COUNTRY COMPARATIVE GUIDES 2020

The Legal 500 Country Comparative Guides

United States: Lending & Secured Finance

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

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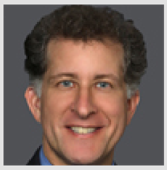
Contributing Firm

Mayer Brown LLP

Authors

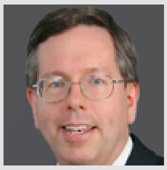


Jeffrey P. Taft
Partner

jtaft@mayerbrown.com

Mae Rogers
Partner

mrogers
@mayerbrown.com



Kevin C. McDonald
Counsel

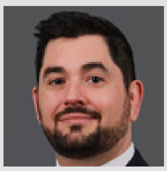
kmcdonald @mayerbrown.com

Brian Trust
Partner

btrust@mayerbrown.com

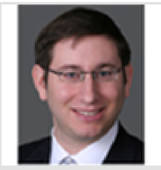
Sean T. Scott
Partner

stscott @mayerbrown.com



Christopher M. Chubb
Partner

cchubb @mayerbrown.com



Steven D. Garden
Partner

sgarden @mayerbrown.com

Jason Kirschner
Partner

jkirschner @mayerbrown.com

Joaquin M. C De Baca
Partner

jcdebaca @mayerbrown.com

Youmi Kim
Associate

ykim@mayerbrown.com

Frederick C. Fisher
Partner

ffisher@mayerbrown.com

Beth D. Vogel
Partner

bdvogel @mayerbrown.com

Jaime L. Gatenio
Partner

jgatenio @mayerbrown.com

1. **Do foreign lenders require a licence/regulatory approval to lend into your jurisdiction or take the benefit of security over assets located in your jurisdiction?**

   Federal law does not generally require a banking license or impose any lender licensing requirements on entities extending commercial credit to U.S. borrowers. Depending upon the amount of the loan, the type of borrower (e.g., natural person or corporate entity) and the security for the loan (e.g., real estate secured or unsecured), some states require that a commercial lender obtain a lending license. For example, the California Financing Law ("CFL") requires a license to make commercial loans regardless of the amount of the loan or the type of collateral securing the loan. Like other state licensing laws applicable to commercial lending activities, California has a number of exemptions from the licensing requirement. While every state requires any person "transacting business" within the state to register or qualify as a foreign corporation or limited liability company, many state laws expressly exclude certain activities, such as creating or acquiring indebtedness and securing or collecting debts, from the definition of "transacting business."

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

   Federal law does not impose any restrictions on the rate of interest charged by lenders making commercial loans. State laws generally contain limits on the rate of interest (usury limits) that can be charged to borrowers, and these interest rate limits often depend upon the principal amount of the loan, the purpose of the loan and the type of lender. In many states, commercial loans are effectively excluded from the general usury restrictions based upon the principal amount or the commercial purpose of the loan. Whether certain fees charged in connection with a commercial loan are treated as interest for purposes of determining compliance with the usury limits depends upon each state's law. In some states, such as New York, there are civil and criminal usury rate restrictions. Finally, some state laws preclude legal entity borrowers from raising usury as a defense to the repayment of a loan.

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

   Federal law does not impose any currency controls or foreign exchange restrictions. Please note that the U.S. Treasury's Office of Foreign Assets Control ("OFAC") administers a number of U.S. economic sanctions and embargoes that target geographic regions and governments, as well as other programs targeting individuals or entities that could be anywhere (such as narcotics traffickers, named terrorists, Foreign Terrorist Organizations, and designated foreign persons who have engaged in activities related to the proliferation of weapons of mass destruction). In addition to targeted countries, OFAC publishes a list of Specially Designated Nationals and Blocked Persons ("SDN list") with whom U.S. persons are prohibited from doing business.

4. **Can security be taken over the following types of asset: i. real property (land), plant and machinery; ii. equipment; iii. inventory; iv. receivables; and v. shares in companies incorporated in your jurisdiction.**

i. real property (land), plants and machinery;

Security can be taken over real property, including land and anything attached or erected on such land, including a plant or any fixtures present on such land. The extent of what constitutes real property and the precise method for taking security is determined by the law of the state in which such real property is located. The most common methods for taking security over real property are with a mortgage, deed of trust or assignment of leases and rents.

ii. equipment;

Equipment is generally considered to be personal property and the creation of a security interest in equipment is governed by the Uniform Commercial Code. For a security interest in any personal property, including equipment, to be enforceable, there must be attachment or creation. For attachment or creation to occur the secured party must have given value to the debtor, the debtor must have a legal interest in the collateral and the debtor must sign a security agreement that describes the collateral and grants a security interest in such collateral. Generally, to maintain a security interest in a debto's insolvency and to obtain priority over other creditors, the security interest needs to be perfected. To perfect a security interest in equipment the secured party must file a UCC-1. While the UCC-1 need not be specific in describing such equipment, the granting language in the security interest should specify that the company is providing a security interest in "equipment."

iii. inventory;

Security can be granted over inventory in the same manner that it is granted over equipment. The language in the security agreement should state that "inventory" is to be covered by the granting clause. A security interest in inventory can also be perfected through the filing of a UCC-1 financing statement.

iv. receivables;

The most common types of receivables over which security can be granted are accounts, chattel paper, commercial tort claims, general intangibles and letter of credit rights. A security interest can be granted over each of these types of receivables in a security agreement by listing each of these categories in the granting clause. In addition, commercial tort claims, or a claim in which the claimant is either an entity or individual, and the claim arose in the course of the claimant's business or profession, must be described in the granting clause of the security agreement with specificity. It is not enough to say "all commercial tort claims" of the company.

TAKING SECURITY

Perfection of a security interest in a company's accounts, chattel paper, general intangibles or commercial tort claims can be accomplished through the filing of a UCC-1 financing statement. A security interest in chattel paper can also be perfected by possession or control. A security interest in a letter of credit right must be perfected by control through a tri-party agreement, where the issuer of such letter of credit consents to the assignment of the proceeds of such letter of credit to the secured party.

v. shares in companies incorporated in your jurisdiction.

Security can be granted over the shares of companies incorporated or organized in the United States. Shares can be issued in certificated or uncertificated form. Such shares are considered personal property and more specifically, investment property, for purposes of the Uniform Commercial Code. The granting of a lien by the company's parent or owner in the "investment property" should be sufficient to provide a security interest in the shares of the company. Perfection can be achieved by either the filing of a UCC-1 financing statement or by possession and/or control. Where a secured party has perfected its security interest by control, such secured party will generally be deemed to have priority over any secured party who has not perfected by control.

If such shares are represented by physical share certificates, control can be obtained by possession of the applicable share certificates along with a signed stock power, which stock power should be blank and undated. Where such shares are not certificated, control can be obtained by either delivering such uncertificated security to the lender or by the issuer of such uncertificated security agreeing that it will comply with instructions originated by the secured party without further consent of the grantor/registered owner of such uncertificated security. Delivery of an uncertificated security to a secured party typically occurs when the secured party becomes the registered owner or when another person (other than a securities intermediary) becomes the registered owner on behalf of such secured party.

If so, what is the procedure – and can such security be created under a foreign-law-governed document?

Security can be created by a foreign-law-governed document. However, one must consider choice of law concerns with respect to the enforceability of such foreign-law-governed security agreement. With respect to issues of perfection and priority over personal property, the Uniform Commercial Code for the state in which such assets are located should be consulted. As mentioned above, state law will govern with respect to taking a security interest in any real property.

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

Yes, a company that is incorporated in the United States can grant security over its future assets, by including an affirmative statement in a security agreement creating a security interest in its after-acquired property. If the security agreement contains such a statement, then no additional action is required to create such security interest. The security interest over such future assets will attach automatically once the company or debtor acquires rights in the after-acquired property, unless there is language in the security agreement specifically delaying such attachment.

One item to note is that an after-acquired property clause in a security agreement will not be sufficient to perfect a security interest in future commercial tort claims. In order to create a security interest in a commercial tort claim that arises after the signing of the security agreement, the language in the granting clause would need to be updated at the time that such commercial tort claim arises, in order to describe such claim with specificity.

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

A single security agreement can be used to take a security interest in all of a company's personal property assets or assets that are subject to the Uniform Commercial Code. A mortgage or deed of trust would be used to grant a security interest in any of the company's real property. Real property generally means real estate, which would include land and anything that is attached to the land or erected on it. Real property excludes anything that may be removed from the land without causing injury to the land.

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

In general, notarization is not significant in the United States – except notarization by a public notary (for a de minimis fee, if any) of signatures on real property mortgages.

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

Several publicly accessible security registration systems govern based on type of collateral, generally for a security interest to have effect against third parties. These include (1) for most personal property, a notice filing with a state Uniform Commercial Code filing office, (2) for real property, recording in local (county or municipal) real property records offices, (3) for motor vehicles and state-titled vessels, notation of lien on the related title certificate issued by the state (in some cases an electronic record), (4) for railcars, a notice filing with the U.S. Surface Transportation Board, (5) for aircraft and certain related equipment, notice filings with the Federal Aviation Administration and with the International Registry established under the Cape Town Convention, (6) for U.S. flag vessels, a notice filed with the U.S. Coast Guard, (7) for copyrights, filing with the U.S. Copyright Office, and (8) for patents and trademarks, filing with the U.S. Patent and Trademark Office.

9. **Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement?**

Filing and recording costs in most U.S. jurisdictions are de minimis. Some states have recording/filing taxes and fees based on value of the collateral or the debt secured. In some cases, this motivates real property owners and financers to refinance real property mortgage debt in a manner that may not attract a new mortgage tax payment (such as assignments and assumptions between old and new parties).

10. **Can a company guarantee or secure the obligations of another group company; are there limitations in this regard?**

As a general matter, group company guarantees are very common in the United States. In addition to the requirement that a guarantee must satisfy general contractual principles to be enforceable (such as consideration and a meeting of the minds), many states have a so-called Statute of Frauds under which a guarantee must be in writing and signed by the guarantor. In terms of consideration, as a general rule, the guarantor need not receive a direct benefit in order for consideration to exist if the guarantee is entered into at the time of the original loan transaction (although, as discussed below, the amount of benefit may be relevant in later insolvency proceedings). Under laws of certain states, however, there must be additional consideration if the guarantee is given after the underlying loan is made.

11. **Are there any issues that lenders should be aware of when requesting guarantees (for example, financial assistance or lack of corporate benefit)?**

Intercorporate guarantees may be challenged as fraudulent transfers under §548 of the United States Bankruptcy Code, or under state law, whose relevant statutes are, in most cases, modeled after the Uniform Fraudulent Transfer Act. Such challenges are generally made either by a trustee or estate representative in bankruptcy, although individual creditors can bring such claims. In the context of challenges to intercorporate guarantees, these are typically based on a theory of constructive fraud, for which the basic elements are essentially the same under both the Bankruptcy Code and state law. Generally speaking, to prevail on such a claim, the creditor or a trustee in bankruptcy must demonstrate that (1) the guarantor received less than “reasonably equivalent value” in exchange for the making of the guarantee, and (2) that the guarantor either (a) was insolvent or became insolvent as the result of the making of the guarantee (or pledging of related collateral), (b) was engaged or about to engage in business or a transaction for which any property remaining with the guarantor was an unreasonably small capital, or (c) intended to incur, or believed that it would incur, debts beyond its ability to pay as they mature.

Typically, lenders do not face significant constructive fraudulent transfer issues in the context of so-called ‘downstream guarantee’ where the parent company guarantees the obligations of a direct or indirect subsidiary. In that context, the parent directly benefits through its equity interests from any value given to the subsidiary, so the ‘reasonably equivalent value’ prong of any fraudulent transfer claim is met.

On the other hand, in underwriting a loan, a lender always has to consider potential fraudulent transfer risks if a subsidiary or an affiliate of the borrower whose stock is owned by the same direct or indirect parent is delivering the guarantee. These types of guarantees (known as upstream and cross-stream guarantees) have the potential to be problematic because the subsidiary or affiliate is taking on a significant liability under the guarantee, but may not receive the proceeds of the loan or other clear, direct benefits. As a result, a creditor or trustee is likely to claim that there was not “reasonably equivalent value” and the incurrence of the guarantee rendered the subsidiary or affiliate insolvent.

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

As a matter of general corporation law of most states, there are no affirmative restrictions on guarantees to support borrowings for the purposes of acquiring shares of the borrower, its parent or any related company – although there may be certain regulatory and other restrictions for specialized entities that go beyond the scope of this memorandum. However, the constructive fraudulent issues discussed in response to Question 11 are particularly acute when the proceeds are being used to acquire shares in other entities, as courts are likely to determine that there is no per se “reasonably equivalent value” for the making of the guarantee. As a result, lenders will need to assess carefully the solvency of the various guarantors. Indeed, a significant body of constructive fraudulent transfer case law has developed in the context of failed leveraged buyouts where subsidiary or affiliate assets were pledged to support a buyout transaction.

13. **Can lenders in a syndicate appoint a trustee or agent to (i) hold security on the syndicate’s behalf, (ii) enforce the syndicate’s rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate?**

In the United States, a syndicate of lenders can, and often does, appoint an agent to hold collateral, administer the loan facility and manage the enforcement process. This agent is often styled as an administrative agent and is the one entity that acts on behalf of all of the lenders. However, the various functions of an agent can also be split among multiple entities, in which case there would be a separate administrative agent, collateral agent and perhaps other roles. An agent is often a lender, but an agent does not need to be a lender or hold any of the loans or commitments.

For an agent to hold collateral for a syndicate of lenders, the lenders must appoint the agent and the agent must accept the appointment and agree to hold collateral on behalf of the lenders. The agent would typically be the sole counterparty or beneficiary (on behalf of all of the lenders) of the debtor's grant under the security agreement. The agent will also be the sole entity to take perfection steps with respect to the collateral and will enforce the lenders' rights on their behalf. Typically, lenders are not able to enforce rights directly, but can only do so by directing the agent to act on their behalf. Enforcement proceeds can be applied by the agent, although are typically subject to a pre-negotiated waterfall.

Agents typically have the ability, under the credit agreement or separate agency appointment agreement, to act on behalf of the lenders in their discretion and are indemnified by the lenders when acting in this role.

However, even in these areas, the lenders (typically by simple majority) have the power to direct the agent.

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

Not applicable.

15. **Does withholding tax arise on (i) payments of interest to domestic or foreign lenders, or (ii) the proceeds of enforcing security or claiming under a guarantee?**

In general, the United States federal income tax rules include three main withholding regimes: backup withholding, "FDAP" withholding, and "FATCA" withholding.

Only backup withholding of tax is relevant to domestic lenders, but most domestic taxpayers are exempt from backup withholding.

With respect to foreign lenders, the United States imposes an "FDAP" withholding tax on interest from U.S. sources. However, there is a broad statutory exemption from FDAP withholding for so-called portfolio interest. In general, interest on a loan is portfolio interest as long as (i) the loan is in registered form, (ii) payment of interest is not subject to certain contingencies (e.g., profits of debtor), (iii) the foreign lender is not a bank extending credit in the ordinary course of its trade or business, (iv) the foreign lender is not related to the debtor as a 10% or more corporate shareholder or partner, or as a controlled foreign corporation, and (v) the foreign lender furnishes a certification that it is not a United States person (e.g., IRS Form W-8).

In addition, a foreign lender, who is eligible for a double income tax treaty, may be entitled to a reduced withholding rate, and a foreign lender receiving the interest as income effectively connected with a trade or business within the United States (or permanent establishment where a treaty is applicable) is generally not subject to withholding (rather is subject to general U.S. income tax rates and certain special rules).

In addition to FDAP withholding, there is another regime commonly called “FATCA” (the Foreign Account Tax Compliance Act). FATCA requires certain foreign financial institutions and other foreign entities to provide information to the United States government regarding U.S. persons who hold accounts or assets of these entities. To implement this framework, FATCA also imposes a withholding tax on interest payments made to foreign lenders unless the foreign lender is a foreign financial institution that entered into an agreement with the United States or otherwise complies with its local law, in available jurisdictions, with respect to reporting applicable information about U.S. accountholders, or is not a foreign financial institution and certifies as to certain U.S. person ownership or is eligible for other exceptions. A foreign lender generally furnishes a statement (e.g., IRS Form W-8) as to its status under FATCA, which can identify the basis for no FATCA withholding.

(Backup withholding tax is also relevant to foreign lenders but, as a practical matter, is typically subsumed by the processes of the FDAP and FATCA withholding regime.)

At the U.S. state and local tax level, backup or non-wage withholding generally does not apply to interest or other income from securities, unless it arises from the conduct of a trade or business in that jurisdiction. However, laws vary among the states and it is necessary to review the applicable tax regime to confirm whether or not withholding is required.

Payments derived from a guarantee are generally treated substantially similar to as described above. For proceeds generated from a security, it depends. If the debtor is using the security to pay interest then the treatment is as described. If the foreign lender is foreclosing on the security, then it will need to evaluate, from a U.S. tax perspective, that it is receiving property as payment on its loan and consider the future implications of ownership or disposition of that property (and this problem is particularly acute in security that is U.S. real estate).

16. **If payments of interest to foreign lenders are generally subject to withholding tax, what is the standard rate and what is the minimum rate possible under double taxation treaties?**

The standard rate for FDAP withholding is 30%. A double income tax treaty may reduce that rate, and some treaties provide for a zero-percent rate. FATCA withholding is also 30%. FDAP and FATCA will not both be imposed—the highest withholding rate is 30%.

17. **Are there any other tax issues that foreign lenders should be aware of when lending into your jurisdiction?**

A foreign lender should monitor the location, nature and frequency of its U.S.-related activity and consider whether U.S. law would treat the foreign lender as having a trade or business (or permanent establishment where a tax treaty is applicable) within the United States.

A foreign lender should also be aware that U.S. tax treaties generally do not apply at the U.S. state and local tax level, which means a foreign lender that is not subject to U.S. federal income tax because it does not have a U.S. permanent establishment may nonetheless be subject to tax in a state where it earns interest if it earns the interest in connection with a trade or business in the United States and has nexus to a relevant state.

18. **Are there any tax incentives available for foreign lenders lending into your jurisdiction?**

No, the United States does not currently have a tax incentive program for foreign lenders. The U.S. financing market does include certain tax-advantaged bonds where qualifying state and local bonds pay interest that is not subject to United States federal tax (and sometimes state and local tax as well) or feature U.S. tax credits and/or federal subsidies.

19. **Is there a history in your jurisdiction of financing structures being challenged by tax authorities, and if so, can you give examples.**

U.S. tax authorities have broad powers to audit non-U.S. taxpayers and assess tax liabilities against them. Having said that, outside of the related-party arrangements or highly structured transactions, assessments against foreign persons related to the acquisition of U.S. loans are relatively rare, although not unheard of. These tend to occur in circumstances where the terms of the loan significantly depart from the standard, or the foreign person has not observed normal practices regarding the way in which it acquires U.S. loans.

Some U.S. state and local tax jurisdictions, New York City in particular, have been considering whether certain non-bank lending structures constitute a business in that jurisdiction under circumstances that may not constitute a U.S. trade or business for federal income tax purposes.

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

Although the law varies by state, courts in the United States generally give effect to the parties' contractual choice of a foreign law (including English law), unless the court determines that the most significant contacts with the transaction at issue are in another jurisdiction, or the application of the foreign law would constitute a violation of a fundamental state policy.

21. **Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards?**

Although the United States is not a signatory to any treaty that requires the recognition of non-U.S. court judgments and the law therefore varies by state, U.S. courts generally enforce foreign judgments, as long as certain requirements are met. The majority of states, including New York, have adopted the Uniform Foreign Money Judgments Recognition Act (UFMJRA), which requires the court to recognize a foreign judgment that is final, conclusive, and enforceable in the jurisdiction in which it was rendered,unless the foreign court (1) was not impartial, (2) did not offer due process of law, or (3) did not have personal jurisdiction over the defendant, among other potential exceptions. States that have not adopted the UFMJRA generally perform a similar analysis under common law and principles of comity to determine whether to recognize a foreign judgment.

The United States is a member of both the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the Inter-American Convention on International Commercial Arbitration (the Panama Convention).

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

The Federal insolvency process is outlined in Title 11 of the United States Code (the "Bankruptcy Code"), which provides the options for several types of insolvency proceedings. Most (but not all) business entities and individuals are eligible to become debtors under the Bankruptcy Code. A bankruptcy case is commenced by filing a petition of relief under the following chapters of the Bankruptcy Code.

Chapter 7 Liquidation: Chapter 7 governs court-supervised liquidation procedures for eligible individuals and business entities. A third-party trustee is appointed to administer the case and liquidate the debtor's non-exempt assets, the proceeds of which are distributed to the debtor's creditors as set forth in the Bankruptcy Code.

Chapter 9 Municipal reorganization: Chapter 9 allows eligible municipalities (including governmental entities such as cities, counties, municipal utilities, taxing districts and school districts) to implement plans of reorganization to address issues and causes of municipal financial distress.

Chapter 11 Reorganization: Chapter 11 governs reorganization proceedings and can be commenced voluntarily or involuntarily. Notably, there is no requirement that a debtor be insolvent to commence a Chapter 11 case. Chapter 11 debtors typically remain in control of their business operations (as debtors-in-possession), though a chapter 11 trustee can be appointed under certain circumstances. The ordinary goal of a chapter 11 debtor is to emerge from bankruptcy under a court-approved plan of reorganization setting forth how the reorganized debtor will pay creditors and relieving the debtor of certain specified obligations. Chapter 11 can also be used to execute court-supervised sales of some or all of a debtor's assets, thereby allowing for sales that might otherwise be difficult or impossible on an out-of-court basis.

Chapter 12 Farmers and fishermen: Family farmers and fishermen with regular annual income are eligible for relief under Chapter 12. A Chapter 12 debtor proposes a plan to repay its creditors over a period of time and is allowed to make seasonal payments.

Chapter 13 Individual restructuring: Chapter 13 is available to individuals with regular income and allows them to restructure under plans of repayment. These plans usually contemplate a repayment scheme three to five years in length. Chapter 13 debtors can typically protect their property from foreclosure as long as they make payments according to their plan.

Chapter 15 Cross-border insolvencies: A foreign debtor with an insolvency case pending in another country may file a petition under Chapter 15, which allows a cooperative administration of the debtor's insolvency proceedings in the United States and the country in which the main insolvency proceeding is taking place.

Other wind-down and dissolution mechanisms are available under various state laws for certain entities which are not eligible to be debtors under the Bankruptcy Code (such as insurance companies). However, these procedures are typically more restricted and may vary on a state-by-state basis.

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

With limited exceptions, the filing of a bankruptcy petition in the Federal court system results in an immediate automatic stay that immediately enjoins creditors from enforcing almost all rights against the debtor. Certain qualified financial and securities transactions are 'safe-harbored' from the automatic stay, but, as a general proposition, it has broad reach. Examples of actions enjoined by the automatic stay include, without limitation:

- pursuing judicial proceedings against the debtor
- enforcing a pre-petition-judgment against the debtor
- obtaining possession of or exercising control over debtors' property (including attempts at pursuing payment of debts)
- creating, perfecting or enforcing liens, and
- applying set off

Creditors may request the court for relief from the automatic stay under certain limited circumstances, including when there is a lack of adequate protection of collateral value, and if the debtor does not have any equity in the property at issue, and such property is not necessary for an effective reorganization. Creditors should be cautious in undertaking any action which might be stayed because courts can impose sanctions in respect of actions that are found to have been taken in violation.

24. **Please comment on transactions voidable upon insolvency.**

The United States Bankruptcy Code allows debtors (or trustees, as applicable) to attempt to void several types of pre-petition transfers of debtor property, including, most commonly, ‘preferential’ transfers and fraudulent transfers. Following is a brief overview of the elements of each:

<u>Preferential transfers</u>: A debtor may avoid pre-petition transfers that (1) were made to a creditor, (2) on account of antecedent debt, (3) made while the debtor was insolvent, (4) within 90 days before the filing of the bankruptcy petition (or one year if made to an insider), and (5) that enable the creditor to receive more than it would receive in a liquidation.

<u>Constructive fraudulent transfers</u>: Debtors may avoid transfers made within two years prior to the filing of the bankruptcy petition, if such transfer was made for less than reasonably equivalent value while the debtor (1) was insolvent or became insolvent as a result of such transfer or obligation, *or* (2) was engaged in a business or a transaction for which any property remaining with the debtor represented unreasonably small capital, *or* (3) intended or believed that it would incur debts that are beyond its ability to pay (as such debts matured).

<u>Actual fraudulent transfers</u>: Debtors may avoid transfers made within two years prior to the filing of the bankruptcy petition if such transfers were made with the actual intent to hinder, delay or defraud a creditor.

Debtors also have the ability to rely on non-bankruptcy law (typically state law) to bring avoidance actions. Debtors most commonly utilize this tactic to bring fraudulent conveyance actions under state law, which may have longer reach-back periods than under the Bankruptcy Code.

Note that certain qualified financial and securities transactions may be safe-harbored from the avoidance actions outlined above.

25. **Is set off recognised on insolvency?**

Yes, but with limitations. The Bankruptcy Code does not create a right of setoff but recognises such right(s) if valid under applicable non-bankruptcy law. The underlying debt must be mutual as between the debtor and the entity seeking setoff and must arise before the commencement of a bankruptcy case to be enforceable. Because a creditor's right to setoff is automatically stayed upon filing of a bankruptcy petition (pursuant to the automatic stay), creditors must seek permission from the court to lift the automatic stay to effect a setoff. Additionally, certain setoffs effectuated within the 90 days prior to the filing of a bankruptcy petition may be voided, depending on the circumstances (including whether the setoff relates to a financial transaction that is safe-harbored under the Bankruptcy Code).

26. **Can you comment generally on the success of foreign creditors in enforcing their security and successfully recovering their outstandings on insolvency?**

Upon commencement of a bankruptcy case, an automatic stay immediately enjoins all creditors from enforcing their security rights against a debtor or the debtor's property. While relief from this stay is sometimes possible, secured creditors are typically bound to pursue recovery by participating in the bankruptcy case along with all other classes of creditors and interested parties, thereby providing a central forum for the coordination and resolution of the restructuring and/or liquidation. Within that structure, while secured creditors often have high rank in payment priority, the success of a secured creditor in recovering its outstandings will typically depend on the ultimate size of the bankruptcy estate (money available to distribute to creditors) and the value of the collateral (leaving the creditor either over-or under-secured).

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

After years of new regulations in response to the financial crisis of 2008, U.S. legislators and regulators appear focused on refining the reforms of the past decade. Federal regulators have recently deemphasized many of the limitations imposed by the "Guidance of Leveraged Lending" it issued in 2013. Similarly, proposed changes to the U.S. tax code would permit certain U.S. borrowers to receive additional credit support from their non-U.S. subsidiaries. Certain foreign lenders will benefit from the relaxation of regulatory requirements; others may find it difficult to compete in increasingly competitive U.S. lending markets.

This transition toward deregulation has not been completely one-sided. The U.S Federal Reserve is reportedly considering additional liquidity requirements for U.S. branches of foreign banks, and the Trump administration emphasized the use of sanctions throughout 2018. Although recent regulatory changes have been less dramatic than many expected, the impact of future changes may vary depending on the specifics of the borrower, lender and transaction at issue.

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

Alternative credit providers, such as private credit funds, business development companies and CLOs, comprise a significant proportion of lending to companies in the U.S. market. While traditional banks have focused on larger, broadly syndicated loan transactions, the amount of alternative credit provided in the U.S. market has increased in recent years on an absolute basis and relative to historical levels. Increased reliance by borrowers on alternative credit sources is due to a number of factors, including consolidation and increased regulation of the U.S. banking industry and an increase in competition from new private credit funds and other non-bank lenders. The competition between prospective lenders has enabled borrowers to enjoy tighter spreads, more relaxed credit underwriting and more flexible deal terms when compared against historical standards, particularly for transactions involving larger borrowers.

In terms of market trends, aside from the loosening of leverage and transaction terms, the U.S. leveraged lending market has seen continued interest in the unitranche debt structure (where traditional first-lien and second-lien credit facilities are combined into a single structure). Many borrowers view unitranche structures as a more straightforward and less burdensome alternative to traditional structures because borrowers need only comply with a single set of covenants and are able to avoid many intercreditor issues present in traditional structures. Although the use of unitranche facilities has steadily increased since 2014, a significant reduction in spreads for unitranche structures throughout 2018 spurred dramatic increase in demand for unitranche structures.