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United States

Lending & Secured Finance

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This country-specific Q&A provides an overview of lending & secured finance laws and regulations applicable in United States.

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United States: Lending & Secured Finance

1. Do foreign lenders (including non-bank foreign lenders) require a licence/regulatory approval to lend into your jurisdiction or take the benefit of security over assets located in your jurisdiction?

While there is no US federal regulatory framework applicable to both US non-bank lenders and foreign non-bank lenders that are engaged in commercial lending in the US, a few US states require non-bank lenders to obtain a license or registration prior to engaging in commercial lending activities (i.e., lending activities between corporate lenders and corporate/institutional borrowers for business or commercial purposes) under certain circumstances and in the absence of an exemption. The commercial lending licensing requirements of some of these states are generally triggered only when a commercial loan is secured by real property located in one of such states. However, in California and Nevada, commercial lending license requirements may be implicated regardless of whether a commercial loan is secured by real property located in any such state. As such, California and Nevada are the states that are most often implicated in the commercial lending context due to the broad scope of their commercial lending licensing requirements. The US states that may impose commercial lending licensing requirements (unless an exemption from such licensing requirements applies), generally include, but are not limited to: Arizona, California, Florida, Nevada, North Dakota, South Dakota and Vermont.

While New York does have a commercial lending licensing requirement, such requirement is generally only applicable to business and commercial loans in a principal amount of US$50,000 or less, and only if certain other specified conditions are met.

2. Are there any laws or regulations limiting the amount of interest that can be charged by lenders?

Federal law does not regulate the amount of interest that can be charged by lenders; instead usury laws are primarily regulated and enforced at a state level. Such usury limits typically take into consideration the size of the loan, the type of loan and the nature of the lender or issuing institution; for example, many states exclude commercial loans from state laws regulating usury limits to the extent such loan complies with certain conditions such as the minimum threshold principal amount or the purpose of such loan. State laws governing usury limits also regulate the calculation of interest for the purposes of determining compliance with such restrictions (in particular, whether certain fees or other charges incurred in connection with a loan should be treated as interest and therefore subject to the usury limits).

3. Are there any laws or regulations relating to the disbursement of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from, your jurisdiction?

Federal law does not impose any restrictions or controls on either the disbursement of loan proceeds in foreign currencies or the payment of interest or fees (or repayment of principal) in a foreign currency. Rather, such restrictions will arise depending on the ability of individual lending institutions to provide loans in a particular foreign currency or otherwise to receive payments in such foreign currency. Lenders should take into account federal sanctions and anti-money laundering laws which require financial institutions to implement due diligence procedures with respect to their customers to prevent the transfer of cash to certain prohibited countries and persons.

4. Can security be taken over the following types of asset: i. real property (land), plant and machinery; ii. equipment; iii. inventory; iv. receivables; and v. shares in companies incorporated in your jurisdiction. If so, what is the procedure – and can such security be created under a foreign law governed document?

In the US, a lien may be created over real property — land and improvements — by execution of a mortgage or deed of trust under the applicable state law where the real property is located, and perfected by recordation of such document in the county land records where the real property is located in compliance with the notarization and other recording requirements described below. In the case of a deed of trust, the trustee is an independent third

party, often the title company involved in the transaction or an individual associated with the title company involved in the transaction, that is granted legal title to the property and whose primary responsibility is to sell the property at a public auction if there is an event of default under the loan which permits foreclosure of the lien of the deed of trust. In the case of a mortgage, the secured party or its agent would be the mortgagee. The creation, perfection and enforcement of the security interest in real property is governed by the law of the state where the property is located so engagement of local counsel in the jurisdiction where the real property is located is important to ensure that necessary local law requirements are included in the security instrument.

Security interests in fixtures attached to real property are governed by the Uniform Commercial Code (UCC) in the jurisdiction where the fixtures are located and may be created pursuant to (i) a written or electronic security agreement, subject to the same requirements for creating a security interest in equipment, inventory, receivables, etc. as set forth in the first sentence of the immediately succeeding paragraph or (ii) the execution of a mortgage or deed of trust, to the extent specifically included therein. To perfect and ensure the priority of a security interest in fixtures, a fixture financing statement must be filed in the land records in the county where the property is located. In nearly all jurisdictions, a mortgage/deed of trust may act as a fixture filing if applicable provisions are included in the mortgage/deed of trust. It is common practice in almost all states (Louisiana is an exception) to rely on the mortgage/deed of trust as a fixture filing (in lieu of filing a separate fixture filing) in transactions where the real estate is not the sole or primary collateral.

To create a valid security interest in equipment, inventory, receivables and shares in companies (as well as the other categories of collateral governed by the UCC), (i) a security provider (i.e., the grantor) must execute or authenticate a written or electronic security agreement that provides an adequate description of the collateral, (ii) the grantor must have rights in the collateral or the power to transfer such rights, and (iii) value must be given. The security agreement is typically governed by the law of a US state and is usually the law of the state that governs the loan agreement, although the assets intended to be covered by such security agreement may be located outside of such state. It is uncommon for security over US assets to be created under a foreign law governed document as this might trigger issues with enforceability and perfection.

A security interest in most types of collateral governed by the UCC (including receivables, equipment and inventory) generally may be perfected by the filing of a notice filing under the UCC, referred to as a UCC-1 financing statement. For debtors that are “registered organizations" (which term includes domestic corporations, limited liability companies and limited partnerships) the UCC-1 financing statement would be filed in the jurisdiction in which the grantor was formed, and for most other domestic organizations, the UCC-1 financing statement would be filed in the jurisdiction of its chief executive office (or sole place of business), although there are exceptions for certain entities and certain types collateral.

In addition, with respect to receivables, if the receivable is evidenced by an instrument or chattel paper, perfection by possession or control of the instrument or chattel paper is preferable to perfection by the filing of a UCC-1 financing statement, as possession or control may entitle the secured party to higher priority and protect the secured party from third parties acquiring better rights in the collateral (although it is not uncommon to perfect by the filing of a UCC-1 financing statement in addition to perfecting by possession or control). Certain types of collateral such as accounts (essentially, receivables that are not evidenced by an instrument or chattel paper) and general intangibles (i.e., intangible collateral that does not fall into another UCC category) may only be perfected by the filing of a UCC-1 financing statement (except to the extent Article 12 of the UCC provides for perfection by control, as discussed below).

Finally, with respect to shares in a company constituting securities, under Article 8 of the UCC, there are separate perfection rules for each of the three methods by which a grantor may hold securities (i.e., certificated securities, uncertificated securities or through a securities account maintained by a financial institution referred to as a securities intermediary). Perfection of a security interest in a certificated security can be accomplished by either the filing of a UCC-1 financing statement or by the secured party taking physical possession of the original share certificate either directly or through an agent of the secured party and, as commonly preferred by secured parties, accompanied by an effective indorsement in blank, to perfect by control (although it is common to perfect by the filing of a UCC-1 financing statement in addition to perfecting by control). Perfection of a security interest in uncertificated securities and securities maintained in a securities account can be accomplished by either the filing of a UCC-1 financing statement or by the secured party obtaining control thereof (i.e., by entering into an agreement whereby the issuer or securities intermediary (as applicable) agrees that it will comply with the transfer instructions originated by the secured party without further consent by the grantor or,

less commonly, by registration of the shares or the securities account in the name of the secured party). Generally, in each of the foregoing methods, perfection by possession or control is preferable to perfection by a UCC financing statement as this entitles the secured party to higher priority and may protect the secured party from third parties acquiring superior rights in the collateral. It is not uncommon to perfect by the filing of a UCC-1 financing statement in addition to perfecting by possession or control.

Article 12 of the UCC, which as of this writing has been enacted in thirty-three states (and in the District of Columbia) and is pending in another seven states, permits perfection by control of digital assets such as cryptocurrencies and NFTs as well as certain electronic accounts and payment intangibles that exist in controllable electronic form.

5. Can a company that is incorporated in your jurisdiction grant security over its future assets or for future obligations?

Yes, a company incorporated in the US can grant security over its after-acquired assets; provided, however, prospective grants of security in after-acquired real property may not be enforceable and are dependent on the laws of the jurisdiction in which such real estate is located. Security grants in non-real estate after-acquired assets are achieved by including express language in the security agreement that the security interest will also apply to cover any future assets acquired by the applicable company to the extent such assets fall within the scope of the pledged collateral. Where such language is included, the security interest will automatically attach to future assets of the company, without the requirement for any further action by such company (with certain exceptions, such as for commercial tort claims). However, depending on the type of asset involved, there may be certain additional measures required to be performed by the grantor in order to perfect the security interest created over such after-acquired property. Note, however, that any assets acquired after the filing of a petition for bankruptcy are subject to being cut-off by applicable bankruptcy law (see Questions 17 and 18 below).

Similarly, a company incorporated in the US can also grant security to secure future obligations by including express language in the security agreement that the obligations secured thereby would also extend to cover any obligations incurred after the date the security agreement is originally entered into; provided, however, that with respect to real property, the enforceability of future obligations that are discretionary varies by jurisdiction and local counsel should advise whether such obligations can only be secured at such time as they are incurred and an amendment or notice of the incurrence of such obligations has been filed in the same manner as the underlying mortgage or deed of trust. To the extent such future obligations are reasonably identified and determinable under the terms of the security agreement as being secured obligations, the security interest in the pledged collateral will automatically secure any such future obligations.

6. Can a single security agreement be used to take security over all of a company's assets or are separate agreements required in relation to each type of asset?

Security interests in the US are commonly taken over substantially all personal property assets (i.e., all assets other than real property) in a single security agreement. Such personal property assets may include general intangibles, including contract rights and intellectual property, accounts receivable, goods, including equipment, movable assets and inventory, securities and securities accounts, and cash deposits.

As noted above, interests in real property, whether owned or leased, need to be addressed in a separate mortgage or deed of trust enforceable under the state in which such real property is located.

7. Are there any notarisation or legalisation requirements in your jurisdiction? If so, what is the process for execution?

With respect to security agreements in respect of personal property, state law does not generally have any notarisation or legalisation requirements.

However, as noted in Question 4 above, the creation of the security interest in real property is governed by the law of the state where the property is located and each state (and the counties therein) have specific requirements to be complied with as to the form of the security instrument (including items such as required margins, required cover pages or specific property information to be included) as well as required or recommended provisions, so engagement of state specific counsel in the jurisdiction where the real property is located is important to ensure that necessary local law requirements are included in the security instrument. In addition to any state specific provisions to ensure compliance with statutory requirements of the applicable state, each security document must be executed by the

property owner, as mortgagor/trustor, and notarized by a notary public in the state where such document is being executed, using the appropriate form of acknowledgment. If the mortgage/deed of trust is being signed outside the US, we recommend consulting with the title company managing the recordation of the security instrument to determine if an apostille or other formalities are required in order to successfully submit and record such document in the land records of the relevant jurisdiction. In addition, in most jurisdictions, original signature and notarization pages are required in connection with the submission for recording of the mortgage or deed of trust in the applicable county records, which submission typically occurs concurrent with or shortly following closing, and therefore requires advance planning for the delivery of such original pages on or prior to closing.

8. Are there any security registration requirements in your jurisdiction?

See Question 4 above.

9. Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement? If so, what are the costs and what are the approaches lenders typically take in respect of such costs (e.g. upstamping)?

The material costs are primarily real estate related. There are nominal recording fees for mortgages / deeds of trust which vary by jurisdiction and depend on the number of pages of the documents being recorded. In addition, certain states impose a mortgage recording tax on the amount secured by the mortgage/deed of trust. In those jurisdictions, the rate varies by state and by city/county and is based on the applicable tax rate multiplied by the amount of obligations secured by the mortgage/deed of trust. As an example, the mortgage tax imposed on mortgages secured by commercial properties in New York City is currently up to 2.80% of the secured amount. On transactions where the real estate collateral is only a portion of the collateral package, to limit the amount of mortgage tax that must be paid, lenders often agree to cap the secured amount of the mortgage at a percentage of the fair market value of the property, often ranging from 100-125% of the fair market value at the time of the execution of the mortgage, rather than securing the entire loan amount. This formulation avoids paying mortgage tax on amounts far exceeding the value of the property, but is intended to provide lender protection over potential appreciation of the property value during the term of the loan, as the amount of mortgage tax paid will cap the recovery upon a foreclosure unless additional mortgage tax is funded on or prior to the time of foreclosure. It is important to consult with local counsel in the jurisdiction where the property is located or a title company to determine the amount of any applicable mortgage recording tax.

Although not required by law, it is customary for a lender to require the borrower to deliver a lender's title insurance policy insuring the enforceability and priority of the mortgage lien as well as a survey of the property. The title policy insures the priority of the mortgage as of the date of recording, subject only to the identified title exceptions. Cost varies based on the location of the property, as in some states title insurance rates are regulated, whereas in other states they are negotiable. However, the costs of title insurance and surveys are typically paid by the borrower as part of the transaction costs.

There are filing costs for financing statements and intellectual property security interests, but these tend to be fixed fees and are nominal in relation to typical deal sizes. Security interests in assets such as vehicles, rolling stock, vessels or aircraft require additional filings, notation of lien and/or registrations under applicable state or federal law, which require additional fees and attorney time.

With respect to personal property, the States of Tennessee and Florida are the only states that impose material taxes in connection with the filing of UCC-1 financing statements, which taxes are calculated based on, among other things, the amount of the obligations secured by the applicable assets.

10. Can a company guarantee or secure the obligations of another group company; are there limitations in this regard, including for example corporate benefit concerns?

Yes, in the US, guarantees fall into three categories, namely (i) "downstream" guarantees whereby a parent company guarantees the debt of its subsidiary, (ii) "upstream" guarantees whereby a subsidiary guarantees the debt of its parent entity, and (iii) "cross-stream" guarantees whereby a subsidiary guarantees the debt of a sister company. Hence, a company incorporated in the US is generally permitted to guarantee and secure the obligations of another company group member, subject to certain considerations and limitations. In order to be enforceable, the guarantee will need to comply with

certain general principles such as the receipt and sufficiency of consideration and in some states, the guarantee must be in writing and duly executed by the guarantor in order to comply with the Statute of Frauds. However, a wholly-owned subsidiary guarantor does not need to demonstrate direct corporate benefit to such guarantor in order to determine the sufficiency of consideration where such intercorporate guarantee benefits the company group as a whole. The corporate benefit consideration would also be relevant in insolvency proceedings, specifically in determining whether a guarantee can be challenged as a fraudulent transfer under the US Bankruptcy Code (as discussed in Question 18 below).

11. Are there any restrictions against providing guarantees and/or security to support borrowings incurred for the purposes of acquiring directly or indirectly: (i) shares of the company; (ii) shares of any company which directly or indirectly owns shares in the company; or (iii) shares in a related company?

Generally, unlike in certain other jurisdictions, the US does not have any restrictions on "financial assistance" that would prohibit providing guarantees or security to support borrowings to finance the acquisition of a target company (or its direct or indirect parent or any related company). However, depending on the type of entity being acquired or that is required to provide the guarantee or security, there may be regulatory issues to consider when the guarantee or security provider is a specialized or regulated entity. Nevertheless, the fraudulent transfer issues noted in Question 18 below would also be relevant in a scenario where guarantees and/or security are bring provided to support borrowings to acquire the shares of another company, and accordingly, the applicable company and the lenders will need to be comfortable with the solvency of the guarantors and security providers prior to entering into such guarantees and/or security – for this reason, the loan documentation will include a solvency representation to this effect.

12. Can lenders in a syndicate (or, with respect to private credit deals, lenders in a club) appoint a trustee or agent to (i) hold security on the lenders's behalf, (ii) enforce the lenders' rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate?

Yes, the lenders in a syndicate or club can, and almost always do, appoint an agent to act on behalf of the lenders as a whole. The agent will administer the loan and in this capacity, the agent may hold security on behalf of the lenders and the other parties entitled to the benefits of the security, including to manage the enforcement of collateral securing the loan and to apply any enforcement proceeds towards satisfaction of the obligations. While in most instances, the entity acting as the administrative agent will be the same entity acting as the collateral agent, there are also instances where the entities acting as administrative agent and collateral agent are not the same (and not affiliated with each other). More often than not, the entity acting as agent is the lead bank (or lead lender) in any given transaction; however, there may be instances where a lender (especially in private credit deals) cannot act as agent due to operational or institutional restrictions, in which case, a third party entity may be retained and appointed as agent.

In terms of process, the lenders will appoint the agent to act as administrative agent and/or collateral agent in the loan documentation, thereby conferring upon the agent(s) the right to take various actions in respect of the guarantee and collateral package on behalf of the syndicate. The appointment of the agent(s) will also preclude the lenders in the syndicate or club from acting directly in their individual capacities in respect of any enforcement of the lenders' rights; instead, they can only do so by instructing the agent(s) to take certain actions on their behalf (and such instructions will typically require majority lender consent). Pursuant to the agency appointment, the guarantors and security providers would provide the guarantees and grant security solely in favor of the agent (acting on behalf of all the lenders and the other secured parties). Given the expansive role of the agent, when assuming the agency role, agents will typically include in the loan documentation comprehensive indemnity provisions to protect their interests in carrying out this agency function.

13. If your jurisdiction does not recognise the role of an agent or trustee, are there any other ways to achieve the same effect and avoid individual lenders having to enforce their security separately?

N/A (See above).

14. Do the courts in your jurisdiction generally give effect to the choice of other laws (in particular, English law) to govern the terms of any agreement entered into by a company incorporated in your jurisdiction?

The courts in the US generally give effect to the choice of law (including English law) that the parties have contractually agreed will govern, provided that such choice of law bears a reasonable relation to the transaction. However, such decisions will also depend on various overriding considerations, such as the applicable court determining that it has jurisdiction to resolve the matter at hand or that the application of such choice of foreign law would be not be contrary to a fundamental policy of the state in which the US court making such determination sits.

15. Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions (in particular, English and US courts) and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e. the New York Arbitration Convention)?

Yes, the US is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been incorporated as Chapter 2 of the Federal Arbitration Act, 9 USC. § 200 et seq. The US is not a party to any treaties for reciprocal recognition of foreign judgments; hence foreign judgments are enforced pursuant to the applicable state statutes, which generally follow the Uniform Foreign Money-Judgments Recognition Act, the Uniform Foreign-Country Money Judgments Recognition Act, or common law principles of international comity. Final and binding money judgments that are enforceable in the country where they were rendered are generally enforced.

16. What (briefly) is the insolvency process in your jurisdiction?

The Bankruptcy Code is the primary corporate insolvency law in the US, which provides alternative regimes for reorganization under Chapter 11 or liquidation under Chapter 7 thereof. Each state also has statutes that provide rules for receivership or assignment for the benefit of creditors, which can vary substantially by state.

A Chapter 11 proceeding is a court-supervised process used to restructure a company's debts. Generally speaking, the process is designed so that (i) the company continues to operate in the ordinary course and emerges from bankruptcy with a stronger balance sheet, and (ii) its management and board remain in control of operations, in each case, subject to court oversight and the rights of parties in interest to be heard. During that process, the company is characterized as a "debtor-in-possession." The goal of a Chapter 11 proceeding is for the debtor-in-possession to develop a plan of reorganization with major stakeholders to restructure its debts.

A Chapter 7 proceeding, as opposed to Chapter 11 proceeding, is a court-supervised process used to liquidate a company in an orderly manner. A Chapter 7 bankruptcy case does not involve the filing of a plan of organization. Instead, a bankruptcy trustee marshals and sells the debtor's non-exempt assets and uses the proceeds of such sales to pay holders of claims in accordance with the provisions of the Bankruptcy Code. Typically, secured creditors will be paid from the value of their collateral, subject to the potential to surcharge for the costs of preserving and realizing the collateral.

17. What impact does the insolvency process have on the ability of a lender to enforce its rights as a secured party over the security?

The filing of a bankruptcy case under the Bankruptcy Code will result in an automatic stay that prevents lenders (and all creditors) from enforcing any security without prior relief from the bankruptcy court. Relief from the stay is available upon application and a showing of cause, including based on the lack of adequate protection of a lender's interests in its collateral. Lack of "adequate protection" means a lack of security to protect against the diminution in value of the secured lender's collateral during the bankruptcy case (i.e., the debtor's use/dissipation of that collateral). As noted above, property acquired after the date of the filing of a bankruptcy petition is not subject to the after-acquired property provisions of the security agreement, and the security interest of such secured party will not attach to such property.

Secured lenders may be "undersecured" or "oversecured" in a Chapter 11 bankruptcy. An oversecured creditor (i.e., where the value of such creditor's collateral exceeds the amount of its debt) is entitled to interest, fees, and related charges as part of its allowed secured claim in a bankruptcy case – whereas an undersecured creditor (i.e., where the value of such creditor's collateral does not exceed the amount of its debt) is not.

In a Chapter 11 bankruptcy, post-petition debtor-in-possession financing (a "DIP financing") may be available, including on a basis that is "priming" or senior to all pre-petition liens. As with use of cash collateral, a debtor is required to provide adequate protection to the relevant secured lenders as a condition to the receipt of a DIP financing that is secured by liens that are senior to or pari passu with the liens of such lenders, or obtain the consent of such lenders.

18. Please comment on transactions voidable upon insolvency.

The types of voidable or challengeable transactions upon the filing of a bankruptcy case include:

a) Preference: Transfers on account of an antecedent debt made within the 90 days prior to the bankruptcy filing when the debtor was insolvent are avoidable if they permit the creditor to receive more than they would have in a hypothetical liquidation under Chapter 7 of the Bankruptcy Code. The 90-day period is extended to one year for insiders. There are a variety of statutory defences and safe harbours to preference claims.

b) Fraudulent Transfers: Transfers of an interest in property of the debtor may be avoidable if (a) they are made with actual intent to defraud or deprive creditors of value or (b)(i) they are made when the debtor is insolvent or render the debtor insolvent and (ii) the consideration received by the debtor therefor is less than reasonably equivalent value.

c) In addition to preference and fraudulent transfer claims, Chapter 11 estates also have the right to pursue any claims of the debtor, including breach of fiduciary duty claims against directors and officers, such as for approving of fraudulent transfers (to the extent available under applicable law).

d) Proceeds of avoidance actions are generally considered as unencumbered assets of the bankruptcy estate and available for unsecured creditors. As a matter of practice, an unsecured creditors committee will seek to prevent a post-petition DIP lender, especially one that is a pre-petition secured creditor, from obtaining DIP liens over avoidance actions, and bankruptcy judges will often side with the unsecured creditors committee on this point.

19. Is set off recognised on insolvency?

Yes, the doctrine of set-off is recognized in bankruptcy cases generally speaking, provided that there is a general prohibition on the set-off of pre-petition claims against post-petition obligations.

US federal bankruptcy law does not affect a creditor's set-off rights and does not create a right of set-off, but preserves rights of set-off that may exist under applicable non-bankruptcy law. Therefore, any set-off rights between parties that exist under a contract or under state law will continue to exist in a bankruptcy.

20. Are there any statutory or third party interests (such as retention of title) that may take priority over a secured lender's security in the event of an insolvency?

Yes, there can be statutory interests (or third party interests) that may take priority over a secured lender's security in the event of insolvency. The primary types of statutory interests available in the United States arise from state law that permits liens for possessory creditors (e.g., warehouse lienors) or other statutory lien claimants (e.g., mechanics, technicians, materialmen, and repairmen) to assert liens on property or equipment (i.e., secured collateral) to secure payment of their pre-petition claims. The Bankruptcy Code authorizes these types of lienors to perfect their liens despite the automatic stay under Section 362 of the Bankruptcy Code. The priority of these statutory interests is defined by state law. In some cases, these interests can be deemed to have been perfected as of an earlier date (e.g., the date a mechanic started work), which can result in the statutory interest taking priority over a secured lender's interest if the statutory interest is deemed to have been perfected prior to the perfection of the secured lender's interests.

21. Are there any impending reforms in your jurisdiction which will make lending into your jurisdiction easier or harder for foreign lenders?

Historically, non-US affiliates that are treated as controlled foreign corporations for US federal income tax purposes have seldom provided guarantees to support the debt obligations of a US borrower, because such guarantees would result in deemed dividends to their direct or indirect US shareholders. Consequently, assets of controlled foreign corporations have seldom been pledged to support the debt obligations of their affiliated US borrower and only up to two-thirds of the voting stock of a first-tier controlled foreign corporation were typically pledged in support of such debt obligations. A controlled foreign corporation generally means a foreign corporation that is directly or indirectly (or by attribution) majority

owned (based on voting stock or value) by United States shareholders. A United States shareholder in this context means a shareholder that is a United States person and owns at least 10 per cent of the foreign corporation.

The US tax reform at the end of 2017 and subsequent guidance issued by the Treasury Department, however, opened possibilities for obtaining upstream guarantees and other credit support from controlled foreign corporations. More specifically, Treasury Regulations issued in May 2019 effectively turned off the deemed dividend rule in respect of earnings of a controlled foreign corporation when such controlled foreign corporation guarantees or provides certain pledges in support of debt of a related US borrower, provided that certain conditions are met.

These rules were expected to make lending to the US for all lenders (including foreign lenders) easier by expanding the availability of foreign entity credit support with respect to debt obligations of US borrowers. However, as a general matter and except where it is critical from a credit perspective, the provision of a non-US upstream guarantee and other credit support is often excluded outright from the guarantee and collateral package of US debt financings, primarily on cost and complexity grounds.

22. What proportion of the lending provided to companies consists of traditional bank debt versus alternative credit providers (including credit funds) and/or capital markets, and do you see any trends emerging in your jurisdiction?

The US loan market has seen a significant uptick in the proportion of lending provided to companies by alternative credit providers (including private credit and direct lending providers, investment funds, specialty finance firms, hedge funds, CLOs and business development companies). Whilst traditional bank lenders still generally dominate the market for larger, broadly syndicated loan transactions and indeed often arrange syndicated transactions where the bulk of the debt facility is provided by CLOs, borrowers in the past decade have increasingly turned to alternative credit providers (including on larger scale financings) in the loan market to avail themselves of the better pricing and deal terms that alternative credit providers are sometimes able to deliver (particularly for better rated credits) in an increasingly competitive market. Over the past few years, we have seen direct lenders provide sole underwrites or club deals for large multi-billion dollar transactions on competitive terms that were historically only seen in syndicated transactions, and deal volume for private credit witnessed an eight-year high in 2025 (despite a fall in deal count from the prior year).

In December 2025, the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation rescinded the Interagency Guidance on Leveraged Lending originally issued in 2013 (along with the corresponding FAQs posted in 2014). Their stated rationale for doing so was that the Guidance was too restrictive for banks operating in the leveraged loan market intending to loan to sub-investment grade issuers, and as a result such lending was pushed to non-bank lenders, out of the agencies' regulatory scope. Their withdrawal allows regulated banks to lend according to their own risk management practices utilizing the broad principles of safety and soundness. With such changes, changes, we expect the competition between traditional bank lending and private credit to intensify.

We expect borrowers to continue looking between the broadly syndicated market and the private credit market for the best solution for their needs on a deal-by-deal basis.

23. Please comment on external factors causing changes to the drafting of secured lending documentation and the structuring of such deals such as new law, regulation or other political factors

Russia's invasion of Ukraine has led to the significant expansion of the scope of existing Russia-related sanctions and export controls imposed by the United States, the United Kingdom, the European Union and a number of other countries. As a result of these measures, US lenders are very focused on ensuring that the sanctions provisions in loan documentation covers the fast-moving developments in respect of "sanctioned persons" and sanctions countries and territories. Lenders are also updating their standard KYC and due diligence protocols to confirm ongoing compliance by borrowers with the complex and ever-evolving changes to the scope of such sanctions. Loan documentation in the US is also continuously evolving to adopt to shifting market trends, including with the development of new liability management technology driven by private equity-backed borrowers.

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