”; or (iii) the disclosure of the information is “reasonably certain to have a substantial effect on the market price of the security”.<sup>3</sup>

VI. **Policies Regarding Trading on, and Disclosure of, Syndicate Information and Borrower Restricted Information**

For the purposes hereof, a buyer or seller will not be considered to be in possession of Syndicate Information or Borrower Restricted Information in connection with a transaction where, in accordance with its internal procedures, such information is not available for use in connection with such transaction (i.e., Syndicate Information or Borrower Restricted Information will not be imputed to an employee of a LMP if such employee has been insulated from such information through use of policies or procedures which restrict the communication of information within an organization).

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<sup>3</sup> A determination of materiality is a fact specific inquiry, requiring careful assessments of the inferences a reasonable person would draw from a given set of facts and the significance of those inferences. The same information may be material in one context but not material in another. According to the SEC, (a) information is non-public if it has not been disseminated in a manner making it available to investors generally, (b) insiders must wait a “reasonable” time after disclosure before trading, and (c) what constitutes a reasonable time depends on the circumstances of the dissemination.

- A. Syndicate Information. A LMP in possession of Syndicate Information can trade on that information in a manner consistent with appropriate standards of professional integrity and fair dealing in the following situations:
1. the LMP has disclosed such information to its counterparty in compliance with applicable confidentiality provisions,
  2. the LMP has not disclosed such information to its counterparty, but the LMP reasonably believes that its counterparty has otherwise received such information or, in the case where the counterparty is already a syndicate member, the counterparty has had the opportunity to receive such information,
  3. the LMP has not disclosed such information to its counterparty but:
    - a. the LMP has offered to disclose such information to its counterparty,
    - b. the counterparty has declined such information and has evidenced or is expected to evidence its decline and nonreliance in an appropriate writing, and
    - c. the LMP reasonably believes that the counterparty is sophisticated; or
  4. the LMP has not disclosed such information to its counterparty (or has disclosed and clearly informed the counterparty that it has disclosed only certain specified information such as written Syndicate Information) but:
    - a. the counterparty has not requested Syndicate Information (or if disclosure of only certain specified information has been made the counterparty understands this and would otherwise obtain further information if desired),
    - b. the counterparty has evidenced or is expected to evidence its nonreliance in an appropriate writing, and
    - c. the LMP reasonably believes that the counterparty is sophisticated, understands the nature and importance of Syndicate Information and the manner in which such information can be obtained and would request it or otherwise obtain it if desired without reliance on the LMP.

Appropriate representations and evidence of nonreliance consistent with conducting transactions in accordance with the foregoing are set forth in Section 13 "Syndicate Information" and Section 15 "Nonreliance" of the LSTA's Par/Near Par Trade Confirmation and Section 16 "Syndicate Information" and Section 20 "Nonreliance" of the LSTA's Distressed Trade Confirmation.

Where the LMP has agreed to provide Syndicate Information to the counterparty,<sup>4</sup> the LMP should disclose all material Syndicate Information relating to the transaction retained by it as of the Trade Date (in such circumstances, the LMP should use reasonable efforts to maintain such Syndicate Information).

Subject to the procedures outlined above, after the LMP has entered a trade with a counterparty, which is not already a member of the syndicate, and agreed to provide the counterparty with Syndicate Information, the LMP should use commercially reasonable efforts to provide to the counterparty notice with respect to all amendments and waivers of the credit documents until the trade settles.<sup>5</sup>

- E. Borrower Restricted Information. Generally, a LMP must never trade on information that is Borrower Restricted Information, except if (1) the LMP has obtained the Borrower Restricted Information without a breach of any duty owed by the LMP to the borrower and (2) the LMP reasonably believes that the counterparty is in possession of such Borrower Restricted Information. Exceptions to the foregoing may be made in accordance with the internal policies of LMPs which are consistent with the general philosophy of the Code of Conduct.

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<sup>4</sup> Where a seller agrees to provide Syndicate Information, "Yes" should be specified opposite "Credit Documentation to be provided by Seller" in the face of the LSTA's Par/Near Par Confirmation or the LSTA's Distressed Trade Confirmation.

<sup>5</sup> The LMP need not solicit a vote from the counterparty with respect to any such amendment or waiver; however, pursuant to market practice, LMPs will generally consult with the counterparty with respect thereto.

#### IV. Due Diligence

Each LMP entering into a transaction in the loan market (as either buyer or seller) should take responsibility to ensure that it has obtained and evaluated all the information (including, without limitation, Syndicate Information) regarding the transaction that such LMP deems appropriate under the circumstances in order to make an informed decision to enter into the transaction. In order to become informed about a particular transaction it is recommended that a LMP review any publicly filed disclosure documents relating to the relevant borrower and loan documents and become knowledgeable about the loan market generally. It is also recommended that a LMP consider whether it should obtain Syndicate Information relating to the proposed transaction. Syndicate Information should be obtainable from a member of the applicable lending syndicate, subject, in many cases, to the signing of a confidentiality agreement as required pursuant to the terms of the confidentiality provisions of the applicable credit agreement.

#### V. Internal Procedures

LMPs should develop and implement internal procedures (which may include information walls, trading restrictions, or other appropriate information control tools and procedures) to ensure that high standards of professional integrity and fair dealing, as well as legal requirements, are observed with respect to Borrower Restricted Information and Syndicate Information. LMPs should adopt policies regarding disclosure of Borrower Restricted Information about borrowers that may not be available to counterparties. In no event should a LMP make intentional misstatements with respect to information in connection with any of its transactions in the loan market, or intentionally make only partial disclosures with respect to such information in such connection without disclosing in writing to its counterparty the scope of such disclosure and the fact that it is not or may not be complete.<sup>6</sup>

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<sup>6</sup> The language set forth in section 15 "Nonreliance" of the LSTA's Par/Near Par Trade Confirmation and section 20 "Nonreliance" of the LSTA's Distressed Trade Confirmation is sufficient written disclosure for these purposes.