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The Financial Crisis 10 Years Later: Lessons Learned

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Introduction

The financial crisis was ignited exactly ten years ago: on September 15, 2008, Lehman Brothers filed for bankruptcy. That same day, Bank of America announced its acquisition of Merrill Lynch. On September 16, the Federal Reserve bailed out AIG. On September 17, the markets were in free-fall. On September 18, Secretary Paulson and Chairman Bernanke briefed Congressional leaders on the contours of a massive bailout plan. And on September 19, the Treasury Department took the unprecedented step of guaranteeing U.S. money market funds.

The financial crisis ravaged the U.S. and world economies and required extraordinary government interventions to prevent a major worldwide depression. It spurred a host of legislative, regulatory, enforcement, litigation, and political responses, many of which are still unfolding. It destroyed venerable businesses and commercial activities and spawned others. And it reshaped market dynamics across the global economy, including in such diverse sectors as private funds, derivatives, securitization, M&A, bankruptcy, and real estate.

Ten years later, market participants and other companies across the globe operate in a significantly altered landscape marked by heightened regulatory expectations and punishing compliance costs, increasingly active regulatory and criminal enforcement worldwide, a growing but increasingly fragmented economy paired with new risks and market pressures, and a political and geopolitical environment that is both fragile and uncertain. Even though the current Administration's approach to financial regulation and enforcement represents a significant departure from the prior Administration's, many of the practical consequences of the financial crisis for companies operating on a global scale are undoubtedly here to stay.

Drawing on the experience of this firm's departments, practice areas, and offices, and having counseled numerous clients with diverse business activities across multiple spheres during and in the aftermath of the financial crisis, we discuss the legal and business ramifications of the financial crisis, highlight certain key lessons learned, and provide a roadmap to enable executives and boards of directors to successfully navigate the post-crisis world and deal with the new market and regulatory realities. Many of the practical implications that emerge from this history—including the heightened importance of risk management, board oversight, institutional culture, transparency and disclosure, as well as the increasing politicization of regulatory and criminal enforcement—apply to all companies across all sectors of the U.S. and global economies.

I. History of the Financial Crisis

Background

The 1999 passage of the Gramm-Leach-Bliley Act formally ended the separation of commercial and investment banking. With access to greater capital, financial institutions began to take bolder steps by investing heavily in financial products such as collateralized debt obligations ("CDOs") and mortgage-backed securities ("MBSs"), some of which were supported by investment-grade credit ratings, but included increasingly higher-risk assets.

The proliferation of these financial products was made possible in large part by low interest rates and rising housing prices in the early 2000s, which led to increased borrowing by both consumers and financial institutions. Consumers financed homes on what appeared initially to be extremely attractive terms, despite the fact that many did not have the means to repay their mortgages in the long term, especially when introductory interest rates on adjustable-rate mortgages reset to much higher rates.

These increasingly exotic mortgage loans—typically originated not by commercial banks, but by mortgage lenders that lacked the capital to retain their products—were sold to investment banks or government-sponsored enterprises ("GSEs") such as Fannie Mae and Freddie Mac. Those purchasers packaged the mortgages into MBSs that in turn were sold to other financial institutions and institutional investors. By 2008, Fannie Mae and Freddie Mac together owned or backed approximately $5.2 *trillion* in mortgages[1]—nearly half of all mortgages in the United States.

MBSs, in turn, often were packaged into CDOs, which pooled high-risk, lower-rated securities with low-risk, higher-rated securities. The CDOs were then sliced into tranches based on credit risk, with highly rated senior tranches and lower-rated junior tranches with lower payment priority and higher risk, but which enjoyed a higher rate of return. The financial institutions that structured the CDOs often retained the senior-most tranches, which carried above AAA ratings and traditionally were considered safe investments.[2] The result was greater leverage on bank balance sheets, with asset classes that were intended to maximize rates of return, but carried heightened risk.

The profitability of MBSs and CDOs fed investor demand, which in turn fed the demand for more mortgages. That demand, along with low interest rates, encouraged generous lending by mortgage lenders. These mortgage lenders arguably had diminished incentives to enforce underwriting standards because their sale of the underlying mortgages reduced their exposure to the risks of eventual default by the mortgage borrower.

Lead-up to the Crisis

After more than five years of continual growth, housing prices began to decline in the second half of 2006. The Federal Reserve ("Fed") had been increasing interest rates since June 2004 in an effort to ward off inflation, and the Fed continued those increases through June 2006. Increased rates led to higher monthly mortgage payments, and, consequently, higher rates of default, while property values continued to fall. Foreclosures increased, and the effects of the declining mortgage industry began to be felt in other industries, such as construction.

MBSs and CDOs, in theory, were designed to spread risk. In practice, however, the assets underlying many MBSs and CDOs included subprime mortgages, and the risks facing these subprime mortgages turned out to be highly correlated, notwithstanding the high credit ratings assigned to many of these instruments. Increasing numbers of mortgage defaults across the country caused the values of structured credit products to plummet and, in this and other ways, had wide-reaching ramifications for financial markets.

Signs of trouble began to appear in February 2007, when HSBC announced large losses linked to subprime mortgages in the United States. In July 2007, two Bear Stearns hedge funds with significant investments in mortgage-related CDOs collapsed. In August 2007, BNP Paribas suspended the calculation of net asset values in three investment funds that had purchased mortgage-related assets and suspended the ability of investors to redeem investments in those funds. In November 2007, Citigroup announced it would incur $8 to $11 billion in previously unexpected fourth-quarter losses related to its investments in subprime-related exposures.[3] Citigroup was far from alone: over the course of late 2007 and 2008, major investment banks were forced to write-down the value of their MBS and CDO portfolios by tens of billions of dollars.[4] In an effort to add liquidity to the market, the Fed reduced the discount window interest rate from 6.25% to 5.75% in late August 2007. A few days later, the Fed arranged for J.P. Morgan, Wachovia, Citigroup, and Bank of America to accept "symbolic loans" of $500 million each, as part of efforts to reduce the stigma associated with borrowing from the discount window.[5]

The Crisis

Despite institutional attempts to mitigate the effects of the subprime mortgage crisis, the tide of defaults, foreclosures, and losses continued to swell. In March 2008, following a "run on the bank" by Bear Stearns customers, counterparties and lenders, J.P. Morgan agreed to acquire Bear Stearns. In July 2008, IndyMac Bank, which had relied heavily on non-traditional mortgage products, was placed into federal conservatorship. That same month, in an effort to calm the turmoil, Congress passed the Housing and Economic Recovery Act of 2008.[6] That statute, among other initiatives, established the Federal Housing Finance Agency ("FHFA") to provide oversight of Fannie Mae and Freddie Mac, whose share prices had sharply declined. Weeks later, on September 6, 2008, the FHFA placed the two GSEs into conservatorship, and the Treasury Department pledged to invest up to $200 billion in them.

But the rescue of Fannie Mae and Freddie Mac failed to stabilize the market, and the global recession unfolded with shocking speed and intensity.

On Monday, September 15, 2008, Lehman Brothers stunned the world by filing for chapter 11 bankruptcy protection after a weekend of desperate negotiations with the Fed and failed last-minute efforts to save the bank. Lehman had invested heavily in MBSs in the years leading up to its bankruptcy. Its highly leveraged portfolio, which consisted in large part of lower-rated securities, led to massive losses and ultimately resulted in a $600 billion bankruptcy filing—the largest in the history of the United States.

On the same day, Bank of America announced its purchase of Merrill Lynch. Merrill Lynch, like a number of other financial institutions, had suffered significant losses from its mortgage-based CDO portfolio, including $19.2 billion in losses incurred between July 2007 and July 2008.[7]

The next day, on September 16, the Fed, using powers under section 13(3) of the Federal Reserve Act that, before 2008,[8] had not been used since the Great Depression, authorized an $85 billion buyout to prevent the collapse of insurer AIG. AIG had become heavily involved in the mortgage market by selling credit default swaps ("CDSs")—essentially, insurance against default—on CDOs. Those CDOs were largely backed by subprime mortgages. The rise in mortgage defaults and drop in CDO values meant AIG had tens of billions of dollars in losses and collateral obligations that it could not cover. These events led to a downgrade in AIG's credit rating and the triggering of certain contractual obligations requiring AIG to post tens of billions of dollars of collateral. Facing a liquidity crisis and unable to post the capital required by collateral calls, AIG effectively became bankrupt. The Fed was forced to put up $85 billion to prevent the collapse not only of the insurer, but also of its entire network of counterparties.

For the rest of 2008, headlines chronicled bank failures and bailouts, including J.P. Morgan's acquisition of Washington Mutual in late September and Wells Fargo's agreement to purchase Wachovia in early October. The stock market crashed, with the S&P 500 plummeting 56% between October 2007 and March 2009, before it finally began to recover.[9]

II. Legislative and Regulatory Responses to the Financial Crisis

Congress acted swiftly in response to Lehman's bankruptcy to stabilize the economy. On October 3, 2008, Congress passed the Emergency Economic Stabilization Act ("EESA"),[10] pursuant to which the Treasury Department implemented various programs to restore stability and liquidity to the financial system, including the Capital Purchase Program ("CPP") and the Capital Assistance Program. Through EESA, Congress created the Troubled Assets Relief Program,[11] which made available $700 billion originally intended for the purchase of "troubled assets." Instead, the funds were primarily used to make direct investments into financial institutions, the automobile industry, and government housing initiatives.

On February 17, 2009, President Obama, who had then been in office for four weeks, signed into law the American Recovery and Reinvestment Act,[12] which provided approximately $800 billion in stimulus to prop up the economy.

The Dodd-Frank Act

Following the passage of legislation focused on economic stabilization and stimulus, Washington's attention turned to financial regulatory reform. The Obama Administration and a Democrat-controlled Congress stitched together a series of far-reaching reform proposals. The Dodd-Frank Act ("Dodd-Frank") passed with only four Republican votes and was signed into law by President Obama on July 21, 2010. The legislation's key planks included:

- **Systemic Risk**. Dodd-Frank subjected bank holding companies with assets in excess of $50 billion and non-bank financial institutions designated by the newly created Financial Stability Oversight Council to more intensive regulation. Among other things, the Fed was directed to establish risk-based capital requirements, liquidity requirements, leverage limits, concentration limits, and corporate governance requirements, and to conduct stress tests.

- **Volcker Rule**. Section 619 of Dodd-Frank generally prohibited banking entities from engaging in proprietary trading and from maintaining ownership interests and other relationships with hedge funds and private equity funds.[13]

- **Orderly Liquidation Authority and Living Wills**. In response to concerns that regulators lacked the necessary tools during the financial crisis, Dodd-Frank authorized the Federal Deposit Insurance Corporation ("FDIC"), under certain conditions, to seize, break up, and wind down a failing non-bank financial institution whose failure would threaten U.S. financial stability. In addition, section 165(d) of Dodd-Frank required significant financial institutions, including banks and non-banks, to submit periodic resolution plans or "living wills" detailing how they would liquidate their assets in a "rapid and orderly way" in the event of a bankruptcy. These plans are then subject to review by regulators; in recent years, the FDIC and the Fed have increasingly rejected financial institutions' living wills, or approved them on the condition that changes be made.

- **Derivatives Reform**. As discussed further below, Dodd-Frank directed the Commodity Futures Trading Commission ("CFTC") to impose a new regulatory structure on the multitrillion dollar derivatives market.

- **Securitization Reform**. In light of the role CDOs and residential mortgage backed securities ("RMBS") played in the crisis, Dodd-Frank included a number of protective measures, including, as discussed below, the issuance of a risk retention rule ensuring that key market participants had more "skin in the game."

- **Regulation of Credit Rating Agencies**. Dodd-Frank increased regulation over credit rating agencies and took some limited steps to address accountability, conflicts of interest, and rating accuracy issues.

- **Creation of the Consumer Financial Protection Bureau ("CFPB")**. Title X created a new agency authorized, among other things, to issue consumer protection regulations governing providers of financial services to consumers, including banks and non-bank entities. Dodd-Frank prioritized rulemaking aimed at issues related to the financial crisis, including issues concerning mortgage "ability to pay" requirements, restrictions on compensation for mortgage loan officers, and mortgage servicing standards.

- **Closing of the Office of Thrift Supervision**. Due to concerns over lax supervision, Dodd-Frank closed the Office of Thrift Supervision and distributed its powers among the Fed, the Office of Comptroller of the Currency ("OCC"), the FDIC, and the CFPB.

Dodd-Frank had undergone only minor amendments until May 2018, when President Trump signed into law the Economic Growth, Regulatory Relief, and Consumer Protection Act ("EGRRCPA").[14] That law limits the application of various provisions of Dodd-Frank with regard to small and mid-sized banks and raises asset thresholds above which larger banks are subject to increased prudential standards. Unlike other legislative proposals such as the Financial CHOICE Act,[15] the EGRRCPA preserved the basic structure of the Dodd-Frank regime while making various targeted adjustments.

Regulatory Initiatives

Dodd-Frank placed enormous rulemaking mandates on the federal banking agencies, the SEC, the CFTC, and the CFPB, among others, and counting, classifying, and tracking these mandates became a cottage industry unto itself. These mandates were in addition to the significant initiatives voluntarily undertaken by regulators in response to the financial crisis.

Stress Testing. During the financial crisis, the Fed launched a program of supervisory stress testing across the largest banks. As then-Fed Governor Tarullo commented, this was "born of necessity during the depths of the crisis" to restore confidence in the U.S. financial system, but stress testing ultimately became a "cornerstone" of the Fed's approach to supervision.[16] The supervisory stress testing is conducted annually along with the Fed's related but broader Comprehensive Capital Analysis and Review ("CCAR") program. The CCAR consists of a quantitative assessment, which uses stress testing to evaluate whether firms have sufficient capital to continue their functions in various stress scenarios, and a qualitative assessment of capital planning practices.

Heightened Expectations and Enhanced Prudential Standards. In September 2014, the OCC issued enforceable "heightened expectations" regarding large banks' risk management and corporate governance practices. These expectations were grounded in the OCC's recognition that the "financial crisis demonstrated that much stronger supervisory standards would be necessary to manage the risks associated with large, complex financial institutions."[17] Earlier that year, in March 2014, the Fed issued enhanced prudential standards pursuant to section 165 of Dodd-Frank. For bank holding companies and foreign banking organizations with $50 billion or more in assets, these standards included risk-based and leverage capital requirements, liquidity standards, risk management requirements (including the establishment of a risk committee), and stress testing.[18] In the following years, the Fed imposed additional requirements, pursuant to section 165, to mitigate the risk that the failure or distress of a large financial institution could pose to U.S. financial stability. These include a risk-based "capital surcharge" for global systemically important banks, requirements for holding long-term debt and a minimum amount of total loss-absorbing capacity, and requirements that certain foreign banking organizations form intermediate holding companies to hold their U.S. subsidiaries. These integrated requirements form what the Fed calls a "more stringent" regulatory regime for the largest, most complex financial institutions.

International Regulatory Efforts

Alongside these U.S. efforts, governments around the world took action to strengthen their financial regulatory frameworks. The Financial Stability Board ("FSB") was established in 2009 by the G-20 to coordinate the work of national authorities and international standard-setting bodies on the post-crisis reform agenda. The efforts focus, among other things, on addressing systemic risk through the Basel III framework, which calls upon standard-setting bodies to institute capital requirements and stress testing, resolution planning for systemically important institutions, derivatives reform, and transforming shadow banking into resilient market-based finance through appropriate oversight and regulation.

Additionally, the International Accounting Standards Board ("IASB") and the U.S. Financial Accounting Standards Board ("FASB") began to institute reforms to their accounting standards. After several years of collaboration with the FASB, the IASB issued a new International Financial Reporting Standard to implement revised guidelines for the accounting of financial instruments. In the United States, the FASB similarly adopted changes to U.S. Generally Accepted Accounting Principles, including changes concerning impairment recognition and hedge accounting for financial instruments.

III. Enforcement and Litigation Activity Following the Financial Crisis

Separate and apart from the significant losses suffered as the market plummeted, the financial crisis led to unprecedented legal exposures for financial institutions and other market participants, totaling several hundreds of billions of dollars.

The regulatory environment for market participants has been intensely challenging for the past ten years. Beginning in 2008, the Department of Justice ("DOJ"), prudential regulators, and other federal and state authorities have wrested ever-larger penalties from banks and other financial institutions, with many fines orders of magnitude larger than those imposed only years earlier. Among other trends, prudential regulators[19] have placed much more emphasis on enforcement, with the number of enforcement actions rising sharply from 582 in 2007 to a peak of 1,795 in 2010. (Only in the past year or two have enforcement actions returned to pre-crisis levels.) Thousands of private civil lawsuits were also filed, alleging myriad, sometimes novel, legal theories under federal and state law and seeking colossal damages in a uniquely anti-bank environment. Some of the most significant enforcement and litigation trends in the wake of the financial crisis include the following:

Criminal Prosecutions

Although it initiated countless criminal investigations relating to the financial crisis, the government was frequently criticized for not criminally prosecuting the financial institutions and top executives perceived by the public as responsible.[20] Notwithstanding the public outcry and political pressure to bring charges, the government was hard pressed to prove criminal liability, and ultimately prosecuted relatively few individuals for crimes related to the financial crisis. And when prosecutors filed charges, the results were decidedly mixed. In late 2009, for example, after a closely watched three-week trial, a jury acquitted two Bear Stearns hedge fund managers on charges brought by federal prosecutors in Brooklyn of lying to investors about, among other things, their funds' subprime exposure, which allegedly resulted in $1.6 billion of investor losses.[21] Hardly any other executives faced charges.[22]

SEC Enforcement Actions

Over the last 10 years, the SEC has brought record numbers of enforcement actions and imposed unprecedented monetary fines. Mary Schapiro, who became Chair of the SEC in January 2009, brought a record number of enforcement actions—735 in FY 2011 alone—and proposed or adopted rules for more than three-quarters of the provisions in Dodd-Frank that require SEC rulemaking.[23] Under the leadership of Mary Jo White, who headed the SEC from 2013 through 2017, the SEC pursued a "bold and unrelenting" approach[24] to enforcement, with an "investigate to litigate" philosophy[25] aimed at placing the SEC in a stronger position at trial or in settlement negotiations. By its own calculations, the SEC brought civil lawsuits or administrative charges related to the financial crisis against more than 200 defendants—almost half of them individuals—and obtained approximately $4 billion in penalties or disgorgement between 2008 and 2016.[26]

The SEC brought several cases arising out of alleged misrepresentations and omissions made in connection with the structuring and issuance of MBS and CDO securities. In April 2010, the SEC sued Goldman Sachs and an employee (Fabrice Tourre) for allegedly failing to disclose to noteholders of the Abacus CDO that a short investor had played a significant role in selecting the CDO's assets.[27] News of the lawsuit caused Goldman Sachs's stock price to fall approximately 13%—a market capitalization loss of $14.2 billion.[28] Goldman Sachs ultimately settled, while Mr. Tourre was found civilly liable at trial. The CDO-enforcement agenda also included the SEC's $285 million settlement with Citigroup over the Class V CDO, which ultimately resulted in a landmark decision by the Second Circuit that upheld the agency's authority to resolve enforcement actions on a no-admit, no-deny basis, reversing District Judge Jed Rakoff's ruling.[29]

The SEC also focused particular attention on the GSEs. Fannie Mae and Freddie Mac both entered into non-prosecution agreements with the SEC. The SEC then civilly charged six former top executives with securities fraud; according to the SEC's charges, the executives had falsely claimed that the GSEs were relatively free from exposure to higher-risk mortgage loans, such as subprime loans and low-documentation (or "Alt-A") loans. After a few years of litigation, the cases against the individuals ultimately were settled for very low dollar amounts (between $10,000 and $250,000 each), often paid by the companies or their insurers, and with minimal non-monetary relief.

The SEC also made organizational changes in response to the financial crisis. In 2010, the SEC reorganized part of the Division of Enforcement into five specialized units to more effectively address changing markets and financial institutions and instruments.[30] The Asset Management Unit is the largest of the five units and focuses on investment advisors, investment companies, hedge funds, and private equity funds.[31] In 2017, the SEC created two new units, including a Cyber Unit, which focuses on cyber-related misconduct.[32]

Public Excoriation: Congress and the FCIC

In response to the crisis, Congress held numerous hearings designed to grill, criticize, and shame CEOs and other executives of large banks, funds, and rating agencies.[33] Marked by frequent bouts of grandstanding, these hearings both reflected and reinforced public anger, frustration, and confusion over the causes of the crisis. One memorable example includes a congressman's cross-examination of a bank executive about internal emails that described certain securities as "junk," a "piece of crap," or a "shitty deal." Congress also created the Financial Crisis Inquiry Commission ("FCIC"), whose members were appointed by Congressional leadership—six by the Democratic majority and four by the Republican minority. Throughout 2010, the FCIC conducted a number of public hearings and private interviews, and issued large document requests to executive branch agencies and corporations alike. The FCIC's 410-page report was released in January 2011 on a party-line vote, with the four Republican members joining dissenting opinions.[34] The Senate's Permanent Subcommittee on Investigations released its own 639-page autopsy on the "Anatomy of a Financial Collapse," in April 2011.[35]

National Mortgage Settlement

In February 2012, the DOJ, the Department of Housing and Urban Development, and forty-nine state attorneys general reached a $25 billion agreement with the five largest mortgage loan servicers—Bank of America, J.P. Morgan, Wells Fargo, Citigroup, and Ally Financial—to address alleged abuses concerning mortgage loan servicing and foreclosures. This "largest federal-state civil settlement ever obtained" was heralded as an achievement of the Financial Fraud Enforcement Task Force set up by the Obama Administration in the wake of the financial crisis.[36] In addition to requiring the mortgage servicers to commit more than $20 billion toward financial relief for consumers, the agreement also set new standards aimed at preventing future foreclosure abuses, including strict oversight of the foreclosure process, with compliance to be overseen by an independent monitor.

DOJ Enforcement Cases under FIRREA

Several years after the peak of the crisis, and after expiration of the statutes of limitation or repose governing most potentially applicable criminal and regulatory charges, the DOJ took a renewed interest in financial crisis cases. The DOJ deployed a novel (and hyper-aggressive) strategy that relied on a rarely used statute passed in the wake of the savings and loan crisis in the 1980s: the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). FIRREA allowed the DOJ to seek civil penalties based on alleged violations of certain criminal laws related to financial institutions.[37] Using this tool, the DOJ, together with various state attorneys general and prudential regulators, secured a series of massive, out-of-court RMBS settlements with a number of large banks. Including both cash and non-cash consideration (such as consumer relief), Bank of America paid $16.65 billion (described by the government as the "largest civil settlement with a single entity in American history");[38] J.P. Morgan, $13 billion;[39] Deutsche Bank, $7.2 billion;[40] Citigroup, $7 billion;[41] Credit Suisse, $5.28 billion;[42] Goldman Sachs, $5.06 billion;[43] RBS, $4.9 billion;[44] Morgan Stanley, $2.6 billion;[45] Wells Fargo, $2.09 billion;[46] and Barclays, $2 billion.[47] The DOJ also brought FIRREA claims against Standard & Poor's, ultimately achieving a $1.375 billion settlement.[48]

Consumer Protection Enforcement

In addition to the national mortgage settlement, the post-crisis era has seen an increased emphasis on other forms of consumer protection enforcement, particularly following the creation of the CFPB. By the end of 2016, the CFPB had recovered nearly $12 billion for consumers[49] and imposed a $100 million fine (at that time, CFPB's largest fine) on Wells Fargo over the unauthorized opening of customer accounts.[50] Although the CFPB has scaled back its investigations under the Trump Administration since Mick Mulvaney was appointed acting director, its enforcement efforts have continued. In 2018, in coordination with the OCC, the CFPB imposed another fine on Wells Fargo, this time for a new record of $1 billion, relating to alleged improper sales processes for auto loans and mortgage interest rate-lock extensions.[51]

State Attorneys General and the New York State Department of Financial Services

A number of state attorneys general played aggressive roles following the financial crisis, specifically focusing on alleged frauds in the sale of MBS. In 2013, then California state attorney general and now U.S. Senator, Kamala Harris created a Mortgage Fraud Strike Force to investigate and prosecute misconduct with respect to mortgage servicing.[52] In New York, former attorney general Eric T. Schneiderman recovered at least $3.7 billion in cash and consumer relief—more than any other state—from RMBS settlements in the aftermath of the financial crisis, including a $500 million settlement with the Royal Bank of Scotland.[53]

The New York State Department of Financial Services ("DFS") was created in October 2011 through the merger of the former Banking and Insurance Departments and is charged with supervising state-licensed banks and branches, insurance companies, and other financial institutions operating in New York. In keeping with the advocacy of its first Superintendent, Ben Lawsky, for "new and creative corporate penalties,"[54] DFS has shown a willingness to seek significant penalties by leveraging the threat of revocation of a New York State banking license. While DFS has never revoked the license of a large financial institution,[55] it did impose a year-long suspension of U.S. dollar clearing on BNP Paribas as part of a resolution relating to sanctions violations, obtain over $2 billion in fines from the bank as part of a nearly $9 billion multi-agency resolution, and require the bank to dismiss several employees.[56] In addition, DFS has secured billions of dollars in penalties from numerous other financial institutions that it supervises.

Increased Non-U.S. Enforcement Activity

The financial crisis also brought increased criminal and regulatory enforcement outside the United States. In Iceland, for example, a special prosecutor was appointed to investigate the actions of bank executives leading up to the financial crisis. The special prosecutor ultimately secured a number of convictions, including convictions of the chief executives of three large Icelandic banks.

Other countries, including France and Germany, prosecuted individuals for crimes related to the financial crisis. In France, Jerome Kerviel, a former Société Générale trader, was found guilty of breach of trust and fraud in connection with €50 billion of unauthorized trades.[57] He served less than five months in prison. In Germany, Stefan Ortseifen, former CEO of IKB, was found guilty of market manipulation for misstating IKB's exposure to subprime-related assets through off-balance sheet entities.[58] He received a suspended sentence. In the United Kingdom, the Serious Fraud Office ("SFO") brought charges against Barclays and four of its former executives (including its former CEO, John Varley) related to Barclays' dealings with Qatar during the financial crisis.[59] The SFO accused Barclays of "unlawful financial assistance" for making a $3 billion loan to an entity owned by the government of Qatar, which that entity allegedly used to purchase shares in Barclays and thus avoid a U.K. bailout of the bank. Earlier this year, in a significant setback for the SFO, the Crown Court dismissed the charges against Barclays; the SFO's attempt to reinstate the charges against the individuals is still pending.[60] The SFO has also had mixed success in prosecuting individuals related to the manipulation of the London Interbank Offered Rate ("LIBOR"). The SFO obtained convictions of former UBS and Citigroup trader Tom Hayes, former Barclays trader Philippe Moryoussef, and former Deutsche Bank trader Christian Bittar, all of whom received lengthy sentences, but the SFO also experienced acquittals and hung juries in LIBOR-related prosecutions.[61]

Today, global financial market participants must contend with a multitude of increasingly active, sophisticated, and coordinated agencies around the world, including the U.K. Financial Conduct Authority, the U.K. Prudential Regulation Authority, the SFO, the German Federal Financial Supervisory Authority ("BaFin"), the Monetary Authority of Singapore, the Hong Kong Monetary Authority, and the Japan Financial Services Agency, among many others. Several of these enforcement agencies appear to be in competition with their U.S. counterparts, and each other, subjecting financial institutions to multiple penalties for the same conduct.

Civil Litigation

Private litigants filed thousands of financial crisis cases in state and federal courts. In 2008 alone, 576 new cases related to subprime mortgages were filed against financial institutions, including 91 federal securities class actions related to the subprime crisis.[62] New complaints related to the financial crisis continued to be filed through 2012 and in some instances later, including some particularly creative lawsuits filed in the last few years.[63] Many private lawsuits alleged fraud by the banks in connection with the sale of home loans, RMBS backed by home loans, CDOs backed by RMBS, or other mortgage-linked derivatives. Other private litigation included borrower class actions, commercial contract disputes, employment cases, and bankruptcy-related adversary proceedings. Large institutional investors sued financial institutions, alleging that risks were not adequately disclosed, such as the Abu Dhabi Investment Authority, which (unsuccessfully) sought rescission of its $7.5 billion investment in Citigroup in an arbitral proceeding. And there were numerous "stock drop" securities fraud lawsuits filed, seeking hundreds of billions of dollars in damages and claiming that public companies failed to disclose risks and exposures of which they were aware. As the number of lawsuits increased, the plaintiffs' bar saw an opportunity to develop as rivals to traditional defense firms in size and sophistication. Many law firms, including Quinn Emanuel, Boies Schiller, Susman Godfrey, Kasowitz Benson, McKool Smith, and Kellogg Hansen, diverted their energies and resources to clients that wanted to sue financial institutions.

One notable repeat plaintiff was the FHFA, the conservator of Fannie Mae and Freddie Mac. In 2011, the FHFA filed lawsuits against eighteen financial institutions involved in the sale of private-label securities[64] to Fannie Mae and Freddie Mac. FHFA ultimately collected more than $20 billion in settlements, including $5.8 billion from Bank of America, $5.5 billion from RBS, $4 billion from J.P. Morgan, $1.9 billion from Deutsche Bank, $1.3 billion from Morgan Stanley, $1.2 billion from Goldman Sachs, and $250 million from Citigroup.[65] After a bench trial against the last two non-settling banks, FHFA was awarded more than $806 million.[66]

Litigants also filed qui tam actions, often with Government intervention. In one such case against Countrywide, the Government obtained a $1.27 billion penalty after trial, based on allegations that Countrywide had knowingly sold faulty mortgages to Fannie Mae and Freddie Mac. In a rare victory for a bank against the Government in a crisis-related mortgage case, the Second Circuit reversed, finding that the Government had proved only a breach of contract, but not fraud.[67]

Another significant area of activity has been shareholder derivative actions seeking to hold boards of directors accountable for allegedly failing to discharge fiduciary duty of oversight. While violations of this duty can give rise to significant liability, the bar for establishing such a claim under Delaware law is extremely high: directors will be considered to have breached their duty of oversight only if it can be shown that they acted in bad faith, either by utterly failing to implement any compliance or risk-monitoring system at all or by consciously failing to monitor or oversee the operations of such a system. Most complaints seeking to hold a board accountable for oversight violations have failed at the motion to dismiss stage. Thus, the Delaware Court of Chancery dismissed a suit by Citigroup shareholders involving "staggering losses" said to result from the board's alleged failure to monitor risks in the subprime lending market. The court reasoned that "the discretion granted directors and managers allows them to maximize shareholder value in the long term by taking risks without the debilitating fear that they will be held personally liable if the company experiences losses."[68] Only in the rarest case[69] will a complaint alleging breach of the fiduciary duty of oversight survive dismissal.

Other Enforcement Activity in the Post-Crisis Era

Finally, due in part to the financial crisis, the last decade has seen more aggressive, multi-agency enforcement against financial institutions in other areas of the law, including anti-money laundering ("AML") and international trade sanctions, as well as in areas, such as the Foreign Corrupt Practices Act ("FCPA") and antitrust, where previous enforcement had largely focused on companies and individuals outside the financial sector. Some examples of this heightened enforcement include a $1.9 billion deferred prosecution agreement with HSBC in 2012 (AML and sanctions);[70] a $1.7 billion deferred prosecution agreement with J.P. Morgan in 2014 (AML violations related to Bernie Madoff);[71] an $8.9 billion resolution that included federal and state guilty pleas in 2014 with BNP Paribas (sanctions);[72] a $412 million resolution with Och-Ziff Capital Management in 2016 (FCPA);[73] and benchmark-related criminal antitrust resolutions with six major banks in 2015, including parent-level guilty pleas and fines totaling more than $2.5 billion.[74] Many of these resolutions, as well as the resolutions discussed above involving crisis-related conduct, required the appointment of a monitor to oversee remediation. Open-ended appointments of monitors, whose work has largely gone unchecked, have become a hallmark of recent corporate resolutions and a frustrating and costly reality for financial institutions and other companies.[75]

IV. Impact of the Financial Crisis on Market Participants and the Broader Economy

We discuss below some of the key impacts and trends we have observed in the decade following the financial crisis, including the impact on global financial institutions, the rise of private equity and hedge funds, and the emergence of shareholder activism. We also survey how the financial crisis has reshaped regulatory and market practices concerning derivatives, securitization, M&A, bankruptcy, and real estate.

Impact on Global Financial Institutions

The large banks in the United States and Europe that were hit hardest by the financial crisis (and survived) have recovered, although the results have been decidedly uneven, and a combination of regulatory and market forces has transformed them into different institutions than they were ten years ago.

Dodd-Frank capital and other requirements and the Basel III standards have forced banks to build capital and maintain minimal leverage ratios.[76] Results from the Fed's recent supervisory bank stress test revealed that the nation's largest bank holding companies have added about $800 billion in common equity capital since 2009.[77] Meanwhile, large banks have made enormous expenditures, particularly in human capital and technology, to comply with increased compliance expectations across a range of areas, including prudential regulation (*e.g.*, stress tests, living wills, third-party management), consumer protection regulation (*e.g.*, sales practices and fair lending reviews), financial crimes compliance (*e.g.*, sanctions, anti-money laundering, and anti-corruption) and privacy and cybersecurity (*e.g.*, E.U.'s General Data Protection Regulation ("GDPR"), DFS's Part 500 cybersecurity regulation). And while investigations and litigations arising from the financial crisis have largely been concluded, financial institutions now live in an environment in which failures of internal controls can result in significant civil and even criminal penalties by a number of regulators here and abroad, as well as sizable exposure to private litigation, not to mention incalculable reputational damage.

At the same time that these costs have increased, banks' profitability[78] has been restrained by persistently low interest rates as well as competition from non-bank participants and other market developments, including the increasing role of private funds and the shift of activity to buy-side asset managers such as Vanguard and BlackRock.[79] As a consequence of these and other factors, large banks have cut costs and trimmed less profitable businesses, resulting in fewer jobs and lower bonuses. In addition, many financial institutions have spun off their proprietary trading operations in order to comply with the Volcker Rule. These measures, in turn, may have diminished the desirability of some banking jobs, and may have caused some talent to migrate to private equity/hedge funds or technology.[80] The challenge for large banks is how to thrive in an era of high capital requirements, rigorous compliance expectations, punitive regulatory and enforcement regimes, and competition from less regulated entities.

Rise in Prominence of Private Equity and Hedge Funds

Private equity and hedge funds were significantly affected by the financial crisis. Unlike investment banks, private equity firms did not rely on short-term funding, but rather on capital that was typically committed for longer periods of time. And although their portfolio companies were highly leveraged and thus experienced economic distress during the crisis, debt was secured against company assets, putting the companies, rather than the private equity firms, at risk of default. While private equity investments in portfolio companies did lose value, no major private equity firm became insolvent during the crisis. And many private equity firms responded to the deteriorating financial condition of portfolio companies entrepreneurially, by purchasing debt from portfolio companies, often at heavily discounted prices. When prices eventually rebounded, private equity firms benefitted.[81]

The regulatory burdens placed on private equity and hedge funds in the aftermath of the financial crisis were comparatively light, and consisted principally of registration and disclosure requirements mandated by the SEC under Title IV of Dodd-Frank.[82] The registration requirement and other factors—including more vigilant regulators and a hostile enforcement environment—led to enforcement actions against private equity firms, typically for failing to disclose or seek consent as to certain conflicts, and against hedge funds and their personnel, typically for insider-trading violations, both criminally and civilly. Regardless, in part because of the disparity in regulatory burdens, private equity and hedge funds began to pose an increasing challenge to banks. When banks were restrained by the immediate financial losses resulting from the financial crisis and the subsequent implementation of heightened regulation, they were forced to retrench operations. Lending to mid-size and smaller companies was a primary casualty, with banks focusing on servicing their larger clients. To fill the gap, private funds—primarily, credit-focused funds—provided loans to businesses that were too small for the bond market yet too large to rely on smaller loan facilities.[83]

Private equity firms also have diversified their activities post-crisis. Private funds have filled other spaces vacated by investment banks, such as mezzanine lending and buying troubled mortgages held by federal agencies and banks. Certain major private fund managers have gone public.[84] Ten years after the financial crisis, private fund managers are commonly involved in the largest corporate transactions and offer the most prized jobs in the financial sector.

Growth of Shareholder Activism

We have seen significant growth in shareholder activism in the years since the financial crisis; this growth may have been spurred to some degree by the crisis-era perception of inadequate corporate governance. In recent years, activist campaigns have increasingly targeted larger cap companies and those that are not necessarily underperforming. In addition, more shareholder activism is being driven by hedge funds, which tend to pursue "offensive" activism (*i.e.*, advancing more proactive business models or initiatives) rather than "defensive" activism (*i.e.*, seeking to resist management initiatives), which is traditionally the province of institutional investors such as pension and mutual funds.

There have been a few notable instances of shareholder activists targeting financial institutions. In June 2014, Trian Fund Management announced that it had acquired a 2.6% stake in Bank of New York Mellon, and by December had reached an agreement with the company to add a representative to the board.[85] Citigroup and Barclays have also been approached by activists. While ValueAct Capital, which announced a $1.2 billion stake in Citigroup in May 2018, seems content to provide advice, Sherborne Investors, with a 5.2% stake in Barclays, seems to be angling for a larger role in determining Barclays' future.[86]

The rise of shareholder activism can be attributed to any number of factors, including a decline in staggered boards of directors, which has made achieving offensive strategies more realistic, and the growing influence of proxy advisors such as Institutional Shareholder Services and Glass Lewis, both of which favor shareholder activism. Moreover, an increasing number of companies have adopted proxy access bylaws or charter provisions, even while regulatory efforts toward universal proxy access have been unsuccessful. Technological advances have also made proxy access more efficient and effective.

Both for banks and other companies, shareholder activism is yet another post-financial crisis factor that heightens expectations on boards of directors, and companies need to be prepared and well-positioned to defend against activists.

Impact on the Derivative Markets

While the issues at the heart of the financial crisis originated outside the derivatives markets, over-the-counter ("OTC") credit derivatives on subprime mortgage-based reference obligations—which experienced explosive growth in the years leading up to the financial crisis—amplified the subprime exposures of the handful of financial institutions holding the risk. The proliferation of such OTC derivatives products resulted in large counterparty exposures by market participants that were not adequately risk-managed. At the same time, the market overestimated the degree to which derivatives redistributed risk in the event of a severe financial downturn.[87] When the financial crisis unfolded, weaknesses in the derivatives markets were exposed as counterparties such as AIG and Lehman Brothers were unable to meet their CDS payment obligations following declines in the market due to mispriced risk and uncollateralized exposure.

In response to the financial crisis, in September 2009, the G-20 leaders agreed, among other initiatives, to reform the OTC derivatives market.[88] The following year, Title VII of Dodd-Frank imposed a significant new regulatory scheme on the market for OTC derivatives. The major requirements, which were implemented principally by CFTC rulemaking, include the following:

- **Swaps Reporting**. The global derivatives market had operated as a predominantly bilateral market with little transparency regarding the size of outstanding swap positions, pricing data, and the nature and types of trades, leaving regulators unable to evaluate the counterparty credit risk of large banks and swap dealers and the build-up of risk in the system in general. In response, Dodd-Frank requires the collection and publication of swap transaction data by swap execution facilities and swap data repositories. While trade data reported to swap data repositories are made publicly available on an anonymous basis, regulators have visibility into trade party and transaction data. Effective reporting has been hampered by a lack of clearly defined uniform technical standards promulgated by the CFTC and by ongoing efforts to harmonize and standardize global reporting standards.

- **Central Counterparty Clearing**. Dodd-Frank's mandatory swap-clearing requirement, which requires certain types of swaps to be cleared through a central clearinghouse, is perhaps the most consequential and significant swaps reform. Today, data collected by the CFTC on U.S. reporting entities indicate that approximately 85% of new interest rate swaps and CDS are being cleared.[89] Additionally, under Dodd-Frank, swaps that are subject to mandatory clearing and available for trading on an exchange or swap execution facility must be executed on such a venue. Commercial end-users are exempt from compliance with the central clearing, exchange trading, and minimum margin requirements in order to facilitate their continued ordinary course risk hedging through the use of OTC derivatives on the theory that their trading activity does not introduce systemic risk.

- **Minimum Margin Requirements**. The corollary to mandatory clearing of certain standardized swaps is the introduction of mandatory minimum margin requirements for most non-cleared swaps. While central clearinghouses impose strict daily margin requirements on all cleared swaps, Dodd-Frank requires that swap dealers and major swap participants exchange prescribed minimum initial and variation margins with their financial end-user swap counterparties to account for the greater risk for the swap dealer or major swap participant and the financial system arising from the use of non-cleared swaps, and to insure against the risk of counterparty default. The requirements for collateralization of both cleared and non-cleared derivatives have increased the costs of using derivatives as instruments for risk management.

- **Swaps Documentation and Portfolio Reconciliation**. Prior to the financial crisis, many outstanding swap transactions were not documented in a timely fashion, and trade portfolios with counterparties were not regularly reconciled, leading to mismatched trading books. Disputes between portfolio and trade valuations presented a major challenge in the close-out of trading books with defaulted counterparties. Dodd-Frank mandates swaps documentation standards, and each swap dealer is required to engage in regular portfolio reconciliation and portfolio compression.

These regulations were put in place largely under the leadership of then-CFTC Chairman Gensler. Since the appointment ofChairman Giancarlo, the CFTC has commenced a comprehensive review of these regulations with the aim of reducing the cross-border reach of Dodd-Frank rules, broadening exemptions from clearing and margin requirements, relaxing restrictions on trade protocols, and tailoring the registration and capital requirements for swap dealers.[90] While regulators in the United States and in the European Union have begun to adopt a series of comparability determinations that would permit substituted compliance for various aspects of derivatives trading activities and reduce the regulatory compliance burden for internationally active market participants, there remain today meaningful discrepancies in the approaches taken by different jurisdictions and there is a need for consistent worldwide regulatory standards.[91]

Impact on the Securitization Market

As discussed above, the market for asset-backed securities ("ABS"), such as RMBS and CDOs, had grown exponentially by 2007. For the most part, financial institutions' securitization activities were only lightly regulated. For example, before the financial crisis, an originator, whether a bank or non-bank financial institution, could utilize a securitization to offload any material financial risk associated with assets it had originated to a special purpose vehicle, which could then borrow money from investors on a non-recourse basis against only those assets. This type of transaction, in which the originator retained no interest in the loans it originated, served to encourage reckless origination of assets. The representations and warranties that were made to investors were focused generally on the characteristics of the assets being originated rather than the ability of the assets to perform and repay the investors' debt. In addition, rating agencies were retained and paid by issuers to rate debt, creating a misalignment of incentives.

To address these issues, section 941 of Dodd-Frank required regulators to issue a “risk-retention” rule that would require originators or sponsors of ABS and RMBS to retain for a meaningful period of time at least 5% of the risk associated with the securities issued;[92] this requirement was limited by a court decision in February 2018, which held that it does not apply to managers of open-market collateralized loan obligations.[93] In addition, pre-existing disclosure obligations of securitization issuers under the Securities Act of 1933 were significantly tightened to create much greater transparency of assets being securitized. Dodd-Frank did not, however, make fundamental changes to the U.S. rating agency model aside from certain regulations regarding conflicts of interest and requiring rating agency disclosure of certain due diligence materials relied on by the rating agency. As was the case before the financial crisis, rating agencies are still retained and paid by issuers.

Since the crisis, three clear trends have emerged in the securitization market:

- **The Market**. The securitization market has remained active notwithstanding the financial crisis and the implementation of Dodd-Frank’s regulatory changes. The volume of securitized transactions in the United States has increased significantly since the financial crisis.[94] Even issuance of RMBS has increased in the past few years as the regulations relating to risk retention have been finalized (2015 and 2016) and greater certainty has returned to the market. For frequent issuers of so-called “on the run” assets, such as credit cards, automobile loans and leases, equipment leases and related assets, and, increasingly, RMBS, the securitization market continues to be a very low-cost and efficient source of funding.

- **The Rating Agencies**. The aftermath of the financial crisis witnessed greater competition among rating agencies. Prior to the financial crisis, three rating agencies dominated the sector. In December 2009, Regulation 17g-5 under the Securities Exchange Act of 1934 was adopted, which opened the door for competition among rating agencies by mandating that a rating agency engaged by an issuer make available to other rating agencies information received from such issuer in connection with a proposed securitization transaction on a password-protected website. The purpose of the rule was to enable non-retained rating agencies to potentially rate such a transaction at the request of an investor or another third party.

- **New Products**. The post-financial crisis period has seen the growth of a broader corporate securitization market involving transactions that work in parallel with the leveraged finance market and in some cases replace traditional bank/bond transactions. The so-called “Alternative ABS Market” has seen the securitization of franchise royalties of major restaurant systems, movies’ slates of film companies, aircraft leases of leading aircraft lessors, cell tower leases of the major cell tower companies, and, most recently, royalties from franchise fees generated by fitness centers and automotive retailers.[95] Volume in this sector of the ABS market has become a significant portion of the total market. These transactions are structured to retain the low debt service cost of traditional securitizations, but are more akin to corporate finance than traditional securitizations. Major private equity firms have utilized

Alternative ABS as a financing tool for acquisition and financing of portfolio companies. In addition, many investment banking firms are seeking to expand their presence in this sector of the market.

Impact on Mergers & Acquisitions

The financial crisis severely disrupted M&A dealmaking, especially transactions that relied on significant leverage for completion. The fundamental assumptions of buyers were called into doubt as the future became highly unpredictable. Financial institutions examined their debt commitment letters to determine whether they were obligated to fund, while parties consulted their lawyers to discuss potential litigation if their counterparties or the financial institutions failed to fund.

In the past decade, the terms of leveraged acquisition agreements have changed significantly. In particular, there has been a shift toward increased clarity about the consequences of a failed deal. In some respects, these changes have created greater certainty for sellers: financing conditions are practically non-existent. The average size of reverse termination fees as a percentage of deal value in the United States has risen from 3.48% in 2007 to 6.07% in 2017. The interplay between the reverse termination fee and the right of a seller to seek specific performance has been tightened in response to the uncertainties characteristic of the financial crisis and the so-called "pure option" reverse termination fees that were prevalent prior to the financial crisis are now virtually non-existent. The market practice now is a "specific performance lite" model, which enables the seller to receive specific performance only under circumstances where the debt has been funded or would be funded if the equity sponsor funds. Where the debt is not funded, the recourse of the seller is the reverse termination fee.

These sorts of deal-certainty clauses also increasingly find their way into strategic M&A as well as private equity transactions. Approximately one-half of public M&A transactions with reverse termination fees involved strategic buyers in 2007.[96] By 2017, the percentage of such transactions had increased to 75%.[97]

The uncertainties that transacting parties faced during the financial crisis have also led parties to a much closer alignment of the conditions in the financing agreements and the conditions in the acquisition agreement. Acquisition agreements now frequently recognize the potential for debt market disruption and more clearly define marketing periods and time periods for performance.

Certain provisions that have become common in leveraged acquisitions are now also designed to reduce the risks of financial institutions participating in these transactions. For example, it is now common for a sponsor to insist that, whatever level of effort it is required to use to obtain financing, it is not obliged to commence litigation against the banks to enforce the loan commitment. It has also become common to include so-called "Xerox provisions" in M&A agreements that prevent the seller from directly suing the buyer's lenders, make the lenders third-party beneficiaries of liability limiting provisions in the acquisition agreement, and provide that any dispute between the seller and the lender will be resolved in accordance with New York law, in New York courts, and without a jury trial. These provisions typically may not be amended without lender consent.

The legacy of the financial crisis lives on in M&A markets. While overall deal levels have returned to pre-crisis levels, there has been a clear evolution in terms of the size and role of private equity in public buyouts. The terms of acquisition agreements have evolved in a manner designed to reduce the uncertainties and clarify the manner in which transacting parties will share the risk of significant market disruption.

Impact on Bankruptcies and Corporate Reorganizations

The financial crisis led to an extraordinary spike in corporate bankruptcy filings: in 2008-2009 alone, the amount of debt restructured under chapter 11 of the Bankruptcy Code was nearly 20 times greater than the amount restructured in 2006-2007.[98] Not only was there a dramatic increase in the number of companies seeking bankruptcy protection, but there also was a dramatic increase in the size and complexity of those companies. These increased demands occurred, moreover, as credit markets froze. As a result, new players—primarily private equity and hedge funds—took on new and dominant roles in the restructuring and chapter 11 processes, leading to significant changes in the marketplace.

Even before 2008, hedge funds and, to a lesser degree, private equity were already becoming increasingly involved in corporate restructurings, as traditional financial institutions sought to deleverage their investments in troubled credits by selling their positions to opportunistic investment funds. Their presence in both in- and out-of-court restructurings skyrocketed during and after the financial crisis, as traditional banks were unwilling to provide debtor-in-possession loans ("DIP Loans") to companies seeking chapter 11 relief and, as time went on, increased capital and regulatory requirements imposed on these financial institutions further restrained their ability and willingness to lend to distressed companies. As a result, private equity and hedge funds today are involved in virtually every substantial restructuring situation, often with positions throughout a company's capital structure. To a substantial degree, these investors have replaced traditional financial institutions as both significant lenders to, and key creditors of, chapter 11 debtors, and have proved to be sophisticated and aggressive voices in the restructuring process.

These crisis-era developments led to several changes in chapter 11 practice:

- **Greater Disclosure**. An individual fund typically does not own a sufficient amount of a company's debt to control the process; rather, hedge funds and private equity firms often form "ad hoc committees" consisting of several different funds that act collectively to achieve a common outcome. The increasing activism of such ad hoc groups, however, led to concerns about the transparency of their positions and the level of disclosure to bankruptcy courts and parties in interest. As a result, in 2011, the Bankruptcy Rules were amended to require greater disclosure of the economic interests held by the members of such groups, including "indirect" interests, such as derivative positions tied to a debtor's securities.[99]

- **Stricter DIP Loan Terms**. Because private equity and hedge fund lenders often held large pre-petition investments in the debtor, they insisted on DIP Loan terms, such as "roll-ups" and shortened maturities, that were intended to protect not only the new funds being advanced under the DIP Loan, but also the lenders' pre-existing claims that may have been purchased at a steep discount. The new DIP lenders also frequently insisted on case milestones, such as the approval of sale procedures or the confirmation of a plan, and restrictive covenants that, if violated, would allow them to declare a default and threaten the viability of the debtor's reorganization. Many provisions that were previously thought to be appropriate only in the most extreme cases are now considered "market" and approved frequently.

- **Increased Reliance on Expedited Restructuring Strategies**. The increased activism of private equity and hedge funds during the financial crisis, together with the seizure of the credit markets, led debtors, creditors, and bankruptcy courts to search for new and creative ways to quickly restructure imperiled businesses. There was a noticeable increase in out-of-court restructurings, as well as pre-packaged and pre-arranged chapter 11 filings, which avoid or minimize lengthy and costly bankruptcy cases and are thus favored by private equity and hedge funds. These alternatives also avoid or minimize the need for expensive DIP Loans to fund operations during bankruptcy.

- **Expanded Role of 363 Sales**. Another tactic born of necessity during the financial crisis was the expanding role of section 363 sales at the outset of a bankruptcy case. As demonstrated in the *Lehman Brothers*, *Chrysler*, and *General Motors* cases,[100] these unprecedented 363 sales disposed of nearly all of the debtors' assets within days of the chapter 11 filings and well before creditors were presented with a proposed plan of reorganization. The sales maximized value for creditors by allowing purchasers to acquire the debtors' assets free and clear of liabilities. And by conducting the sales at the beginning of the case, the debtors converted their assets into cash and eliminated the risk of further value deterioration during a time of unprecedented market turmoil, and diminished the need for expensive DIP Loans that would have primed the claims of pre-petition creditors. These financial crisis precedents—each was appealed and ultimately affirmed by higher courts—have resulted in distressed companies and their private equity and hedge fund creditors increasingly relying on section 363 sales as an efficient solution for a troubled company.

While not perfect, the Bankruptcy Code provided the flexibility and authority for courts, insolvent companies, creditors, and restructuring professionals to address the challenges of the financial crisis. As demonstrated by mega-cases such as *Lehman Brothers*, *Washington Mutual*, and *General Motors*, the combination of tools available under chapters 11 and 15 of the Bankruptcy Code, the Securities Investor Protection Act, and the Federal Deposit Insurance Act has allowed for an orderly resolution of highly complex insolvencies. In contrast, other countries, whose insolvency laws primarily focus on liquidation rather than reorganization, had far fewer tools to deal with the financial crisis. Nevertheless, the financial crisis recast the roles that various institutions play in corporate restructurings, with private equity and hedge funds replacing the roles previously occupied by traditional financial institutions. Although commentators before the financial crisis voiced concerns about the increasing role of private equity and hedge funds, such concerns appear to have been largely overblown, as the presence of these alternative investors has created an ultra-competitive restructuring landscape that results in innovative restructuring strategies and access to non-traditional pools of capital.

Impact on the Real Estate Market

The changes in regulations and market practices in response to the financial crisis have led to major changes in the commercial and residential real estate lending and investment markets, as well as the nation's housing market.

Changes in Commercial Real Estate Financing. Between 2005-2007, over $600 billion in commercial mortgage-backed securities ("CMBS") was issued, comprising nearly 25% of the then-total outstanding U.S. commercial real estate debt of $3.2 trillion.[101] The workouts and refinancing of CMBS loans originated pre-crisis that defaulted or matured post-crisis were subject to Dodd-Frank requirements, including the risk-retention rule and new rating agency requirements, and to stricter underwriting metrics and standards precipitated by the crisis. These requirements have resulted in a substantial reduction in securitization of U.S. commercial real estate debt and changed the structure and terms of securitized loans.

Indeed, in the ten years since the crisis, total U.S. commercial real estate debt has grown to $3.9 trillion, but the share of CMBS loans has decreased to 16% of that total. According to one analysis, 77% of CMBS loans originated from 2003 to 2008 are no longer securitized through CMBS.[102] Today's CMBS issuances have vastly reduced dollar values and higher property type and borrower concentrations compared to those before the financial crisis.[103] In addition, CMBS loans in today's market are typically mortgage loans secured by cash-flowing properties with greatly reduced leverage and more restrictive and lender-friendly loan documentation, including expanded "non-recourse carve-out" guaranties from creditworthy sponsors. Before the crisis, multiple tranches of mortgage and mezzanine loans for the same property were common, and, in some instances, such securitized loans were provided for development projects with no or limited cash flow.

Additionally, stronger regulatory requirements (including the risk-retention rule, increased bank capital requirements with respect to "High Volatility Commercial Real Estate" loans under Basel III and Dodd-Frank, and more stringent Know Your Customer requirements), and the significantly tighter underwriting metrics and standards adopted in response to the crisis, have decreased the share of commercial real estate debt held by traditional bank lenders. The loans that are issued by such lenders typically involve more restrictive lender-friendly loan documentation (including expanded "non-recourse carve-out" guaranties) similar to today's CMBS loans.

New, less-regulated financing sources—including private equity funds, real estate investment funds, REITs, foreign high-net worth individuals, and yield-seeking institutional investors—have emerged to "plug the gap" left by traditional bank lenders in providing higher-yielding sources of real estate risk capital. Even these alternative lenders do not generally lend more than 75% of the value of the underlying real estate asset, which evidences greater caution compared with the loans equal to 90% of a property's value that lenders were making leading up to the financial crisis.

Post-crisis, commercial real estate finance is now on a more stable economic footing due to lower leverage, more stringent underwriting of both collateral and borrowers, and less concentrated sources of capital.

Changes in the U.S. Housing Market. The foreclosure crisis that followed the crash led to broad changes in the nation's housing markets, decreasing homeownership and increasing the share of renters. The percentage of households that own a home has dropped by almost 5 percentage points in the aftermath of the crisis.[104] Residential mortgage underwriting standards, led by Fannie Mae and Freddie Mac, now require larger down payments, and have stricter income and asset tests, leading to a shrinking of the eligible home-buying population and the virtual elimination of lending to "subprime" residential buyers. While stricter underwriting standards have reduced risk in the residential mortgage sector, the resulting increase in the renting population has also exacerbated the grave U.S. housing affordability problem[105] by increasing rents. The affordability issue predated the financial crisis, but was made more acute by the lack of construction of new housing at the depths of the crisis, the higher cost of capital in the aftermath of the crisis (which has shifted supply to higher-cost housing units), and the increasing rents resulting from the increase in demand for rental housing.

The availability of large pools of foreclosed homes and home sites in fast-growing markets in the depths of the post-crash recession and the increasing demand for rental housing did not go unnoticed by the markets, and a new type of single-family home investor emerged. Since the crisis, private equity firms have created new investment funds, joint ventures, and REITs to acquire (and also to finance and build) large portfolios of single-family houses to be operated as rental housing. While such investors' ownership percentage of all U.S. single-family homes is still relatively modest, continuing strong private fundraising activity in this space indicates that private equity investors see continued opportunities in this new type of investment that arose out of the financial crisis.[106]

V. The New Landscape 10 Years Later—and Lessons Learned

The legislative, regulatory, enforcement, litigation, and political responses to the crisis over the past decade suggest a number of important lessons and practical implications. While many of the regulatory responses focused on the financial sector, the heightened expectations with respect to risk management, governance, transparency, and culture—and the more rigorous, sophisticated, interconnected, and politicized enforcement environment—affect businesses or enterprises across all sectors of the economy.

Regulators, Investors, and the Public Now Have Heightened Expectations for Risk Management, Strong Governance, Transparency, and a Culture of Compliance

Proactive Risk Management. In simplest terms, the conventional wisdom is that the financial crisis was precipitated by risks that were hiding in plain sight and that "dramatic failures of corporate governance and risk management"[107] were a key cause of the crisis. The foundational building blocks for successful navigation of the heightened scrutiny that characterizes the post-crisis business, regulatory, and enforcement environment are thus a comprehensive and effective risk management program, for which the CEO and the senior management team are accountable, and equally comprehensive and effective risk oversight by the board of directors. Post-crisis, regulators, investors, customers, political leaders, and the public now hold financial institutions and other companies accountable for proactive management of all risks inherent in their business—including, importantly, reputational risk. Risk management cannot be delegated to the risk control function, although a strong risk function is important; business heads, executive management, and the board also must own risk management, and ensure that it is operating effectively from the top down and the ground up across the institution, because ultimately they will be held strictly accountable for any breakdown in controls.

Heightened Expectations for Boards of Directors. As we have discussed in several client alerts, regulators' expectations of boards of directors are higher than ever.[108] Now-Chair of the Federal Reserve Board Jerome Powell noted in 2017, "Across a range of responsibilities, we simply expect much more of boards of directors than ever before. There is no reason to expect that to change."[109] Some of these expectations are set forth explicitly in regulatory guidance—*e.g.*, the OCC's July 2016 Director's Book[110]—but even boards of institutions not subject to such express guidance can expect to be held accountable for comprehensive oversight of the institution's business, financial performance, management, culture, diversity, compliance, risk, financial reporting, and responsibility to the communities and stakeholders it serves. Boards are now expected to ensure that senior management establishes and maintains an effective risk management structure and that the board receives effective reporting of all material activities and risks, including detailed reports and concrete action plans. Boards must also monitor management's response to identified problems or red flags.[111]

Boards may be held responsible for establishing and maintaining compliance systems over an increasingly broad range of areas, including market conduct, securities disclosure, cybersecurity, financial crimes, antitrust, privacy/data, and other varieties of what some regulators call "employee misconduct risk." Additionally, in the wake of scandals over employee treatment[112] and renewed attention to issues of sexual harassment in light of the #MeToo movement, regulators and the public are imposing increasing pressure on companies to take proactive steps to monitor, internally investigate, report, and remediate such potential problems in the area.[113]

While financial regulators in the United States historically have seldom intervened (at least publicly) in board matters, in contrast to some foreign regulators that have few other enforcement tools at their disposal, that is no longer the case. Prudent boards of directors should heed the lessons from the recent Wells Fargo enforcement action, for example, in which the Fed took the extraordinary steps of prohibiting the firm's growth pending remediation, announcing the replacement of four board members, and issuing public "letters of reprimand," including letters of reprimand to Wells Fargo's former CEO and Chair and former Lead Director, for their "failures to meet supervisory expectations."[114]

Emphasis on Culture and "Tone at the Top." The financial crisis gave rise to frustration among regulators, political leaders, and the public around the globe concerning the institutional culture that led to enormous levels of risk and apparent serial misconduct. Recognizing that even the strongest regulatory supervision and internal controls cannot prevent all instances of unethical or inappropriate behavior, regulators have touted the importance of a culture of compliance, in which employees self-regulate their behavior to conform to shared values and norms.[115] In repeated speeches and conferences, regulators have emphasized that "tone at the top"—from senior management and the board—is necessary but not sufficient to create a strong culture of compliance. A good "tone at the top" will be ineffective unless it is reflected by an "echo from the bottom" in the form of broad-based staff engagement, including engagement in pockets of the organization that may operate with more autonomy or may go overlooked.[116] Desired conduct should be tangibly rewarded, and bad behavior discouraged and punished, through compensation, promotion, and recognition. In addition, boards should consider creating dedicated ethics and culture committees to advise and assist them in establishing, monitoring, and safeguarding the firm's culture.

Compensation Structures Should Reward Attention to Compliance. In tandem with their increased focus on culture, financial regulators have directed careful scrutiny to the incentives created by compensation structures, and bank regulators in particular have adopted or proposed rules concerning incentive compensation structures. Whether or not these rules apply to an institution, its compensation incentives and desired business outcomes should be structured to align with the firm's stated values and its concrete policies intended to reflect those values. Compensation structures should reward attention to compliance and embed disincentives to chase "bad" or "risky" short-term profits.[117] Where local employment law permits, including in the firm's compensation scheme, the right to claw back incentive compensation upon discovery of misconduct, and exercising that power in appropriate cases, should be strongly considered.[118]

Centralized and Strong Control Functions. Controls break down when control functions become captive to the businesses they are entrusted to monitor. For that reason, a centralized corporate structure with independent audit, risk management, legal, and compliance systems that report to the CEO and corporate function heads and/or the board, rather than to individual lines of business, is essential to transparency and oversight. Centralized controls reduce the risk that individual business units can strong-arm or co-opt control functions, and allow the board and management to identify and address problems systemically across lines of business.[119]

Use of Technology to Facilitate Compliance. Advances in regulatory technology ("RegTech") promise to make surveillance easier and more thorough. These advances, for example, can harness big data analytics to flag possible violations or highlight potential vulnerabilities.[120] Investment in these technologies as they become available and are proven effective is money well spent. Conversely, regulators have put increasing pressure on firms that fail to make sufficient RegTech investment.

Cyber Risks and Data Privacy. Regulators and policymakers across the globe are increasingly concerned about risks, threats, and vulnerabilities associated with advances in technology, including virtual currency.[121] These advances in turn raise a range of issues—in the case of virtual currency, how, for example, to protect investors purchasing bitcoin or other virtual currencies or to regulate initial coin offerings. In the case of reliance on computers and connectivity to the internet, the risk is cybercrime or negligent leaks of information. Cybersecurity threats can result from deliberate attacks from, or unintentional events precipitated by, insiders or third parties, including cybercriminals, competitors, nation-states, and "hacktivists," and may take multiple forms, including the theft or destruction of financial or intellectual property and the disruption of business operations.[122]

Many view cybersecurity risks as potential systemic threats and a possible trigger for the next crisis. The increase in frequency and scope of cyberattacks may increase the costs and potential negative consequences for market participants as well as other companies, including remediation costs, increased cybersecurity protection costs, lost revenues, litigation and legal risks, increased insurance premiums, reputational damage that adversely affects customer or investor confidence, and damage to the company's competitiveness, stock price, and long-term shareholder value.[123] In addition, financial institutions and other companies' obligations to protect data have become substantially more onerous under regulatory schemes such as the GDPR, which took effect May 25, 2018,[124] and DFS's Part 500 cybersecurity regulation.[125] In the United States, the SEC issued guidance in February 2018 to assist public companies in preparing disclosures concerning cybersecurity risks and incidents[126] and has signaled that this will be an area of enforcement focus, establishing a Cyber Unit "targeting cyber-related misconduct."[127] Cybersecurity and data privacy risk management policies and procedures should be considered key elements of enterprise-wide risk management.

Tailored Disclosures. With the benefit of hindsight, it is clear that more tailored risk and conflict disclosures would have significantly reduced legal exposure for market participants.[128] The failures of disclosure leading up to the financial crisis occurred at all levels. In the context of RMBS, for example, the use of standard or form disclosures inhibited the accurate communication of the characteristics of the underlying mortgages or the risk profiles of the ultimate derivative products throughout the chain, including to the ultimate retail consumers.[129] The importance of accurate and complete disclosures, not only at the public company level, but also with respect to all securities products, cannot be overstated. Similarly, more robust disclosure concerning the risks, conflicts, limitations, and costs of other financial products, such as payment protection insurance, in marketing and at the point of sale would have avoided or mitigated losses for many institutions.

Whistleblower Incentives and Protections. On the stated basis that the financial crisis might have been averted or at least mitigated if insiders had a greater incentive to report corruption or fraud to the government, Dodd-Frank established rewards and protections for whistleblowers through programs at the SEC and CFTC. Pursuant to these programs, the SEC and CFTC can pay awards to eligible whistleblowers who voluntarily provide information that leads to a successful enforcement action resulting in monetary sanctions exceeding $1 million.[130] Between 2011 and 2018, the SEC paid out more than $275 million to whistleblowers, including more than $100 million in 2017 alone. Information provided by whistleblowers has resulted in $1.5 billion in disgorgement and penalties. Protections of whistleblowers have also been significantly enhanced.[131] Employers may not impede whistleblowing, which may take the form of requiring employees to sign confidentiality agreements that would apply to whistleblowing communications or agreements to waive any right to a whistleblowing award. The SEC has enforced this prohibition aggressively and, in May 2017, the CFTC approved amendments that significantly strengthened its program's anti-retaliation provisions.[132] Since 2015, the SEC has brought a number of enforcement actions against companies for their use of what the SEC considered to be restrictive clauses in severance agreements or other documents that, according to the SEC, impeded whistleblowers and violated the securities laws. Companies would be well-advised to ensure that their employment, confidentiality, and severance agreements do not interfere with their employees' ability to alert the CFTC and SEC to possible violations.

Multi-Agency Actions, Criminal Resolutions, and a Focus on Individual Accountability Are Here to Stay

Regulatory "Pile-Ons." Following the financial crisis, no regulator wished to appear weak or inadequately vigilant. Competition among regulators to appear "tough" drove up the cost of resolution with each independent regulator, and higher-cost individual resolutions increased the aggregate cost of resolving the underlying general issue.[133] And the overlapping jurisdiction of various regulators at the state, federal, and international levels frequently subjected financial institutions to multiple penalties for the same conduct. While there have been some efforts to improve coordination, including improvements across borders—most recently, the DOJ announced a new policy in May 2018 concerning the coordination of penalties[134]—cutting the other way is a continuing and widespread public perception that financial institutions have been inadequately punished for bad conduct. For companies subject to the jurisdiction of multiple regulators, this regulatory pile-on is likely to remain the "new normal" and counsels strongly in favor of coordinated inter-business and cross-border controls. Likewise, an important part of managing regulatory relationships is ensuring appropriate and timely reporting on investigations and other developments to all interested regulatory authorities—even where their interest may not be readily apparent—while carefully complying with protocols on confidential supervisory information.

Criminal Prosecution of Financial Institutions. In the immediate aftermath of the financial crisis, major financial institutions were considered effectively off-limits from criminal prosecution, principally because the collateral consequences flowing from a "run on the bank" precipitated by a criminal conviction were viewed as posing systemic risks to the functioning of the general financial markets that a prudent prosecutor would not set in motion.[135] The guilty pleas of both European and U.S. banks in recent enforcement actions—including Credit Suisse,[136] BNP Paribas,[137] Barclays, Citicorp, J.P. Morgan, Royal Bank of Scotland, and UBS[138]—may have somewhat dispelled this notion and shown that a guilty plea, even at the level of a major bank entity or holding company, is a survivable event provided there is appropriate coordination between prosecutors and regulatory authorities. Although it is not a priority under the current Administration, in any future major economic downturn, aggressive prosecutors may not shy away from criminal prosecutions of financial institutions.

Criminal Prosecution of Bank Executives. One of the perceived failures of the Obama Administration's response to the financial crisis is that no senior bank executives were prosecuted. In the next crisis or scandal, the DOJ may be more amenable to pursuing prosecution of senior officers. This approach would be consistent with the policy expressed in the 2015 DOJ memo by then-Deputy Attorney General Sally Yates,[139] which emphasized individual accountability. At the same time, at least with respect to the current DOJ, its enforcement priorities include violent crime, immigration, and the opioid crisis, and it may be less eager to pursue financial sector executives. Apart from the DOJ, financial regulators have broad powers to pursue enforcement against senior officers for supervisory failures, which they, too, may use more zealously going forward.

The Importance of Prompt Self-Reporting, Cooperation, and Remediation. The DOJ and global financial regulators have embedded in their enforcement policies incentives for institutions to self-report any discovered misconduct, conduct a thorough internal investigation to ensure that the full scope and source of the misconduct have been discovered, cooperate fully with any ensuing investigation by regulators and enforcement agencies, voluntarily undertake enhancements to systems and controls and other remediation, and resolve investigations consensually with the regulators.[140] Even where the benefits of such self-reporting and cooperation are not expressly quantified (as with, for example, the enforcement regime of the U.K.'s Financial Conduct Authority), comparing outcomes across institutions generally suggests that those benefits are material, and that they are both financial and reputational. One of the benefits of a robust control environment is facilitating early identification of problems that can then be appropriately self-reported, rather than risking subsequent discovery of those problems by a supervisory or market-conduct regulator. In the post-crisis enforcement environment, the importance of marrying robust systems and controls with robust and transparent communications with regulators, including self-reporting discovered misconduct in real time, cannot be overstated.

Our Current Political Moment

As we reflect on the financial crisis and its important lessons, it bears emphasis that the regulatory pendulum in the United States is starting to swing in the other direction. The Trump Administration is pursuing a broad deregulatory agenda and has already achieved the single largest regulatory roll-back since the financial crisis through the passage of EGRRCPA.[141] And while EGRRCPA left the basic framework of Dodd-Frank in place, President Trump has long vowed to "do a number on" Dodd-Frank.[142] If Republicans retain control of Congress this November, they may well pursue the CHOICE Act or some similar roll-back legislation. A related issue is whether and how the Administration will continue to cooperate with international financial regulatory efforts;[143] in some instances, lack of an effective U.S. voice in these processes could slow the pace of regulation worldwide, while in other instances it could lead to even more fragmented regulation that may ultimately hinder market activity.

In light of this political environment, can financial market participants and other companies relax their focus on strong risk management and compliance? In a word, no. In time, both the political and the economic cycle will turn. It is tempting in good times, and while enforcement is perceived to be more lax, to reduce investment in compliance and put more focus on short-term profits. But that is exactly the mindset that led to the financial crisis and the resulting legislation, enforcement, litigation, and reputational damage. Just as the comprehensive legislation and heightened expectations for market conduct that followed on the 1929 market crash and the Great Depression have been with us ever since, despite tinkering at the margins, so too the regulatory environment and public expectations resulting from the financial crisis are likely, at least in broad terms, here to stay. And despite signs of deregulation, there is still an abiding public perception that large financial institutions have not been sufficiently held to account for their roles in the financial crisis, or for bad conduct in the intervening years; President Trump himself has expressed this perception at times. Companies across sectors would be well advised to view comprehensive focus on risk management, corporate governance, transparency, and culture as a critical imperative regardless of which party controls the White House, the Congress, or state houses.

What's Next?

Looking forward, commentators have pointed to several areas to watch as potential triggers of the next financial crisis. Most ominously, cybersecurity poses unique risks, as financial services are increasingly provided online, taking advantage of new technologies, and thus are vulnerable to the ever-more prevalent disruptive threats by well-financed and uber-sophisticated actors that are difficult to predict and even more difficult to defend against. A successful cyber-attack on a major financial institution could well generate instability across the banking system. Greater coordination between the government and the private sector—and across jurisdictions—is required to safeguard our financial systems against cyberattack. These risks will escalate if cryptocurrency, which largely operates beyond government regulation, becomes a significant alternative system for payments.

Some commentators continue to voice concerns about other, less regulated areas of the financial sector. For example, participants in the shadow banking sector now account for more than $45 trillion in assets and tend to offer loans to borrowers with lower credit scores and higher debt-to-income levels,[144] but remain subject to far less regulation than their traditional counterparts. Likewise, asset managers now control $160 trillion in assets[145]—an amount that exceeds the entire global holdings of banks.

The current wave of deregulation and related backlash from hyper-aggressive enforcement in the immediate aftermath of the financial crisis only exacerbate these risks. While financial institutions on a global basis have diminished in size, risks remain. For example, China is now home to five of the world's ten largest banks, measured by assets–and China's bank supervisory regime has different priorities and safeguards than the U.S. regime, and the ratio of corporate debt to gross domestic product in China is above 150%. Further, only a single financial institution deals, clears, and settles repos (a $1.9 trillion market), which raises the prospect of systemic risk in the event that institution were to falter. Moreover, the types of financial instruments and practices that played a role in causing the 2008 financial crisis are again on the rise. For example, the size of the U.S. high-yield bond market is nearly double its pre-crisis level;[146] corporate leverage now exceeds pre-crisis levels; origination of collateralized loan obligations now match pre-crisis CDO market levels; and today's derivatives market totals more than $500 trillion—more than seven times the global GDP.[147] Add to these potential risks the immense value represented by technology companies and their rapidly growing intersection and interconnection with our global financial markets, the stress on traditional U.S.-international economic alliances and coalitions, the incipient and unpredictable trade wars, and escalating geopolitical instability.

To be sure, our financial system is far better capitalized and less leveraged, its participants have been stress-tested and subjected to unprecedented levels of supervision, and governments and regulators across the globe are far more prepared to deal with systemic threats. But how these enhanced powers and recently instituted protections will operate in real-time, across jurisdictions, in the face of new (and different) crises is unknown and unknowable.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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