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1 Receivables Contracts

1.1 Formalities. In order to create an enforceable debt obligation of the obligor to the seller: (a) is it necessary that the sales of goods or services are evidenced by a formal receivables contract; (b) are invoices alone sufficient; and (c) can a binding contract arise as a result of the behaviour of the parties?

Laws in the United States are adopted at the federal or state level. Answers related to state laws are based on New York law (unless indicated otherwise). In particular, answers to questions below that refer to the Uniform Commercial Code (the "UCC") are based on the version of the UCC in force in New York; however, many of those answers may change if the United Nations Convention on the Assignment of Receivables in International Trade (which the United States has ratified) comes into effect in the United States.

Under the UCC, certain contracts must be reduced to some form of writing to be enforceable: (i) contracts for the sale of goods for US$500 or more; and (ii) contracts for services that, by their terms, will not be completed within one year. A purchase order, invoice, order acknowledgment or other writing is sufficient for a contract for a sale of goods if it is executed or adopted by the party to be charged and specifies the quantity of goods sold. Subject to the requirements noted, a binding contract may arise in the absence of a writing with respect to a sale of (i) goods for which payment has been made and accepted, or (ii) goods that have been received and accepted.

1.2 Consumer Protections. Do your jurisdiction's laws: (a) limit rates of interest on consumer credit, loans or other kinds of receivables; (b) provide a statutory right to interest on late payments; (c) permit consumers to cancel receivables for a specified period of time; or (d) provide other noteworthy rights to consumers with respect to receivables owing by them?

Allowable rates of interest are limited under state law, with variations based on the state and the type of receivables. State interest rate limitations are pre-empted by federal law for depository institutions, which follow their home state's laws, and for most first-lien mortgages. Interest on late payments is generally not separately restricted or mandated.

State and federal laws permit consumers to cancel certain types of receivables, with the applicability and cancellation periods depending on the type of receivable (e.g., mortgage refinancings), the type of marketing process (e.g., door-to-door sales) and jurisdiction.

Consumers who obtain credit, loans or other kinds of financing receive protections under state and federal laws, including those mandating disclosure, prohibiting discriminatory practices, protecting consumer data, prohibiting certain unfair debt collection practices, protecting military service members, protecting certain consumer purchases of goods or services and regulating the residential mortgage process.

1.3 Government Receivables. Where the receivables contract has been entered into with the government or a government agency, are there different requirements and laws that apply to the sale or collection of those receivables?

Yes. The general rules governing the sale or collection of receivables are not applicable where the U.S. government or an executive branch, agency or instrumentality is the obligor, in which case the Federal Assignment of Claims Act applies to the assignment of the receivables, and the federal government's right to exercise set-off. Some states have similar laws applicable to obligations of the state or its agencies or instrumentalities.

2 Choice of Law – Receivables Contracts

2.1 No Law Specified. If the seller and the obligor do not specify a choice of law in their receivables contract, what are the main principles in your jurisdiction that will determine the governing law of the contract?

In a dispute relating to a matter arising in a given jurisdiction, if the plaintiff and defendant are domiciled in that jurisdiction, a court in that jurisdiction generally applies the substantive law of the jurisdiction, rather than the substantive law of another jurisdiction.

If a dispute has a connection to two or more jurisdictions, most states follow some form of the conflicts rules set forth in the UCC and/or the Restatement (Second) of Conflict of Laws (the "Second Restatement").

Most states have adopted the choice of law rule in UCC Section 1-301(b), which provides that, if a contract does not contain a valid choice of law provision, the substantive law of the jurisdiction bearing an "appropriate relation" to the transaction governs rights and duties under the transaction. The majority of courts have defined "appropriate relation" by applying the law of the state with the "most significant relationship" to the matter at issue.

Under the Second Restatement, a court generally applies the local law of the state with the "most significant relationship" to the transaction and the parties, based on certain key factors,

which include: (1) the place of contracting (where the last act occurred that was necessary to give the contract binding effect); (2) the place of negotiation; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties.

2.2 Base Case. If the seller and the obligor are both resident in your jurisdiction, and the transactions giving rise to the receivables and the payment of the receivables take place in your jurisdiction, and the seller and the obligor choose the law of your jurisdiction to govern the receivables contract, is there any reason why a court in your jurisdiction would not give effect to their choice of law?

Under the facts described above, it is likely a court would give effect to a clear choice of governing law in the receivables contract.

2.3 Freedom to Choose Foreign Law of Non-Resident Seller or Obligor. If the seller is resident in your jurisdiction but the obligor is not, or if the obligor is resident in your jurisdiction but the seller is not, and the seller and the obligor choose the foreign law of the obligor/seller to govern their receivables contract, will a court in your jurisdiction give effect to the choice of foreign law? Are there any limitations to the recognition of foreign law (such as public policy or mandatory principles of law) that would typically apply in commercial relationships such as that between the seller and the obligor under the receivables contract?

Courts analyse the enforceability of choice of law clauses by following a variety of approaches, including the Second Restatement, Section 1-301(a) of the UCC and any special state statutes.

Section 1-301(a) of the UCC provides that if the parties' agreement bears a reasonable relation to more than one state, the parties should be permitted to select which of those states' laws will govern their agreement. Courts usually interpret the reasonable relation standard liberally. In general, a "reasonable relation" may be found to exist in the state where a significant enough percentage of the entering into, and/or the performance of, the agreement has occurred.

Under the Second Restatement, courts generally enforce the parties' choice of law unless the selected state does not have a "substantial relationship" with the parties or the transaction, and there should be at least a "reasonable basis" for the choice of law.

While a choice of foreign law in a governing law clause is generally presumed valid, courts may refuse to enforce a clause where a party makes a strong showing that the clause resulted from fraud or overreaching, the clause is unreasonable or unfair, or the enforcement of the clause would violate a strong public policy of the forum. In addition, Section 1-301 of the UCC provides additional protections for individual consumers.

The United States has ratified the United Nations Convention on Contracts for the International Sale of Goods (the "CISG"), and unless the parties have clearly agreed to opt out of the CISG, any contracts for the sale of goods between parties with their principal places of business in different CISG countries are bound by the articles of the CISG rather than the domestic law of the parties' countries.

3 Choice of Law – Receivables Purchase Agreement

3.1 Base Case. Does your jurisdiction's law generally require the sale of receivables to be governed by the same law as the law governing the receivables themselves? If so, does that general rule apply irrespective of which law governs the receivables (i.e., your jurisdiction's laws or foreign laws)?

In most cases, the sale of a receivable may be governed by the law of a jurisdiction different from the law governing such receivable, irrespective of which law governs the receivable. However, the parties generally may not choose the law governing the perfection and priority of any sale of receivables. Instead, in the case of perfection and priority, the governing law is determined in accordance with the choice of law rules under the UCC.

3.2 Example 1: If (a) the seller and the obligor are located in your jurisdiction, (b) the receivable is governed by the law of your jurisdiction, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of your jurisdiction to govern the receivables purchase agreement, and (e) the sale complies with the requirements of your jurisdiction, will a court in your jurisdiction recognise that sale as being effective against the seller, the obligor and other third parties (such as creditors or insolvency administrators of the seller and the obligor)?

Generally yes, so long as the following conditions are satisfied: (1) the chosen jurisdiction has a reasonable and substantial relationship and sufficient contacts with the original transaction, and such jurisdiction has the most significant contacts with such transaction; (2) such jurisdiction does not violate or contravene a public or fundamental policy of the state or of another jurisdiction whose law would apply in the absence of choosing such jurisdiction; and (3) the choice of such jurisdiction was not induced by fraud.

Even if the foregoing conditions are satisfied, a court may decline to apply the law of a jurisdiction chosen by the parties when (a) doing so is necessary to protect the fundamental policies of the jurisdiction whose law would otherwise apply, and (b) such jurisdiction has a materially greater interest in the determination of a particular issue than the jurisdiction of the chosen law.

3.3 Example 2: Assuming that the facts are the same as Example 1, but either the obligor or the purchaser or both are located outside your jurisdiction, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller), or must the foreign law requirements of the obligor's country or the purchaser's country (or both) be taken into account?

Yes, subject to the analysis that is described in the response to question 3.2.

3.4 Example 3: If (a) the seller is located in your jurisdiction but the obligor is located in another country, (b) the receivable is governed by the law of the obligor's country, (c) the seller sells the

receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the obligor's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the obligor's country, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller) without the need to comply with your jurisdiction's own sale requirements?

A "true sale" determination under non-U.S. law will generally be recognised in U.S. courts, subject to the analysis described in the response to question 3.2.

In the United States, most transfers of receivables (including sales) create a "security interest" under the UCC even if the relevant transfer is not a "grant for collateral security". Such a "security interest" must be perfected as against the seller in order to be enforceable against third parties. The methods for perfecting a security interest in certain receivables are described in the responses to questions 4.2 and 4.3.

The law governing perfection of a security interest against a seller is subject to mandatory choice of law rules under the UCC. If the filing of a financing statement achieves perfection, the law of the seller's "location" will generally govern. The seller's "location" depends on several factors: (1) the type of organisation it is; (2) whether it is formed under the laws of a foreign country; (3) the location of its chief executive office; and (4) whether the jurisdiction of its chief executive office provides a public filing system for non-possessory liens. The "location" of a seller will often be the jurisdiction of its organisation, rather than any physical location. If perfection is obtained by possession, the law of the jurisdiction where the receivable is physically located will govern.

3.5 Example 4: If (a) the obligor is located in your jurisdiction but the seller is located in another country, (b) the receivable is governed by the law of the seller's country, (c) the seller and the purchaser choose the law of the seller's country to govern the receivables purchase agreement, and (d) the sale complies with the requirements of the seller's country, will a court in your jurisdiction recognise that sale as being effective against the obligor and other third parties (such as creditors or insolvency administrators of the obligor) without the need to comply with your jurisdiction's own sale requirements?

Generally, yes.

3.6 Example 5: If (a) the seller is located in your jurisdiction (irrespective of the obligor's location), (b) the receivable is governed by the law of your jurisdiction, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the purchaser's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the purchaser's country, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller, any obligor located in your jurisdiction and any third party creditor or insolvency administrator of any such obligor)?

See the response to question 3.4.

4 Asset Sales

4.1 Sale Methods Generally. In your jurisdiction what are the customary methods for a seller to sell receivables to a purchaser? What is the customary terminology – is it called a sale, transfer, assignment or something else?

In securitisation transactions, the seller/originator typically sells all of its right, title and interest in, to, and under the receivables and related assets, and all proceeds of the same, to the securitisation special purpose entity ("SPE") issuer (directly or through one or more affiliated intermediaries) under a sale agreement. Under such an agreement, the SPE pays or gives consideration for the transfer of the receivables, and the seller/originator typically represents and warrants that the receivables meet certain criteria. The response to question 4.9 addresses whether a transfer will be regarded as a "true sale" or, alternatively, will be deemed a loan despite its form. Although governing documents may use a range of language, such a transaction is normally referred to as a sale or assignment of receivables.

4.2 Perfection Generally. What formalities are required generally for perfecting a sale of receivables? Are there any additional or other formalities required for the sale of receivables to be perfected against any subsequent good faith purchasers for value of the same receivables from the seller?

With the exception of receivables that are characterised as promissory notes and payment intangibles (see the response to question 4.3), a sale of receivables is perfected when a UCC financing statement is filed. The UCC financing statement must identify the seller and the purchaser and provide a reasonable description of the receivables. In addition, the UCC financing statement must be filed in the appropriate jurisdiction, where the seller is "located" (see the response to question 3.4).

4.3 Perfection for Promissory Notes, etc. What additional or different requirements for sale and perfection apply to sales of promissory notes, mortgage loans, consumer loans or marketable debt securities?

Different perfection rules apply to receivables that are "promissory notes", "payment intangibles", "chattel paper", or "accounts".

"Promissory notes" evidence the monetary obligation of residential and commercial mortgage loans in the United States. A sale of a promissory note is perfected automatically, without requiring the filing of a UCC financing statement or any additional action (e.g., retaining possession of the promissory notes).

Monetary obligations not evidenced by promissory notes or other instruments are characterised as "payment intangibles". As with promissory notes, their sale is automatically perfected. However, it is common to include the grant of a back-up security interest in the sale agreement for "promissory notes" and "payment intangibles", in case the sale is re-characterised as a loan and automatic perfection does not apply. The perfection of this back-up security interest is not automatic; it is accomplished by filing a UCC financing statement (see the response to question 4.2).

"Chattel paper" evidences both the monetary obligation and a security interest in specific goods, such as in the case of automobile or equipment loans. Unlike sales of promissory notes and payment intangibles, a sale of chattel paper is not automatically perfected, and additional actions must be taken to perfect the security interest. A sale of "tangible" chattel paper (a record inscribed on a tangible medium) can be perfected either by filing a UCC financing statement or by the purchaser (or its agent) taking possession of the tangible chattel paper. A sale of "electronic" chattel paper can be perfected either by filing a UCC financing statement or by the purchaser taking "control" of the electronic chattel paper.

The right to payment of a monetary obligation for credit card charges or for certain other services are characterised as "accounts". A sale of accounts is not automatically perfected, and the security interest must be perfected by filing a UCC financing statement; it is also common to include the grant of a back-up security interest in the sale agreement.

We note that the State of New York has not enacted the 2022 amendments to the UCC yet and the answers provided herein do not factor in such 2022 amendments.

4.4 Obligor Notification or Consent. Must the seller or the purchaser notify obligors of the sale of receivables in order for the sale to be effective against the obligors and/or creditors of the seller? Must the seller or the purchaser obtain the obligors' consent to the sale of receivables in order for the sale to be an effective sale against the obligors? Whether or not notice is required to perfect a sale, are there any benefits to giving notice — such as cutting off obligor set-off rights and other obligor defences?

Neither the seller nor the purchaser is required to notify the underlying obligors in order for the sale of receivables to be enforceable between the seller and purchaser. Under the UCC, however, obligor notification that the receivable has been sold is required for: (1) the purchaser to enforce the payment obligation directly against the obligor; and (2) the obligor to be required to pay the purchaser, in each case subject to the defence or claim of recoupment that the obligor has with respect to the transaction that gave rise to the receivable. In addition, see the response to question 4.13 regarding set-off rights.

If a receivable is evidenced by a negotiable instrument (e.g., a note that is a promise to pay), a purchaser who is a holder in due course generally may enforce the receivable directly against the obligor and will take free and clear of any defences resulting from the seller's conduct.

4.5 Notice Mechanics. If notice is to be delivered to obligors, whether at the time of sale or later, are there any requirements regarding the form the notice must take or how it must be delivered? Is there any time limit beyond which notice is ineffective — for example, can a notice of sale be delivered after the sale, and can notice be delivered after insolvency proceedings have commenced against the obligor or the seller? Does the notice apply only to specific receivables or can it apply to any and all (including future) receivables? Are there any other limitations or considerations?

There is no required form of delivery of notice. However, to be effective (for the purposes described in the response to question 4.4), the notice must reasonably identify the receivables and be "authenticated" (i.e., signed by the seller or the purchaser of the receivables). There is no time limit for the delivery of such a notice; however, as noted in the response to question 4.4, notification is required in order for the purchaser to enforce the payment obligation directly against the obligor. Therefore, the notice should be given sooner rather than later.

4.6 Restrictions on Assignment — General Interpretation. Will a restriction in a receivables contract to the effect that "None of the [seller's] rights or obligations under this Agreement may be transferred or assigned without the consent of the [obligor]" be interpreted as prohibiting a transfer of receivables by the seller to the purchaser? Is the result the same if the restriction says "This Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor]" (i.e., the restriction does not refer to rights or obligations)? Is the result the same if the restriction says "The obligations of the [seller] under this Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor]" (i.e., the restriction does not refer to rights)?

The wordings in the first two questions would likely be understood as contractual restrictions on the assignment of the seller's rights. The wording in the third question would likely not be understood that way. However, the UCC will override any such restriction on assignment either in whole or in part depending on the characterisation of the receivable, as detailed in the response to question 4.7.

4.7 Restrictions on Assignment; Liability to Obligor. If any of the restrictions in question 4.6 are binding, or if the receivables contract explicitly prohibits an assignment of receivables or "seller's rights" under the receivables contract, are such restrictions generally enforceable in your jurisdiction? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If your jurisdiction recognises restrictions on sale or assignment of receivables and the seller nevertheless sells receivables to the purchaser, will either the seller or the purchaser be liable to the obligor for breach of contract or tort, or on any other basis?

In general, such restrictions will not prevent the sale of receivables or render such sale unenforceable. However, the rights and obligations of a debtor on a general intangible or a person obligated on a promissory note will be unaffected in all material respects if a restriction rendered ineffective by the UCC would be effective under law other than the UCC. Contractual remedies that the debtor or other obligor may seek in connection with a breach of such restrictions will be determined by state law.

4.8 Identification. Must the sale document specifically identify each of the receivables to be sold? If so, what specific information is required (e.g., obligor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics? Alternatively, if the seller sells *all* of its receivables to the purchaser, is this sufficient identification of receivables? Finally, if the seller sells *all* of its receivables *other than* receivables owing by one or more specifically identified obligors, is this sufficient identification of receivables?

Under the UCC, the sale document must "reasonably identify"

the receivables being sold, but each individual receivable does not need to be specifically identified.

If the seller sells all of its receivables, a description by reference to the UCC-defined collateral type (here, "accounts") will generally be sufficient. Similarly, if the seller sells all its receivables other than specifically identified receivables, then the description-by-type may still be sufficient if it reasonably identifies the receivables that are not being sold.

4.9 Recharacterisation Risk. If the parties describe their transaction in the relevant documents as an outright sale and explicitly state their intention that it be treated as an outright sale, will this description and statement of intent automatically be respected or is there a risk that the transaction could be characterised by a court as a loan with (or without) security? If recharacterisation risk exists, what characteristics of the transaction might prevent the transfer from being treated as an outright sale? Among other things, to what extent may the seller retain any of the following without jeopardising treatment as an outright sale: (a) credit risk; (b) interest rate risk; (c) control of collections of receivables; (d) a right of repurchase/redemption; (e) a right to the residual profits within the purchaser; or (f) any other term?

Yes, a transaction may be characterised as a secured loan despite the parties' stated intention to treat it as an outright sale. Whether a transaction will be characterised as a secured loan or a "true sale" would be determined by an analysis, under common law rules, of the facts and relative interests of the parties involved (including any creditors). Accordingly, there is no bright line test governing the analysis. In addition, a sale of certain collateral types, including accounts receivable, requires that the purchaser perfect its interest.

Several states have adopted statutes that purport to preclude recharacterisation in the context of securitisations or other transactions, but it is unclear whether bankruptcy courts, which exercise considerable equitable discretion, would respect such laws.

Some courts have treated a clear and unambiguous expression of intent to enter into a sale as dispositive, especially among sophisticated parties. However, many courts will alternatively or additionally consider the economic substance of the transaction. For those courts, the key economic factor is whether the purchaser bears the risk and benefits of ownership of the receivables. If the purchaser does not bear the risk of loss (e.g., it has a right to a guaranteed return or has recourse against the seller in the case of non-payment by the obligors), then the transaction is more likely to be characterised as a loan.

Sellers in securitisations may generally retain some limited risks or benefits with respect to the receivables, without undermining a true sale conclusion (e.g., rights to service receivables, obligations to repurchase receivables related to specified breaches of representations or covenants).

4.10 Continuous Sales of Receivables. Can the seller agree in an enforceable manner to continuous sales of receivables (i.e., sales of receivables as and when they arise)? Would such an agreement survive and continue to transfer receivables to the purchaser following the seller's insolvency?

An agreement for the continuous sale of receivables is generally enforceable. See the response to question 6.5 for discussion of the effect of an intervening insolvency.

4.11 Future Receivables. Can the seller commit in an enforceable manner to sell receivables to the purchaser that come into existence after the date of the receivables purchase agreement (e.g., "future flow" securitisation)? If so, how must the sale of future receivables be structured to be valid and enforceable? Is there a distinction between future receivables that arise prior to *versus* after the seller's insolvency?

An agreement for the sale of future receivables is generally enforceable. As noted in the response to question 6.5, the purchaser will generally have an interest only in receivables that arise prior to the seller's filing for bankruptcy.

4.12 Related Security. Must any additional formalities be fulfilled in order for the related security to be transferred concurrently with the sale of receivables? If not all related security can be enforceably transferred, what methods are customarily adopted to provide the purchaser the benefits of such related security?

Generally, no additional formalities are required, and the steps described in the responses to questions 4.2 and 4.3 are sufficient to transfer the related security concurrently with the sale of receivables.

4.13 Set-Off; Liability to Obligor. Assuming that a receivables contract does not contain a provision whereby the obligor waives its right to set-off against amounts it owes to the seller, do the obligor's set-off rights terminate upon its receipt of notice of a sale? At any other time? If a receivables contract does not waive set-off but the obligor's set-off rights are terminated due to notice or some other action, will either the seller or the purchaser be liable to the obligor for damages caused by such termination?

Under the UCC, the obligor's set-off rights (mutual claims arising from unrelated transactions) against an assignee are cut off upon the obligors' receipt of an authenticated notice of an assignment from the assignor or the assignee, whereas recoupment rights (mutual claims arising from the same transaction) can be asserted by the obligors against an assignee before or after notice of assignment. Moreover, set-off rights are subject to automatic stay in bankruptcy, whereas recoupment rights are not. The claim of an obligor against an assignor may be asserted against an assignee only to reduce the amount the account debtor owes.

4.14 Profit Extraction. What methods are typically used in your jurisdiction to extract residual profits from the purchaser?

Methods used to extract residual profits from the purchaser typically include: (1) the originator's taking fees for administering and collecting the assets (e.g., acting as servicer); (2) the issuer SPE's paying the originator deferred consideration on the assets purchased; (3) the originator's holding equity in the issuer SPE; (4) the originator's receiving any excess spread or residual collateral; and (5) the originator's taking a fee from the issuer SPE for credit enhancement arrangements. See discussion of "true sale" considerations in the response to question 4.9.

5 Security Issues

5.1 Back-up Security. Is it customary in your jurisdiction to take a "back-up" security interest over the seller's ownership interest in the receivables and the related security, in the event that an outright sale is deemed by a court (for whatever reason) not to have occurred and have been perfected (see question 4.9 above)?

Yes, certain primary transaction documents, such as receivable purchase agreements, customarily provide for a back-up security interest in the receivables to mitigate against the risk of a court re-characterising the "sale" as a financing.

5.2 Seller Security. If it is customary to take back-up security, what are the formalities for the seller granting a security interest in receivables and related security under the laws of your jurisdiction, and for such security interest to be perfected?

The sale or purchase agreement for the receivables usually contains the grant of the back-up security interest to the purchaser and thus also serves as a security agreement under the UCC. Such back-up security interest is perfected in the manner described in the responses to questions 4.2 and 4.3.

5.3 Purchaser Security. If the purchaser grants security over all of its assets (including purchased receivables) in favour of the providers of its funding, what formalities must the purchaser comply with in your jurisdiction to grant and perfect a security interest in purchased receivables governed by the laws of your jurisdiction and the related security?

Generally, in the relevant security documents, the purchaser must (i) formally grant a security interest in all of its rights in each of the categories of assets covered by Article 9 of the UCC that constitute the collateral, and (ii) authorise the filing of an "all-assets" UCC financing statement. The purchaser must also comply with the applicable formalities described in the responses to questions 4.2, 4.3 and 5.7 in order to perfect a valid security interest in favour of the lenders/secured parties.

5.4 Recognition. If the purchaser grants a security interest in receivables governed by the laws of your jurisdiction, and that security interest is valid and perfected under the laws of the purchaser's jurisdiction, will the security be treated as valid and perfected in your jurisdiction or must additional steps be taken in your jurisdiction?

The sale of payment intangibles and promissory notes is automatically perfected with no additional steps. For other collateral types (e.g., accounts, chattel paper, deposit accounts, investment properties), the steps described in the responses to questions 4.2, 4.3 and 5.7 must be taken for the security interest to generally be treated as perfected.

5.5 Additional Formalities. What additional or different requirements apply to security interests in or connected to insurance policies, promissory notes, mortgage loans, consumer loans or marketable debt securities?

See the responses to questions 4.2 and 4.3. Article 9 of the UCC does not apply to a transfer of an interest in or an assignment of a claim under an insurance policy.

5.6 Trusts. Does your jurisdiction recognise trusts? If not, is there a mechanism whereby collections received by the seller in respect of sold receivables can be held or be deemed to be held separate and apart from the seller's own assets (so that they are not part of the seller's insolvency estate) until turned over to the purchaser?

Yes, various forms of trusts are recognised under U.S. state laws. However, in the context of the sale of receivables, it will generally not be sufficient for the seller to agree to hold the related collections in trust for the purchaser in order for the purchaser's rights in the collections to be protected. Generally, collections must be deposited in a segregated account for the benefit of the purchaser.

5.7 Bank Accounts. Does your jurisdiction recognise escrow accounts? Can security be taken over a bank account located in your jurisdiction? If so, what is the typical method? Would courts in your jurisdiction recognise a foreign law grant of security taken over a bank account located in your jurisdiction?

While U.S. state laws generally recognise escrow accounts, the conditions for an escrow transaction to be valid, and the legal status of escrow accounts, vary from state to state.

Generally, security interests may be granted in deposit accounts located in U.S. state jurisdictions and must be perfected by control. There are two commonly used ways to perfect by control: (1) the secured party is the bank that maintains the account for the debtor; or (2) a tri-party account control agreement is entered into among the debtor, the secured party and the bank that maintains the account, and the bank agrees to follow the instructions originated by the secured party directing the disposition of funds on deposit in the account without further consent of the debtor. A secured party may also establish control over a deposit account by becoming the customer of the account bank in respect of the account.

If the deposit account is located in the United States (and the security interest and control are established as required by the UCC), a court should generally recognise the rights of the secured party in the deposit account even if a security interest in such account is also granted under a foreign law pledge agreement, security agreement, debenture or other similar instrument (subject, however, to choice of law considerations addressed in section 2 and perfection considerations addressed in this response).

5.8 Enforcement over Bank Accounts. If security over a bank account is possible and the secured party enforces that security, does the secured party control all cash flowing into the bank account from enforcement forward until the secured party is repaid in full, or are there limitations? If there are limitations, what are they?

The secured party's control over the funds will be subject to any set-off rights of the account bank that have not been waived. If the account owner becomes a debtor in a bankruptcy, the secured party's rights over any funds deposited into the account during the 90 days prior to the commencement of bankruptcy (or one year if the secured party is considered an

"insider" of the account owner under the Bankruptcy Code) will be subject to further bankruptcy considerations. See the response to question 6.3.

5.9 Use of Cash Bank Accounts. If security over a bank account is possible, can the owner of the account have access to the funds in the account prior to enforcement without affecting the security?

Yes, the owner may have such access without affecting the security interest of the secured party.

6 Insolvency Laws

6.1 Stay of Action. If, after a sale of receivables that is otherwise perfected, the seller becomes subject to an insolvency proceeding, will your jurisdiction's insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables (a "stay of action")? If so, what generally is the length of that stay of action? Does the insolvency official have the ability to stay collection and enforcement actions until he determines that the sale is perfected? Would the answer be different if the purchaser is deemed to only be a secured party rather than the owner of the receivables?

The U.S. Bankruptcy Code (the "Bankruptcy Code") imposes an automatic stay upon all actions against the seller of receivables and its property immediately upon the filing of the seller's bankruptcy petition. However, the automatic stay will generally not affect a perfected sale of receivables that qualifies as a "true sale" and occurs prior to bankruptcy. (See the response to question 4.9 for discussion of true sale considerations.)

If the sale of the receivables is characterised as a secured loan rather than a true sale, then the "sold" receivables remain property of the seller's bankruptcy estate, and the purchaser will be prohibited from obtaining proceeds or exercising control over the receivables. The automatic stay would generally terminate only when the case is closed or dismissed, or the debtor receives a discharge, whichever is earlier, or when stay relief is ordered by the court.

The court may impose a temporary stay pending determination of whether the sale of receivables was a perfected "true sale" or, alternatively, should be recharacterised as a secured loan.

6.2 Insolvency Official's Powers. If there is no stay of action, under what circumstances, if any, does the insolvency official have the power to prohibit the purchaser's exercise of its ownership rights over the receivables (by means of injunction, stay order or other action)?

Bankruptcy courts have pervasive equity powers that may be exercised with the overriding goal of an equitable reorganisation and, as a result, various legal rights and policies could be subordinated to that goal.

6.3 Suspect Period (Clawback). Under what facts or circumstances could the insolvency official rescind or reverse transactions that took place during a "suspect" or "preference" period before the commencement of the seller's insolvency proceedings? What are the lengths of the "suspect" or "preference" periods in your jurisdiction for (a) transactions between unrelated parties, and (b) transactions between related parties? If the purchaser is majority-owned or controlled by the seller or an affiliate of the seller, does that render sales by the seller to the purchaser "related party transactions" for purposes of determining the length of the suspect period? If a parent company of the seller guarantee's the performance by the seller of its obligations under contracts with the purchaser, does that render sales by the seller to the purchaser "related party transactions" for purposes of determining the length of the suspect period?

Under the Bankruptcy Code, a debtor-in-possession, bankruptcy trustee or other party with requisite standing may avoid a transaction as a "preference" or "fraudulent transfer".

Generally, a preference is (1) a pre-petition transfer to a creditor made by a debtor, (2) while the debtor was insolvent, (3) in respect of an antecedent debt, and (4) enabling the creditor to receive more than the creditor would have received had the debtor's assets been liquidated. The look-back period for preferential transfers is 90 days before the date of the bankruptcy petition filing; however, the period is one year if the creditor was an insider at the time of the transfer. Accordingly, if a creditor/purchaser is majority-owned or controlled by a debtor/seller (or affiliate thereof), the sale by the debtor/seller to the creditor/purchaser will be considered a "related party transaction", and thus, the creditor/purchaser may be an insider, triggering the longer one-year look-back period. However, if a parent guarantees the debtor/seller's obligations to an unrelated creditor/purchaser, there would not be a "related party transaction" and the 90-day period would apply.

A transfer may be voided as a fraudulent transfer if the transfer was made within the applicable look-back period and the other conditions described below are met. The look-back period is two years before the date of the bankruptcy petition filing for fraudulent transfer actions brought under the Bankruptcy Code's fraudulent transfer provision. However, the Bankruptcy Code allows a debtor/trustee to utilise a state's fraudulent transfer statute and to have recourse to that state's longer look-back period (many states have a four-year look-back period and New York law provides a six-year look-back period to transfers that occurred prior to April 2020). To avoid a transfer made within the look-back period as a fraudulent transfer, the moving party must also show that the debtor/seller either:

- made the transfer with the actual intent to hinder, delay or defraud any entity to which the debtor/seller was or became indebted; or
- received less than a reasonably equivalent value in exchange for such transfer and (i) was insolvent when the transfer was made or became insolvent as a result thereof, (ii) was engaged (or was about to engage) in a business or transaction for which any property remaining with the debtor/seller is unreasonably small capital, or (iii) intended to incur (or believed that it would incur) debts beyond its ability to pay as such debts matured.

A creditor/purchaser that, in good faith, gave value to the debtor/seller for the transfer may enforce the obligation to the extent of such value.

6.4 Substantive Consolidation. Under what facts or circumstances, if any, could the insolvency official consolidate the assets and liabilities of the purchaser with those of the seller or its affiliates in the insolvency proceeding? If the purchaser is owned by the seller or by an affiliate of the seller, does that affect the consolidation analysis?

Although the Bankruptcy Code does not expressly provide for the substantive consolidation of corporate entities, courts are willing, upon exercise of their general equitable powers under the Bankruptcy Code, to order substantive consolidation in appropriate circumstances. Because the power to order substantive consolidation derives from the equity jurisdiction of the bankruptcy courts, such orders are considered by courts on a case-by-case basis. However, a presumption exists against substantive consolidation, and the party seeking that result has the burden of establishing its necessity.

Courts in the United States are not unified in their approach to substantive consolidation. Early cases relied on "piercing the corporate veil", ordering substantive consolidation if an "alter-ego" or "mere instrumentality" of the debtor was used to hinder, delay or otherwise defraud the debtor's creditors. While they may still rely on piercing the corporate veil, modern federal courts have also adopted a number of other criteria for determining substantive consolidation, which appear to comprise two similar but not identical tests. Under one line of cases, courts evaluate: (1) whether there is substantial identity between the entities to be consolidated (as a result of the internal relationships of the affiliated entities); and (2) whether consolidation is necessary to avoid some harm or realise some benefit with respect to the creditors of the entities to be consolidated. Under a second line of cases, courts have suggested that, in considering whether to order substantive consolidation, they should focus on two critical factors: (1) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit; and (2) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors.

Even if the purchaser is an affiliate of the seller, such as is the case when a seller sells receivables to an affiliated SPE, steps can be taken to mitigate the possibility of substantive consolidation, including (i) strictly observing corporate formalities between the SPE and its affiliates, (ii) not permitting the SPE to transact with its affiliates except on arm's-length terms, (iii) maintaining separate bank accounts and otherwise segregating the assets of the SPE, (iv) communicating the separateness of the SPE to third parties, (v) maintaining separate financial statements for the SPE, and (vi) maintaining at least one member of the SPE's board of directors that is independent from the SPE's affiliates.

6.5 Effect of Insolvency on Receivables Sales. If insolvency proceedings are commenced against the seller in your jurisdiction, what effect do those proceedings have on (a) sales of receivables that would otherwise occur after the commencement of such proceedings, or (b) sales of receivables that only come into existence after the commencement of such proceedings?

If the seller files for bankruptcy, receivables not yet sold at the time of, or that do not come into existence until after, the commencement of the seller's bankruptcy proceeding would be included in the seller's bankruptcy estate. Accordingly, the purchaser would be subject to the automatic stay and would not be able to enforce the seller's obligation to sell such receivables, or to exercise any ownership rights over such receivables, absent a court order.

Receivables generated after the commencement of the seller's bankruptcy proceeding would generally not be subject to the security interest of the purchaser arising under a purchase agreement or other security agreement entered into by the seller and purchaser before the commencement of the bankruptcy proceeding, except that the purchaser may claim a pre-petition security interest in receivables that are the proceeds of assets owned by the seller and pledged or sold to the purchaser prior to the commencement of the bankruptcy proceeding.

The agreement itself may not survive the seller's bankruptcy, as it may be characterised as an "executory contract" (i.e., a contract under which the obligation of both the seller and purchaser are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other), in which case the seller may reject the contract.

6.6 Effect of Limited Recourse Provisions. If a debtor's contract contains a limited recourse provision (see question 7.4 below), can the debtor nevertheless be declared insolvent on the grounds that it cannot pay its debts as they become due?

If a debtor's contracts all include a limited recourse provision, the debtor would generally not be considered insolvent under the Bankruptcy Code, because the Bankruptcy Code defines insolvency as having debts that are greater than one's property at fair valuation. However, notwithstanding the presence of limited recourse provisions, a court may find that a debtor is insolvent under applicable state law, based on the debtor's not being able to pay its debts as they become due.

7 Special Rules

7.1 Securitisation Law. Is there a special securitisation law (and/or special provisions in other laws) in your jurisdiction establishing a legal framework for securitisation transactions? If so, what are the basics? Is there a regulatory authority responsible for regulating securitisation transactions in your jurisdiction? Does your jurisdiction define what type of transaction constitutes a securitisation?

There is no special federal or state law governing securitisation transactions. Instead, a range of federal and state laws govern various aspects of securitisation transactions. A handful of states, not including New York, have enacted special securitisation statutes, but securitisation transactions that are subject to those state laws also remain subject to the Bankruptcy Code and other applicable federal law.

At the federal level, the three most relevant laws are the Securities Act of 1933 (the "Securities Act"), the Securities Exchange Act of 1934 (the "Exchange Act") and the Investment Company Act of 1940 (the "Investment Company Act").

- Under the Securities Act, Regulation AB prescribes the types of disclosures that must be made to investors in SEC-registered offerings of asset-backed securities. (See the response to question 8.7 for discussion of certain prohibitions on conflicts of interest between certain securitisation participants under the Securities Act).
- Under the Exchange Act, the following rules apply specifically to asset-backed securities transactions:

(1) Rule 15Ga-1 (relating to reporting of repurchase activity); (2) Rule 15Ga-2 (relating to filing due diligence reports prepared by third parties); and (3) Rule 17g-5 (relating to posting deal-related information to all nationally recognised statistical rating organisations). (See the response to question 8.6 for discussion of risk retention requirements under the Exchange Act.)

- Under the Investment Company Act, certain issuing entities (generally mutual funds) must register with the SEC as investment companies and comply with the Act's related restrictions. Issuing entities for securitisation are typically excepted or exempt from the Act because they meet the conditions for one of the following: (1) Rule 3a-7 (which applies to certain securitisations, subject to a number of additional conditions); (2) Section 3(c)(5) (which applies to securitisations for certain asset classes); and (3) Sections 3(c)(1) and 3(c)(7) (which apply to securitisations that are placed privately or institutionally).

The SEC is the primary U.S. securities regulatory authority, and it has general oversight, rulemaking and enforcement powers with respect to U.S. securities laws, including those cited above. In certain circumstances, other regulatory agencies may also have authority over a securitisation transaction and its participants (e.g., the Federal Deposit Insurance Corporation, which has authority over banking institutions).

7.2 Securitisation Entities. Does your jurisdiction have laws specifically providing for establishment of special purpose entities for securitisation? If so, what does the law provide as to: (a) requirements for establishment and management of such an entity; (b) legal attributes and benefits of the entity; and (c) any specific requirements as to the status of directors or shareholders?

No, there are no federal or state laws that govern special purpose entities established specifically for securitisations. However, as noted in the responses to questions 7.1 and 8.6, there are certain federal laws that target such entities, and there are both federal and state laws with which such entities must comply, even though the laws are not targeted at securitisations (e.g., consumer protection laws).

7.3 Location and form of Securitisation Entities. Is it typical to establish the special purpose entity in your jurisdiction or offshore? If in your jurisdiction, what are the advantages to locating the special purpose entity in your jurisdiction? If offshore, where are special purpose entities typically located for securitisations in your jurisdiction? What are the forms that the special purpose entity would normally take in your jurisdiction and how would such entity usually be owned?

If special purpose entities are on-shore, they are often formed under the laws of the State of Delaware or the State of New York. If special purpose entities are off-shore, they are often formed under the laws of the Cayman Islands. In the case of on-shore entities, they often take the form of a limited liability company (in Delaware), a statutory trust (in Delaware) or a common law trust (in either Delaware or New York).

For reasons discussed in section 9, the choice of on-shore or off-shore may be related to tax considerations.

7.4 Limited-Recourse Clause. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) limiting the recourse of parties to that agreement to the available assets of the relevant debtor, and providing that to the extent of any shortfall the debt of the relevant debtor is extinguished?

New York courts will typically enforce limited-recourse provisions. To determine whether a limited-recourse provision (or one of its carve-outs) applies, courts will analyse the specific language, context and purpose of the provision to determine the intent of the parties. (See the response to question 2.3 for discussion of cross-border enforcement of limited-recourse provisions.)

Pursuant to the Bankruptcy Code, the general rule in a chapter 11 bankruptcy case is that an under-secured creditor's deficiency claim is treated as a recourse claim, whether or not it is limited in recourse by agreement or under applicable non-bankruptcy law, subject to two exceptions: (1) recourse remains limited with respect to certain property sold in connection with the bankruptcy proceedings; and (2) the general rule also does not apply if the under-secured creditor elects to waive its deficiency claim in certain circumstances.

7.5 Non-Petition Clause. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) prohibiting the parties from: (a) taking legal action against the purchaser or another person; or (b) commencing an insolvency proceeding against the purchaser or another person?

Covenants not to sue are typically governed by state law and are expressly permitted under New York law. However, because New York law disfavours agreements intended to absolve a party of its wrongdoing, New York courts apply close judicial scrutiny to determine the intent of the parties. Additionally, a covenant not to sue is construed against the party asserting it and, therefore, must be clear and unequivocal.

New York courts will typically enforce contractual provisions prohibiting parties from commencing an involuntary bankruptcy proceeding against a purchaser or another person. However, as noted in the response to question 7.7, contractual provisions prohibiting parties from commencing a voluntary bankruptcy proceeding are unenforceable.

7.6 Priority of Payments "Waterfall". Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) distributing payments to parties in a certain order specified in the contract?

New York courts will typically give effect to waterfall provisions that provide for the priority of distributions of proceeds of collateral and other payments amongst contractual parties. A New York court will also generally give effect to a waterfall provision that is governed by the law of another country (subject to the conflicts of laws considerations discussed in the response to question 2.3).

Waterfall provisions pursuant to which the priority of a payment right of a party that files for bankruptcy is "flipped" from a senior position to a subordinate position as a result of

such filing are likely unenforceable (as *ipso facto* clauses) under the Bankruptcy Code, subject to limited exceptions for waterfall provisions that are part of or incorporated into certain protected contracts, such as swaps or repurchase agreements, that are entitled to safe harbour protections under the Bankruptcy Code.

7.7 Independent Director. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) or a provision in a party's organisational documents prohibiting the directors from taking specified actions (including commencing an insolvency proceeding) without the affirmative vote of an independent director?

Bankruptcy courts will generally give effect to contractual provisions in an agreement prohibiting directors from taking specified actions, such as filing for bankruptcy without the affirmative vote of an independent director, even if the agreement's governing law is the law of another jurisdiction. However, independent directors cannot be prohibited from voting to allow the issuer SPE to file a voluntary bankruptcy petition, because such a prohibition would generally be against public policy. Further, the failure of a director (even an independent director) to vote to commence bankruptcy proceedings when the director properly concludes that it would be in the best interest of the issuer SPE, would likely constitute a breach of fiduciary duty.

7.8 Location of Purchaser. Is it typical to establish the purchaser in your jurisdiction or offshore? If in your jurisdiction, what are the advantages to locating the purchaser in your jurisdiction? If offshore, where are purchasers typically located for securitisations in your jurisdiction?

Where the purchaser is also the issuing entity for the securitisation, the jurisdiction of its establishment will be determined as discussed in the response to question 7.3. Where the purchaser is a "depositor" (or other intermediary between the initial seller and the issuing entity), its jurisdiction of establishment may be the same as, or different from, the jurisdiction of the issuing entity, depending on the transaction structure.

8 Regulatory Issues

8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in your jurisdiction, will its purchase and ownership or its collection and enforcement of receivables result in its being required to qualify to do business or to obtain any licence or its being subject to regulation as a financial institution in your jurisdiction? Does the answer to the preceding question change if the purchaser does business with more than one seller in your jurisdiction?

Subject to limited exceptions based on the type of receivable, a purchaser of receivables is generally not required to obtain a licence to do business in the United States for the sole purpose of purchasing and holding receivables. However, servicing, collection, and enforcement activities may require a licence and/or qualification to do business in a given state, especially in the case of consumer receivables (e.g., residential mortgage loans). Also, in some cases, purchasers may wish to hold receivables (e.g., residential mortgage loans), indirectly through beneficial interests in statutory or common law trusts with nationally chartered banks serving as trustees; in such circumstances, the trusts may benefit from federal preemption of otherwise applicable state law, such as licensing requirements, because of the banks' involvement.

8.2 Servicing. Does the seller require any licences, etc., in order to continue to enforce and collect receivables following their sale to the purchaser, including to appear before a court? Does a third-party replacement servicer require any licences, etc., in order to enforce and collect sold receivables?

For certain receivables and in certain jurisdictions, a servicer that is not the originator/seller (and any back-up servicer) may be required to have a licence or other qualification or register with the jurisdiction in order to service, collect, or enforce obligations, particularly with respect to consumer receivables. By way of example, a servicer of residential mortgage loans is generally required to hold and maintain a licence issued by the state in which the related mortgaged property is located in order to service the related residential mortgage loan.

8.3 Data Protection. Does your jurisdiction have laws restricting the use or dissemination of data about or provided by obligors? If so, do these laws apply only to consumer obligors or also to enterprises?

Federal and state laws restrict the use and sharing of personally identifiable information about consumer obligors (and, in limited cases, non-consumer obligors) and prohibit certain types of sharing without the related individual's either consenting or having the right to opt out. Federal and state laws also require entities possessing consumer information to have data security policies and procedures.

8.4 Consumer Protection. If the obligors are consumers, will the purchaser (including a bank acting as purchaser) be required to comply with any consumer protection law of your jurisdiction? Briefly, what is required?

Consumer receivables must be serviced in compliance with consumer protection laws, regardless of the purchaser. While such an obligation applies to the respective servicer, the purchaser in certain circumstances can be held liable for acts or omissions of its servicer. The purchaser is also required to protect consumer data it holds directly. Depending on the statute and the nature of the transaction, a purchaser may also be liable for the actions of the originator of the receivables.

8.5 Currency Restrictions. Does your jurisdiction have laws restricting the exchange of your jurisdiction's currency for other currencies or the making of payments in your jurisdiction's currency to persons outside the country?

No. However, anti-money laundering laws require financial institutions of various kinds to adopt procedures to detect and prevent money laundering and terrorist financing activities, and sanctions laws prohibit doing business with designated persons or countries.

8.6 Risk Retention. Does your jurisdiction have laws or regulations relating to "risk retention"? How are securitisation transactions in your jurisdiction usually structured to satisfy those risk retention requirements?

Yes. U.S. federal securities law and related implementing rules impose credit risk retention requirements in connection with certain securitisations. The "sponsor" of a "securitization transaction" must retain at least a 5% economic interest in the credit risk of the securitised assets (subject to a number of exceptions and exclusions). The 5% economic interest may take the form of an "eligible horizontal residual interest" (the equity or most subordinated portion of the issuer's capitalisation) or an "eligible vertical interest" (a vertical slice of the issuer's capitalisation) or a combination of the two. A sponsor may hold retained interests through a "majority-owned affiliate" (i.e., an entity, other than the issuing entity, that, directly or indirectly, majority controls, is majority controlled by or is under common majority control with, the sponsor, where majority control means ownership of more than 50% of the equity of an entity, or ownership of any other controlling financial interest in the entity, as determined under U.S. GAAP). In addition, there are alternative means for the sponsors of certain kinds of "securitization transactions" to satisfy their risk retention requirements (e.g., through "third-party purchasers" in the case of certain collateralised commercial mortgage-backed securities ("CMBS") transactions).

8.7 Regulatory Developments. Have there been any regulatory developments in your jurisdiction which are likely to have a material impact on securitisation transactions in your jurisdiction?

Conflict of Interests Rule: On November 27, 2023, the SEC issued a rule under the Securities Act (Rule 192) that restricts securitisation participants (defined to include placement agents, underwriters, initial purchasers, sponsors, and certain of their respective affiliates and subsidiaries) with respect to an asset-backed security from engaging in conflicted transactions with respect to the asset-backed security (generally meaning short sales, purchases of credit default swaps, or similar credit derivatives or their substantial economic equivalents) until the one-year anniversary of the first closing of the sale of the asset-backed security. The rule includes exceptions for risk-mitigating hedging activities, *bona fide* market-making activities and liquidity commitments, and a safe harbour for certain foreign transactions. Securitisation participants must comply with the rule's prohibition with respect to any asset-backed security the first closing of the sale of which occurs on or after June 9, 2025.

Corporate Transparency Act: The Financial Crimes Enforcement Network ("FinCEN") issued a final rule (as amended, the "BOI Rule") on September 29, 2022, implementing Section 6403 of the Corporate Transparency Act (the "CTA"). The CTA and BOI Rule require certain domestic reporting companies (defined as any entity that is (i) a corporation, (ii) a limited liability company, or (iii) created by the filing of a document with a secretary of state or any similar office under the law of a state or Indian tribe) and foreign reporting companies (defined as any entity that is: (i) a corporation, limited liability company or other entity; (ii) formed under the law of a foreign country; and (iii) registered to do business in the United States by the filing of a document with a secretary of state or any similar office under the law of a state or Indian tribe) to file reports with FinCEN identifying and providing information about their beneficial owners and applicants. The BOI Rule contains exemptions for certain entities already generally subject to substantial U.S. federal or state regulation under which beneficial ownership may be known, such as certain entities registered with the SEC. The CTA and the BOI Rule have been challenged in a number of cases. It is uncertain what the outcome of the cases will be.

9 Taxation

9.1 Withholding Taxes. Will any part of payments on receivables by the obligors to the seller or the purchaser be subject to withholding taxes in your jurisdiction? Does the answer depend on the nature of the receivables, whether they bear interest, their term to maturity, or where the seller or the purchaser is located? In the case of a sale of trade receivables at a discount, is there a risk that the discount will be recharacterised in whole or in part as interest? In the case of a sale of trade receivables where a portion of the purchase price is payable upon collection of the receivable, is there a risk that the deferred purchase price will be recharacterised in whole or in part as interest? If withholding taxes might apply, what are the typical methods for eliminating or reducing withholding taxes?

For purposes of the answers below, it is assumed, for withholding tax purposes, that purchasers of receivables are treated as beneficial owners of the receivables (rather than as lenders taking a security interest) and that the transfer of any interest-bearing receivables will likewise be treated as a transfer of beneficial ownership to the purchaser.

Generally, payments of interest on interest-bearing receivables made by U.S. obligors ("U.S. source interest") to non-U.S. recipients ("foreign recipients") are subject to U.S. federal withholding tax. However, under the "portfolio interest" exemption, interest may be paid without U.S. federal withholding tax if certain requirements are satisfied. Among other requirements, (1) the receivable must be in "registered form", (2) the formula for determining the amount of interest payable cannot reflect the economic performance of the obligor or its assets, and (3) the recipient must provide certification showing that it is legally entitled to benefit from the portfolio interest exemption.

Even if interest qualifies as "portfolio interest", or an income tax treaty would otherwise reduce the withholding rate, under FATCA, a 30% U.S. federal withholding tax is generally imposed on certain payments (including U.S. source interest payments made on receivables issued on or after 1 July, 2014) to "foreign financial institutions" and certain other foreign financial entities unless those foreign entities comply with the requirements of FATCA.

Furthermore, unless certain recipients of U.S. source interest (including a seller or a purchaser) provide the payor appropriate certifications showing that such recipients are not subject to back-up withholding tax, the payor is required to withhold the tax and pay the withheld amount to the U.S. tax authorities. Any amounts withheld may be refunded by the U.S. tax authorities or allowed as a credit against the recipient's U.S. federal income tax liability.

Payments of non-U.S. source interest by a foreign obligor to a seller or a purchaser are generally not subject to U.S. federal withholding tax unless such interest payments are considered branch profits for U.S. federal income tax purposes and certain other requirements are met.

If a purchaser acquires a trade receivable at a discount, then, depending on the particular facts, the purchaser may generally treat such discount as "market discount" for U.S. federal income tax purposes and not be subject to U.S. federal withholding tax on such market discount. If a seller sells a trade receivable where a portion of the purchase price is payable upon collection of the receivable, then depending on the particular facts, the seller may be required to treat a portion of such purchase price as interest income for U.S. federal income tax purposes. Absent any exceptions, a foreign seller may be subject to U.S. federal withholding tax with respect to such interest if the purchaser is a resident of the United States.

9.2 Seller Tax Accounting. Does your jurisdiction require that a specific accounting policy is adopted for tax purposes by the seller or purchaser in the context of a securitisation?

Most sellers and purchasers are generally required to use the accrual method of accounting with respect to amounts of interest payable by the obligors on the receivables.

9.3 Stamp Duty, etc. Does your jurisdiction impose stamp duty or other transfer or documentary taxes on sales of receivables?

There are generally no federal stamp duty or other transfer or documentary taxes on sales of receivables. Generally, such charges are also unusual at the state level. However, certain states, such as Tennessee and Florida, impose tax upon the recordation of certain instruments of indebtedness, which should be considered.

9.4 Value-Added Taxes. Does your jurisdiction impose value-added tax, sales tax or other similar taxes on sales of goods or services, on sales of receivables or on fees for collection agent services?

At the federal level, there are currently no value-added tax, sales tax or other similar taxes on sales of goods or services, on sales of receivables or on fees for collection agent services. However, that may not be true for state and local taxes. For example, most states have some form of sales tax or other similar tax on sales of goods or certain enumerated services. Sales tax generally does not apply to the sale of receivables. A small number of states impose sales tax on "debt collection services".

9.5 Purchaser Liability. If the seller is required to pay value-added tax, stamp duty or other taxes upon the sale of receivables (or on the sale of goods or services that give rise to the receivables) and the seller does not pay, then will the taxing authority be able to make claims for the unpaid tax against the purchaser or against the sold receivables or collections?

As noted above, there are no such charges or duties at the federal level. However, such charges or duties may apply at the state or local level, and any related purchaser liability would depend on the particular state or local tax law in question.

9.6 Doing Business. Assuming that the purchaser conducts no other business in your jurisdiction, would the purchaser's purchase of the receivables, its appointment of the seller as its servicer and collection agent, or its enforcement of the receivables against the obligors, make it liable to tax in your jurisdiction?

Depending on the particular facts or circumstances, a foreign purchaser of receivables may be treated as engaging in a trade or business in the United States. Such treatment is most likely if the purchaser participates (or is deemed to participate) in the origination of the receivables, conducts origination activities through a permanent U.S. establishment, and the persons servicing the receivables are treated as the purchaser's agents.

A foreign purchaser that is treated as engaging in a trade or business in the United States will generally be required to pay U.S. federal income tax on any income that is effectively connected with its trade or business in the United States ("ECI") (unless there is relief under an applicable income tax treaty) and to file a U.S. federal income tax return. If an applicable income tax treaty applies, a foreign purchaser will generally be liable for U.S. federal income tax with respect to its ECI that is attributed to a trade or business carried through the purchaser's permanent establishment in the United States.

9.7 Taxable Income. If a purchaser located in your jurisdiction receives debt relief as the result of a limited recourse clause (see question 7.4 above), is that debt relief liable to tax in your jurisdiction?

A purchaser that is relieved of a limited recourse debt by allowing the creditor to seize the underlying collateral will generally be treated as having sold the collateral for the amount of such debt and will have a taxable gain or deductible loss equal to the difference between the amount of the debt and the purchaser's tax basis (usually its cost subject to adjustments) in such collateral.

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Pietro also worked for General Electric Oil & Gas as senior counsel for Europe, where he focused on engineering, construction, procurement, financing and sale contracts for turbines, compressors and other complex equipment used in the oil and gas industry. Pietro earned his law degree from "Università Statale di Milano" and his Master of Laws from University of Pennsylvania Law School.

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