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A legal update from Dechert's Financial Institutions and Finance and Real Estate Groups

FDIC Issues Opinion Clarifying Treatment of Securitizations by Financial Companies Subject to Resolution Under Title II of the Dodd-Frank Act

Our October 2010 *DechertOnPoint* "[FDIC Begins Action on Its Super-Resolution Rules for Covered Financial Companies](#)" discussed how systemically significant non-bank financial companies ("covered financial companies") may find themselves in unknown territory if the FDIC is appointed receiver for them. Creditors, equity holders, counterparties and vendors need certainty as to how a company will be resolved under Chapter 7 or 11 of the Bankruptcy Code, or under FDIC receivership rules in order for markets to function effectively. Recently an issue arose as to how the FDIC would interpret its receivership authority under Title II in regard to securitizations entered into by a covered financial company.

The FDIC acted to provide interpretive guidance to demonstrate how it would harmonize its new authority under Title II of Dodd-Frank with provisions in the Bankruptcy Code in a manner that will facilitate continued securitizations by covered financial companies. This action addressed uncertainty related to covered financial company receiverships that could have adversely impacted the willingness of market participants to proceed with such securitizations.

FDIC General Counsel Opinion

Our client, the Securities Industry and Financial Markets Association ("SIFMA"), has been working to obtain regulatory clarifications from the FDIC. It received that on December 29, 2010, when the FDIC's Acting General Counsel, Michael Krimminger, issued an opinion that addresses how the FDIC would exercise its receivership authority in such a situation.

The letter indicates that the FDIC would harmonize its broad receivership authority with current bankruptcy law principles. Specifically the opinion indi-

cates that the appropriate interpretation of section 210(a)(11)(H)(i)(II) is as follows:

- The avoidance provisions in section 210(a)(11) would apply the *bona fide* purchaser construct only in the case of fraudulent transfers alleged under subparagraph (A) and preferential transfers of real property (other than fixtures) alleged under subparagraph (B);
- The avoidance provisions in section 210(a)(11)(B) would apply the hypothetical lien creditor construct as applied under section 547(e)(1)(B) of the Bankruptcy Code to any alleged preferential transfers of personal property and fixtures; and
- The avoidance provisions in section 210(a)(11)(B) would apply the 30-day grace period as provided in section 547(e)(2) of the Bankruptcy Code.

The opinion indicates that the Acting General Counsel intends to recommend that the FDIC Board of Directors adopt a regulation confirming these interpretations through a notice and comment rulemaking.

This reflects the receptiveness of the FDIC to take actions to promptly resolve interpretative issues which arise under the Dodd-Frank Act which could impair steps toward continuing recovery of the financial markets.



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