United States

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MARKET AND LEGAL REGIME

1. Please give a brief overview of the securitisation market in your jurisdiction. In particular:

- **How active and/or developed is the market and what notable transactions and new structures have taken place recently?**
- **To what extent have central bank liquidity schemes assisted the securitisation market in your jurisdiction? Were retained securitisations common in the last 12 months?**
- **Is securitisation particularly concentrated in certain industry sectors?**

Securitisation overview

Securitisation has evolved over the past 40 years to constitute a major component of the debt capital markets in the US today, despite significant declines in total issues following the recent financial crisis. Introduced as a means of funding for US banks, securitisation developed from mortgage pools to include other asset classes including:

- Automobile loans and credit card receivables.
- Insurance and reinsurance products.
- More recently, securitisations of bonds (collateralised bond obligations (CBOs)), loans (collateralised loan obligations (CLOs)), asset-backed securities (ABS) (collateralised debt obligations (CDOs)) and other assets (including healthcare receivables, aircraft leases and more esoteric financial assets).

Securitisation issues by collateral class is currently dominated by mortgage-backed securities (MBS) that are issued and guaranteed by a government agency, followed by ABS (including automobile, credit cards, student loans and equipment leases) and CDOs.

Central bank programmes

In response to the credit crisis, the US has introduced (among other initiatives) two programmes designed to restore liquidity and confidence to financial markets:

- The Term Asset-Backed Securities Loan Facility (TALF), announced in November 2008. Under the TALF, the Federal Reserve will lend up to US$1 trillion (about EUR679.3 billion) on a non-recourse basis to holders of certain AAA-rated ABS backed by newly originated consumer and small business loans, and certain high quality commercial mortgaged-backed securities (CMBS). As of January 2010, TALF loans collateralised by newly issued ABS and legacy CMBS (issued before 1 January 2009) will be available until 31 March 2010. TALF loans collateralised by newly issued CMBS will be available until 30 June 2010.
- The Public Private Investment Programme (PPIP), announced in March 2009. Funded through a combination of Troubled Asset Relief Programme (TARP) funds, private investors and TALF loans, PPIP's mandate is to purchase troubled "legacy assets" from banks' balance sheets. One component of PPIP focuses on buying residential loans for which the US Federal Deposit Insurance Corporation (FDIC) will provide certain limited non-recourse loan guarantees. Under a second component, PPIP will buy certain legacy securitisation assets. PPIP's purchasing power will initially be US$500 billion (about EUR339.7 billion), with the potential to expand to US$1 trillion over time.

The market has to date responded positively to TALF, with more than US$100 billion (about EUR67.9 billion) of eligible securities being sold since its launch in March 2009. Secondary market ABS values have begun to increase and non-TALF transactions are now starting to recover.

New structures

Although the volume of securitisation transactions continues to be well below pre-crisis levels, a number of resecuritisation of real-estate mortgage investment conduits (re-REMIC) transactions and similar arrangements have been structured recently.

In these transactions, an outstanding securitisation bond (typically a senior bond that was originally rated AAA but that now may be rated below investment grade) can be repackaged or re-tranched into two or more new bonds, with the objective that the most senior new bond receives a fresh AAA rating. Although the more junior bonds issued in the re-REMIC transaction may obtain low ratings or may be unrated, the re-tranching may both:

- Increase the holder's liquidity by giving it a bond with a more attractive rating.
- Result in a lower overall capital charge for the holder.

2. Is there a specific legislative regime within which securitisations in your jurisdiction are carried out? In particular:

- **What are the main laws governing securitisations?**
- **Is there a regulatory authority?**

No specific legislation or regulatory body governs securitisations.

Rather, a transaction is subject to various federal and state laws depending on:

- The nature of the transaction (including the assets securitised).
- The transaction parties (including the type and jurisdiction of organisation of the SPV, the nature and domicile of the originator, the nature and domicile of investors, and the ongoing activities that the SPV will undertake).
- The means by which the securities are underwritten and sold (for example, through a registered public offering or a private placement of securities that is exempt from registration).

Laws relevant to securitisations include:

- Securities Act of 1933 (Securities Act).
- Securities Exchange Act of 1934 (Exchange Act).
- Trust Indenture Act of 1939.
- Investment Advisors Act of 1940.
- Investment Company Act of 1940.
- Internal Revenue Code of 1986.
- US Bankruptcy Code.

Regulatory authorities with jurisdiction over transaction parties include the:

- Securities and Exchange Commission.
- Commodity Futures Trading Commission.
- Federal Deposit Insurance Corporation.
- Board of Governors of the Federal Reserve System.

REASONS FOR DOING A SECURITISATION

3. Which of the reasons for doing a securitisation, as set out in the Model Guide, usually apply in your jurisdiction? In particular, how are the reasons for doing a securitisation in your jurisdiction affected by:

- **Accounting practices in your jurisdiction, such as application of the International Financial Reporting Standards (IFRS)?**
- **National or supra-national rules concerning capital adequacy (such as the Basel International Convergence of Capital Measurement and Capital Standards: a Revised Framework (Basel II Accord) or the Capital Requirements Directive)? What authority in your jurisdiction regulates capital adequacy requirements?**

Usual reasons for securitisation

Securitisation in the US is undertaken for all of the reasons identified in the Model Guide (*see Model Guide, Reasons for doing a securitisation*), including to:

- Obtain lower cost financing.
- Obtain balance sheet benefits (for example, reducing debt and improving financial ratios) by accelerating cash receipts on sales of receivables.
- Reduce the amount of capital required to be held against risk-weighted assets under capital adequacy regimes by removing assets from the originator's balance sheet.
- Permit financing and liquidity of assets that otherwise may have been financed only through traditional borrowing methods or not at all.
- Profit through credit arbitrage based on differences in funding costs in the capital markets and returns on the assets acquired in the securitisation.

Accounting practices

Accounting rules applicable to sponsors of securitisations (whether GAAP or regulatory accounting principles) often significantly affect the securitisation's structure, including to both:

- Achieve true sale treatment for the transferred assets.
- Avoid consolidation of the purchaser of the assets (often, a qualified special purpose entity (QSPE)) on the balance sheet of the sponsor.

Capital adequacy

The Basel I and Basel II rules, as implemented in the US, have standards that govern:

- Recourse obligations.
- Direct credit substitutes.
- Securities issued in connection with securitisations.

Because these rules can require an institution to maintain capital against these assets at a level as high as dollar-for-dollar, securitisations must be structured with these rules in mind. Capital requirements are regulated by each of the federal banking agencies in relation to the institutions for which they are responsible.

THE SPECIAL PURPOSE VEHICLE (SPV)

Establishing the SPV

4. How is an SPV established in your jurisdiction? Please explain:

- **What form does the SPV usually take and how is it set up?**
- **What is the legal status of the SPV?**
- **How is the SPV usually owned?**
- **Are there any particular regulatory requirements that apply to the SPVs?**

SPVs take many different forms. The SPV's type and organisational jurisdiction is based on both the:

- Desired tax treatment of the SPV.
- Nature and identity of the originators of the assets and the investors in the transaction.

The most common forms of SPVs used are:

- Trusts (including grantor trusts and business trusts).
- Limited liability companies (LLCs).

Less common securitisation vehicles include limited partnerships.

Grantor trusts are typically established under declarations of trust by the trust's settlors. Business trusts and LLCs (organisational forms authorised under specific state statutes) are typically formed by registration with the secretary of state or similar authority within the organisational jurisdiction. Limited partnerships are generally created under a partnership agreement among its partners.

For most purposes, business trusts, LLCs and limited partnerships are generally recognised as having separate legal personalities. Grantor trusts are typically not recognised as separate legal persons; instead, the trust's liabilities are liabilities of the trust's trustee (limited in recourse, generally, to the trust property).

In securitisations involving SPVs established in the US, the SPV can either be:

- Owned by the originator in the securitisation.
- Orphaned. For orphaned SPVs, the SPV's equity (typically nominal in amount) is owned by an entity or charitable foundation that is unrelated to the originator, and the owners of that equity have little or no economic involvement in the securitisation.

The regulatory status of the SPVs generally depends on the nature of the assets owned by the SPV and the activities that it undertakes, rather than on the SPV's organisational form.

5. Is the SPV usually established in your jurisdiction or offshore? If established offshore, in what jurisdiction are SPVs usually established and why? Are there any particular circumstances when it is advantageous to establish the SPV in your jurisdiction?

Whether an SPV is established within the US or offshore depends on the nature of the securitisation transaction and the particular tax, securities law and investor considerations that the parties deem relevant. For example, offshore SPVs can allow broader types of non-US investors to hold the SPV's securities than US SPVs (for example, for US Investment Company Act reasons). However, an offshore SPV with non-US investors may be more limited in the activities that it may engage in than onshore SPVs with only US investors (for example, for US federal tax reasons).

Typical ABS securitisations in the US (mortgage loan, credit card and auto loan securitisations) use SPVs established in the US. In contrast, CDO transactions (securitising loans, bonds or ABS securities) often use SPVs established in offshore jurisdictions (including the Cayman Islands, British Virgin Islands and Jersey) with favourable tax and regulatory environments.

If an offshore SPV is used in a US securitisation, a US corporation or LLC (typically organised in Delaware) is often formed to co-issue the securitisation's debt securities. These Delaware co-issuers typically have minimal assets and capital, and their nominal equity is typically either:

- Owned by the offshore SPV.
- Held by the entity or charity that holds the nominal equity in the offshore SPV.

For tax and other reasons, it is also not uncommon for an offshore SPV to establish one or more US subsidiaries for the limited purpose of holding defaulted assets or property received through a workout or restructuring of those defaulted assets.

Ensuring the SPV is insolvency remote

6. Is it possible to make the SPV insolvency remote in your jurisdiction? If so, how is this usually achieved?

It is possible to reduce the risk (but not eliminate it) that an SPV may become subject to bankruptcy proceedings by, generally, both:

- Limiting the scope of future potential creditors of the SPV.
- Reducing the likelihood of the SPV's insolvency.

The steps commonly include:

- Ensuring that the SPV's organisational documents limit its powers (for example, restrictions on debt, liens and mergers) and activities (for example, prohibition on becoming an operating company).
- Requiring non-petition agreements from transaction parties as a contractual impediment to an involuntary petition.
- Requiring limited-recourse agreements from transaction parties to limit their recourse to the SPV's assets (to prevent the SPV from meeting relevant legal definitions of insolvency).
- Requiring the SPV to have members on its board of directors who are independent of the originator and whose votes are required for any voluntary bankruptcy petition.
- Using an orphan SPV as issuer.

Ensuring the SPV is treated separately from the originator

7. Is there a risk that the courts can treat the assets of the SPV as those of the originator if the originator becomes subject to insolvency proceedings? If so, can this be avoided/minimised?

It is possible that an SPV's assets could be treated as the assets of the originator if both the:

- Originator becomes subject to insolvency proceedings.
- Bankruptcy court administering the originator's case exercises the equitable remedy of substantive consolidation under the US Bankruptcy Code.

To reduce this risk, each transfer of assets to the SPV must constitute a true sale (*see Question 16*) and the SPV must be sufficiently separate from the originator. Indications that an SPV is separate from the originator include:

- Separate financial statements are maintained.
- Business is conducted in the SPV's own name and observing corporate formalities.
- The SPV is held out as a separate entity and credit.
- Liabilities are paid from the SPV's own funds.
- Adequate capital is maintained for the SPV's business operations.

THE SECURITIES

Issuing the securities

8. Are the securities issued by the SPV usually publicly or privately issued?

Securitisation securities can be issued in either a public offering or a private placement. Various factors, including compliance with the US Investment Company Act of 1940 and the desired tax treatment of the SPV, are relevant in determining whether a securitisation is effected as a public offering or as a private placement.

9. If the securities are publicly issued:

- **Are the securities usually listed on a regulated exchange in your jurisdiction or in another jurisdiction?**
- **If in your jurisdiction, please briefly summarise the main documents required to make an application to list debt securities on the main regulated exchange in your jurisdiction. Are there any share capital requirements?**
- **If a particular exchange (domestic or foreign) is usually chosen for listing the securities, please briefly summarise the main reasons for this.**

Publicly issued securitisation securities are typically not listed on a regulated exchange in the US.

Issue through a public offering generally involves both:

- Filing a registration statement under the Securities Act (including a prospectus, the primary disclosure document) followed by review by the US Securities Exchange Commission (SEC).
- Compliance with the SEC's Regulation AB and related rules relating to shelf registrations of ABS.
- There are no share capital requirements for listing debt securities on a US public exchange.

Exemptions from registration under the Securities Act are available for private transactions involving a limited number of sophisticated investors.

It is common for securities issued in private placement securitisations to be listed on foreign exchanges (for example, the Irish Stock Exchange and the Luxembourg Stock Exchange) in response to investor demand for such a listing.

Constituting the securities

10. If the trust concept is not recognised in your jurisdiction, what document are the securities issued by the SPV constituted by and how are the rights in them held?

The trust concept is recognised in the US and many securitisations are structured using trusts.

SPVs can issue debt securities to investors and securitise their assets through various transaction structures, most commonly by entering into a trust indenture with a trustee. The trustee represents the interests of the investors that hold the securities, usually notes or bonds, issued by the SPV. An indenture typically:

- Provides for the issue of notes and governs transfers of notes.
- Creates a lien on the SPV's assets in favour of the trustee for the benefit of the investors (giving them secured creditor status).
- Restricts the SPV's powers and operations (for example, limiting new debt or lien incurrence).
- Establishes restrictions and procedures for the purchase, disposition and management of the SPV's assets.
- Specifies the order in which payments are made to investors.
- Specifies the events of default on which investor classes (through the trustee) can terminate the indenture and enforce remedies against the SPV.

TRANSFERRING THE RECEIVABLES

Classes of receivables

11. What classes of receivables are usually securitised in your jurisdiction? Please explain any particular reasons (for example, the strength of the origination market) why such receivables are usually securitised and the progress of the market in securitising new classes of receivables.

The asset classes securitised most by volume are mortgage loans, followed by credit card receivables, automobile loans and other consumer loans. Corporate bonds and loans have also been securitised in large volumes. Theoretically, any asset with an identifiable stream of cash flow can be securitised. Asset classes best suited for securitisation are those that may be packaged and serviced most efficiently.

The transfer of the receivables from the originator to the SPV

12. How are the receivables usually transferred from the originator to the SPV (for example, assignment, novation, sub-participation, declaration of trust)? How is the transfer perfected? Are there any rules, requirements or exemptions that apply specifically to transferring receivables in a securitisation transaction?

Many securitisations are structured using a two-step process:

- The entity that originates the pool of assets transfers the assets (by sale or capital contribution) to an intermediate, bankruptcy remote SPV (often a wholly owned subsidiary of the originator). This is usually structured to constitute a true sale.
- The intermediate SPV transfers the pooled assets to another SPV, which subsequently issues debt securities to investors. The intermediate SPV may retain servicing rights over the pooled assets. This transfer is not typically required to satisfy all of the requirements for a legal true sale (because the transferor is a bankruptcy-remote SPV).

The transfer of receivables at both stages is typically documented as an absolute assignment of all rights, title and interest in the receivables in exchange for an agreed purchase price.

Article 9 of the Uniform Commercial Code (UCC), in force in each of the United States (with variations from state to state), applies to sales of most receivables. Therefore, each buyer of receivables in the chain of ownership (including the intermediate SPV and, ultimately, the issuing SPV) must comply with the attachment and perfection provisions of Article 9. SPVs typically perfect their interest in the assets by filing a UCC-1 financing statement under the applicable UCC. Filing an appropriate financing statement in the correct jurisdiction:

- Evidences the sale of the assets.
- Elevates the assignment above competing third-party claims.
- If the intended true sale of the assets is re-characterised as a loan, provides the SPV transferee with contingency status as a secured creditor (an improvement from unsecured creditor status).

13. Are there any types of receivables that it is not possible or not practical to securitise in your jurisdiction (for example, future receivables)?

Almost any asset class with predictable future cash flows can be securitised (*see Question 11*). Although securitisation of future receivables presents unique legal challenges (for example, attachment to claims not yet in existence), there are recent examples of these securitisations in the US.

14. How is any security attached to the receivables transferred to the SPV? What are the perfection requirements?

Under sections 9-203(f) and (g), among others, of the UCC, the attachment of a security interest in a receivable should both:

- Give the secured party the rights to all proceeds of that receivable.
- Constitute attachment of a security interest in a supporting obligation for the receivable (for example, rights to draw under a letter of credit, and rights under guarantees of the receivable).

Similarly, the attachment of a security interest in a right to payment or performance secured by a security interest (or other lien on personal or real property) should also constitute the attachment of a security interest in the security interest, mortgage, or other lien.

In addition, pre-existing security interests attached to portfolio assets of the SPV before the securitisation can be assigned by the original secured party to the assignee under Section 9-514 of the applicable UCC (or analogous provisions of other applicable state laws).

Prohibitions on transfer

15. Are there any prohibitions on transferring the receivables or other issues restricting the transfer? For example, is a negative pledge enforceable, or are there any legislative provisions that affect the transfer of receivables (such as consumer or data protection rules)?

Many contracts that give rise to receivables purport to prohibit transfers of, or grants of security interests in, those receivables. However, many of those prohibitions are ineffective (*section 9-406, UCC*). In addition, once the obligor on an account receivable is notified of the assignment of the receivable, it can only discharge its obligation by paying the new assignee (*UCC*).

Consumer transactions, including mortgages, credit card loans, automobile loans and automobile leases, are subject to both state and federal legislation. These laws and the UCC are complex. Therefore, it is necessary to:

- Consult with local state legal practitioners.
- Review the related contracts in detail.
- Gain a complete understanding of the nature of the assets being assigned.

Avoiding the transfer being re-characterised

16. Is there a risk that a transfer of title to the receivables will be re-characterised as a loan with security? If so, can this risk be avoided and/or minimised?

Investor, accounting and rating agency considerations generally require the originator to transfer the relevant assets in a sale that is treated as a true sale for state law, bankruptcy and accounting purposes. If the originator is subject to bankruptcy proceedings, the bankruptcy court may re-characterise the transaction as a loan from the transferee to the originator. The SPV's portfolio of assets could be determined to be part of the originator's bankruptcy estate (and, accordingly, subject to administration by the originator and its bankruptcy court, and available to satisfy claims of the originator's creditors).

Among the steps to be taken to reduce this re-characterisation risk, the most significant are to ensure that the:

- Seller/originator does not maintain residual rights to control the assets or have obligations to repurchase or substitute assets following the transaction.
- Intermediate SPV/purchaser pays the fair market value of the assets.
- Seller/originator is not subject to collection risk or recourse for credit losses on the assets.
- Intent of the parties is reflected in the transaction documents to characterise the transfer as a sale.

The transaction documents also usually provide for a backup security interest to mitigate the effects of any possible re-characterisation as a financing.

Ensuring the transfer cannot be unwound if the originator becomes insolvent

17. Can the originator (or a liquidator or other insolvency officer of the originator) unwind the transaction at a later date? If yes, on what grounds can this be done and what is the timescale for doing so? Can this risk be avoided or minimised?

Following an originator's filing of a bankruptcy petition, transfers (including a grant of a security interest) can in certain circumstances be set aside under the US Bankruptcy Code. A bankruptcy court can characterise the transfer as a fraudulent conveyance or a preference.

There are two types of fraudulent conveyance:

- A transfer of property by the debtor/originator with the actual intent to defraud its creditors.
- A constructive fraudulent transfer, generally implicated when both the:
  - debtor/originator transfers property without receiving "reasonably equivalent value" in exchange for the transfer;
  - debtor is insolvent at the time of the transfer.

The "look-back period" for fraudulent conveyances is two years before the date of filing the petition (this period can be longer, depending on the applicable state laws).

The originator's property that is transferred to an SPV can be recovered in the originator's bankruptcy as a preference, if the transfer both:

- Was for or on account of a pre-bankruptcy debt of the originator that was made while the originator was insolvent.

  There is a presumption of insolvency within:
  - 90 days of the bankruptcy filing, if the transfer was to a non-insider creditor;
  - one year of the bankruptcy filing, if the transfer was to a insider creditor.
- Would allow the SPV to receive more on its pre-bankruptcy debt than it would have received in a bankruptcy liquidation of the originator.

Establishing the applicable law

18. Are choice of law clauses in contracts usually recognised and enforced in your jurisdiction? If yes, is a particular law usually chosen to govern the transaction documents? Are there any circumstances when local law will override a choice of law?

Transaction parties often select New York law to govern US securitisations. For transactions involving US$250,000 (about EUR169,830) or more, the parties can select New York law to govern their contractual rights and duties, whether or not the contract bears a reasonable relation to New York (*section 5-1401,General Obligation Law*). However, the constitutionality of this has been questioned.

Under New York state conflict of laws rules, New York courts generally uphold a choice of the law of another jurisdiction to govern a contract if the jurisdiction of the chosen foreign law has a substantial relationship to the parties or transaction (unless the application of the chosen foreign law results in a violation of a fundamental public policy of New York state).

The choice of law rules of other jurisdictions may vary materially from the New York rules.

SECURITY AND RISK

Creating security

19. Please briefly list the main types of security that can be taken over the various assets of the SPV in your jurisdiction, and the requirements to perfect such security.

An SPV typically pledges all of its assets to the indenture trustee for the benefit of the investors. Perfection requirements for personal property are governed by the UCC and broadly fall into three categories:

- Perfection by filing a UCC-1 financing statement in the appropriate filing office (applicable to most types of personal property).
- Perfection by control, generally satisfied by possession of the collateral by the secured party or entering into a control agreement (applicable to investment property, deposit accounts, electronic chattel paper and letter-of-credit rights).
- Perfection by possession (applicable to money, tangible chattel paper, instruments, goods and documents).

Perfecting liens on other types of collateral (for example, real property and automobiles), requires compliance with local state laws and may include:

- Filing mortgages or deeds of trust in the jurisdiction in which the real property is located.
- Notation of the lien on the automobile's certificate of title, as applicable.

For further information on taking security over assets in the United States, see PLC *Cross-border Finance Handbook 2010, Country Q&A, United States*.

20. How is the security granted by the SPV held for the investors? If the trust concept is recognised, are there any particular requirements for setting up the trust (for example, the security trustee providing some form of consideration)? Are foreign trusts recognised in your jurisdiction?

The security interest granted by an SPV is typically granted to the indenture trustee for the benefit of the investors as secured parties. The trust concept is recognised in the US. A trust relationship is often established between the SPV and the trustee by entering into a declaration of trust or a trust indenture.

The Trust Indenture Act of 1939 (TIA) applies to publicly issued securities. Generally, the TIA:

- Establishes criteria for indenture trustees and governs their actions.
- Specifies various substantive provisions, including investor protections, to be contained in the indenture.

Credit enhancement

21. What methods of credit enhancement are commonly used in your jurisdiction? Are there any variations or specific issues that apply to the credit enhancement techniques set out in the Model Guide?

US securitisations have employed a broad range of credit enhancement techniques, including:

- Over-collateralisation.
- A senior/subordinated capital structure.
- Financial guaranty insurance from monocline insurers.
- Reserve funds established with excess cash flow or proceeds from the issue of securities.

Each method of credit enhancement has unique characteristics and should be considered independently of the securitisation transaction to evaluate the quality of the credit worthiness extended to the deal. For example, over-collateralisation (where an SPV's asset pool has a greater value than the debt securities issued) is subject to valuation and accounting parameters that may be unfavourable in volatile markets (which could result in severe write-downs of collateral). Similarly, credit support provided by monoline insurers is only as good as the monoline insurer's credit and this industry has suffered due to the financial crisis.

Risk management and liquidity support

22. What methods of liquidity support are commonly used in your jurisdiction? Are there any variations or specific issues that apply to the provision of liquidity support as set out in the Model Guide?

Certain structures provide the SPV with external liquidity support, which may be:

- In the form of loans from the originator or a third-party bank.
- By accumulating cash reserves from retained spread.

Certain transaction-specific risks (for example, interest rate risk and currency risk), can be managed by entering into swaps or other derivatives.

Liquidity support in the form of third-party loans should be evaluated based on, among other factors, the lender's credit quality and the particulars of the credit documentation (for example, the lender's ability to withdraw its lending commitment under certain circumstances). Determining the adequacy of cash reserve funds is largely a quantitative exercise involving:

- Modelling of future cash flows (the greater the spread between the SPV's receivables and payables, the faster the reserve account accumulates).
- Evaluating the quality and safety of investments that may be made with the reserve funds over the life of the transaction.

CASH FLOW IN THE STRUCTURE

Distribution of funds

23. Please explain any variations to the Cash flow index accompanying Diagram 9 of the Model Guide that apply in your jurisdiction.

Diagram 9 of the Model Guide reflects a typical cash flow structure for US receivables securitisations (*see Model Guide, Diagram 9 and box, Cash flow index*). Variations can include cash flows in:

- Synthetic structures, with no transfers of receivables (exposure to assets being gained synthetically through derivatives).
- Covered bonds, where the portfolio assets remain on the originator's balance sheet.

Profit extraction

24. What methods of profit extraction are commonly used in your jurisdiction? Are there any variations or specific issues that apply to the profit extraction techniques set out in the Model Guide?

Profit extraction follows the examples in the Model Guide (*see Model Guide, Profit extraction*). Care should be taken that the types of profit extraction proposed do not conflict with true sale, non-consolidation, accounting or tax rules or requirements.

THE ROLE OF THE RATING AGENCIES

25. What is the sovereign rating of your jurisdiction? What factors impact on this and are there any specific factors in your jurisdiction that affect the rating of the securities issued by the SPV (for example, legal certainty or political issues)? How are such risks usually managed?

The sovereign rating of the US is AAA with a stable outlook. Relevant sovereign rating criteria considered by the rating agencies include:

- The national regulatory framework.
- Fiscal policy.
- Monetary policy.
- Foreign currency control.
- Political and legal risks.

TAX ISSUES

26. What tax issues arise in securitisations in your jurisdiction? In particular:

- **What transfer taxes may apply to the transfer of the receivables? Please give the applicable tax rates and explain how transfer taxes are usually dealt with.**
- **Is withholding tax payable in certain circumstances? Please give the applicable tax rates and explain how withholding taxes are usually dealt with.**
- **Are there any other tax issues that apply to securitisations in your jurisdiction?**

The relevant taxes include:

- Federal, state and local income taxes.
- Franchise taxes.
- Transfer taxes.
- Intangible taxes.

There is significant variation in the tax consequences for various asset classes and structures. However, the most significant tax is generally the federal income tax. Federal net income tax generally applies to corporate entities at a rate of 35%. If there is no applicable exception or treaty, withholding tax applies to portfolio income earned by non-US persons on a gross basis at a rate of 30%. State and local tax rates vary by jurisdiction.

In certain cases, the sponsor wishes to avoid triggering net income tax on the transfer of assets to the SPV. If so, it is important to structure the transfer to qualify as a financing for tax purposes rather than a sale. The applicable tax law standards are not necessarily the same as those that apply for financial accounting or legal true sale purposes.

Taxes imposed on an SPV can render a securitisation uneconomic. Federal income tax laws generally subject corporations to tax on their net income. Commercial paper issuers manage entity-level tax by issuing commercial paper in amounts that match interest deductions with the income from the SPV's assets. However, this approach is generally not practical for most asset classes as longer term debt secured by less liquid assets may not constitute debt for tax purposes (precluding deduction of interest), because the SPV is too thinly capitalised.

Federal income tax laws do not subject partnerships and certain trusts to tax on their net income. A real estate mortgage investment conduit (REMIC), a special form of pass-through vehicle that is subject to a special tax regime), is generally employed to securitise mortgage-backed assets. Otherwise, a sponsor usually structures an SPV as a trust or partnership for tax purposes. However, a number of requirements must be met to ensure pass-through treatment. Even if pass-through treatment is achieved, if persons considered owners of the SPV for tax purposes (that is, equity rather than debt holders) are non-US persons, entity level tax can arise if the SPV is "doing business" in the US. Doing business does not result from mere investment or trading in securities, but may encompass active origination (of bank loans, for example).

Subject to exceptions, withholding tax does not generally apply to interest on most registered form debt. Therefore, if an instrument is viewed as debt issued by the SPV, there is typically no withholding tax. Instruments treated as equity for tax purposes may attract withholding tax (for example, if the underlying assets are not registered form debt or the SPV is doing business in the US).

SYNTHETIC SECURITISATIONS

27. Are synthetic securitisations possible in your jurisdiction? If so, please briefly explain any particularly common structures used. Are there any particular reasons for doing a synthetic securitisation in your jurisdiction?

Synthetic securitisations are widely used, most commonly by using portfolio credit derivatives. In these transactions, one party (the protection buyer) pays a premium to the SPV (the protection seller, which issues securities to investors) in exchange for the right to receive a payment on the occurrence of credit events affecting the relevant reference entities (for example, a bankruptcy filing or failure to pay).

Synthetic securitisations are attractive because they both:

- Can be completed quickly (without ramp-up periods needed to accumulate cash assets in non-synthetic transactions).
- Provide more flexibility in issuing securities with very specifically crafted subordination levels, yields and reference portfolios.

OTHER SECURITISATION STRUCTURES

28. Which of the various structures, set out in the Model Guide or otherwise, are commonly used in your jurisdiction?

The market has historically generated the largest volume of securitisation issues in the world and essentially all of the structures in the Model Guide have been used to some extent in the US.

REFORM

29. Please summarise any reform proposals and state whether they are likely to come into force and, if so, when. For example, what structuring trends do you foresee and will they be driven mainly by regulatory changes, risk management, new credit rating methodology, economic necessity, or other factors?

The US Congress has considered several significant reforms, but no sweeping reform has yet been enacted. The proposals include:

- The heightened regulation of rating agencies.
- A requirement that sponsors of securitisations hold a percentage of the securitisation for their own accounts.
- A new federal agency to regulate the terms and sale of financial products to consumers.
- Efforts to end the role of private banks in the government-guaranteed student loan business.
- Proposals to require large classes of over the counter derivative transactions (including credit default swaps) to be cleared on exchanges.

Two statutes have been enacted that were designed to solve specific problems:

- The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 requires a national registry to test and register any person who is involved in the business of originating mortgages.
- The Credit Card Accountability Responsibility and Disclosure Act of 2009 seeks to stop egregious charges imposed on cardholders by credit card issuers.

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